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PROCEEDINGS
IN THE
SENATE DOCUMENTS
Arbitration
1911

THE PERMANENT COURT OF INTERNATIONAL
JUSTICE
AT THE HAGUE
UNDER THE PROVISIONS OF THE GENERAL TREATY OF
ARBITRATION OF APRIL 4, 1904, AND THE SPECIAL
AGREEMENT OF JANUARY 27, 1906, BETWEEN
THE UNITED STATES OF AMERICA
AND GREAT BRITAIN

VOL. 74

IN TWELVE VOLUMES
VOLUME IV

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NORTH ATLANTIC COAST FISHERIES

PROCEEDINGS

IN THE

North Atlantic Coast Fisheries
Arbitration

BEFORE

THE PERMANENT COURT OF ARBITRATION
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ARBITRATION OF APRIL 4, 1908, AND THE SPECIAL
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THE UNITED STATES OF AMERICA
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(IN TWELVE VOLUMES)

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NORTH ATLANTIC COAST FISHERIES

CASE

PRESENTED ON THE PART OF

THE GOVERNMENT OF HIS
BRITANNIC MAJESTY

TO THE

TRIBUNAL CONSTITUTED UNDER AN AGREEMENT SIGNED
AT WASHINGTON ON THE 27TH DAY OF JANUARY,
1909, BETWEEN HIS BRITANNIC MAJESTY AND
THE UNITED STATES OF AMERICA

NOTE.—This volume contains also Parts 1 and 2 of the Appendix to the Case of Great Britain.

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THE CASE OF GREAT BRITAIN.

THE CASE PRESENTED ON THE PART OF THE GOVERNMENT OF HIS BRITANNIC MAJESTY TO THE TRIBUNAL CONSTITUTED UNDER AN AGREEMENT SIGNED AT WASHINGTON ON THE 27TH DAY OF JANUARY, 1909, BETWEEN HIS BRITANNIC MAJESTY AND THE UNITED STATES OF AMERICA.

THE SUBMISSION.

On the 27th day of January, 1909, an agreement was concluded between Great Britain and the United States in order to provide for a decision of certain differences which have arisen between them as to the scope and meaning of article one of the treaty signed at London on the 20th day of October, 1818, relating to the British North American fisheries, and of the liberties referred to in the said article, and otherwise in respect of the rights and liberties which the inhabitants of the United States have or claim to have in the waters or on the shores therein referred to.

The first article of the agreement provides that the following questions shall be submitted for decision to a Tribunal of Arbitration constituted as thereafter specified (App., p. 1.).

Question 1.—To what extent are the following contentions or either of them justified?

It is contended on the part of Great Britain that the exercise of the liberty to take fish referred to in the said article, which the inhabitants of the United States have forever, in common with the subjects of His Britannic Majesty is subject, without the consent of the United States, to reasonable regulation by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, 2 or rules, as, for example, to regulations in respect of (1) the hours, days, or seasons which fish may be taken on the treaty coasts; (2) the method, means, and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts; (3) any other matters of a similar character relating to fishing; such regulations being reasonable as being, for instance—

(a.) Appropriate or necessary for the protection and preservation of such fisheries and the exercise of the rights of British subjects therein and of the liberty which by the said article 1 the inhabitants of the United States have therein in common with British subjects;

(b.) Desirable on grounds of public order and morals;

(c.) Equitable and fair as between local fishermen and the inhabitants of the United States exercising the said treaty liberty and

not so framed as to give unfairly an advantage to the former over the latter class.

It is contended on the part of the United States that the exercise of such liberty is not subject to limitations or restraints by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or regulations in respect of (1) the hours, days, or seasons when the inhabitants of the United States may take fish on the treaty coasts, or (2) the method, means, and implements used by them in taking fish or in carrying on fishing operations on such coasts, or (3) any other limitations or restraints of similar character—

(a.) Unless they are appropriate and necessary for the protection and preservation of the common rights in such fisheries and the exercise thereof; and

(b.) Unless they are reasonable in themselves and fair as between local fishermen and fishermen coming from the United States, and not so framed as to give an advantage to the former over the latter class; and

(c.) Unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement.

Question 2.—Have the inhabitants of the United States, while exercising the liberties referred to in said article, a right to employ as members of the fishing crews of their vessels persons not inhabitants of the United States?

Question 3.—Can the exercise by the inhabitants of the United States of the liberties referred to in the said article be subjected, without the consent of the United States, to the requirements of entry or report at customhouses, or the payment of light, or harbour, or other dues, or to any other similar requirement, or condition, or exaction?

3 *Question 4.*—Under the provision of the said article that the American fishermen shall be admitted to enter certain bays or harbours for shelter, repairs, wood, or water, and for no other purpose whatever, but that they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein or in any other manner whatever abusing the privileges thereby reserved to them, is it permissible to impose restrictions making the exercise of such privileges conditional upon the payment of light or harbour or other dues, or entering or reporting at customhouses, or any similar conditions?

Question 5.—From where must be measured the “three marine miles of any of the coasts, bays, creeks, or harbours” referred to in the said article?

Question 6.—Have the inhabitants of the United States the liberty under the said article or otherwise to take fish in the bays, harbours, and creeks on that part of the southern coast of Newfoundland which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands, or on the Magdalen Islands?

Question 7.—Are the inhabitants of the United States whose vessels resort to the treaty coasts for the purpose of exercising the liberties referred to in article 1 of the treaty of 1818 entitled to have for those vessels, when duly authorised by the United States in that

behalf, the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading vessels generally?

Article 2. Either party may call the attention of the tribunal to any legislative or executive act of the other party, specified within three months of the exchange of notes enforcing this agreement, and which is claimed to be inconsistent with the true interpretation of the treaty of 1818, and may call upon the Tribunal to express in its award its opinion upon such acts, and to point out in what respects, if any, they are inconsistent with the principles laid down in the award in reply to the preceding questions; and each party agrees to conform to such opinion.

Article five of the agreement provides for the constitution of a Tribunal of Arbitration chosen from the general list of members of the Permanent Court at The Hague in accordance with the provisions of article forty-five of the convention for the settlement of international disputes concluded at the second peace conference at The Hague on the 18th October, 1907.

Article eleven provides that the agreement shall be deemed to be binding only when confirmed by the two Governments by an exchange of notes.

The agreement was duly confirmed on the 4th March, 1909, and the present Tribunal has been constituted in accordance with
4 the provisions of article five. The full text of the agreement is set out in the appendix to this case.

In accordance with the provisions of article two (App., p. 2) notices were served by both parties, and these will be found in the appendix.

The accompanying Case, together with the documents, official correspondence, maps, and other evidence on which the Government of Great Britain relies contained in the appendices, is delivered pursuant to article six of the agreement.



INTRODUCTION.

The treaty between Great Britain and the United States, to be interpreted by this Tribunal, was concluded on the 20th October, 1818. It is thought desirable, however, to submit a brief statement as to the position of the British American colonies at the time of the war of independence (terminated by the treaty of 1783), and a short chronological summary of the more material subsequent incidents, in order to enable the Tribunal better to appreciate the questions which are presented for their decision.

POSITION BEFORE 1783.

British American Colonies.—Prior to the 4th July, 1776, Great Britain possessed upon the American continent seventeen colonies. On that date the thirteen southern colonies declared their independence, and afterwards became the United States of America. The four northern colonies—Newfoundland, Nova Scotia, St. John's Island (now known as Prince Edward Island), and Quebec (afterwards Upper and Lower Canada)—adhered to the United Kingdom. The questions involved in the present reference relate to liberties claimed within the territorial waters, or on the land, of these colonies; and it is material to call attention to some points in their history.

Newfoundland.—The ownership of Newfoundland was, at one time, a matter of dispute between Great Britain and France; but by the treaty of Utrecht, in 1713, France ceded all her claims to Great Britain, subject to the following clause (App., p. 7):—

Moreover, it shall not be lawful for the subjects of France to fortify any place in the said Island of Newfoundland, or to erect any buildings there, besides stages made of boards, and huts necessary and usual for drying of fish; or to resort to the said island, beyond the time necessary for fishing and drying of fish. But it shall be allowed to the subjects of France to catch fish, and to dry them on land, in that part only, and in no other besides that, of the said Island of Newfoundland, which stretches from the place called Cape Bonavista to the northern point of the said island, and from thence, running down by the western side, reaches as far as the place called Point Riche.

Nova Scotia.—By the same treaty of Utrecht (1713), France ceded to Great Britain "Nova Scotia, or Acadie, with its ancient boundaries." A question as to whether these boundaries did, or did not,

include the north coast of the peninsula was settled by the later treaty of 1763, France giving up all claim. By this later treaty, too, Cape Breton Island passed from France to Great Britain. At the date of the 1783 treaty, therefore, Great Britain was possessed of the whole of Nova Scotia (including New Brunswick and Cape Breton) and all of its coast fisheries. (App., p. 7.)

Prince Edward Island.—By the treaty of 1763, this island (then called St. John's Island) was ceded by France to Great Britain. At first, part of Nova Scotia, it was afterwards, in 1768, made a separate province. (App., p. 8.)

Quebec.—Prior to 1763, France was possessed of much of that which now constitutes the Provinces of Ontario and Quebec in Canada; but ownership of the territory lying between the thirteen British colonies on the Atlantic coast and the River Mississippi was in dispute between Great Britain and France.

By the treaty of 1763, France ceded to Great Britain "Canada with all its dependencies," including all the territory in dispute to the east of the Mississippi. In the same year, part of the ceded territory was constituted a province under the name of the Province of Quebec. In 1774, there was a re-arrangement, and all the territory now known as the Provinces of Ontario and Quebec (in Canada) and as the States of Indiana, Ohio, Illinois, Wisconsin, and Michigan, and the eastern part of Minnesota (in the United States), together with all the great lakes (except the southern half of Lake Ontario), were united as the Province of Quebec.

Labrador and the Magdalen Islands formed part of the Province of Quebec in 1783. A portion of Labrador was annexed to Newfoundland prior to the treaty of 1818. (App., p. 8.)

POSITION BEFORE 1783.

Fisheries.—There were, and are, two sorts of fisheries: (1) the bank fisheries of the ocean; and (2) the coast fisheries within the territorial waters of the respective colonies.

In respect of the bank fisheries (lying more than 35 miles from the shore), Great Britain at one time asserted an exclusive right. By the treaty of 1763, Spain had relinquished the pretensions of the Guipuscoans, and other Spanish subjects to fish there; and France had agreed not to (App., p. 10)—

exercise the said fishery but at the distance of 3 leagues from all the coasts belonging to Great Britain, as well those of the continent as those of the islands situated in the said Gulf of St. Lawrence. And as to what relates to the fishery on the coasts of the Island of Cape Breton out of the said gulf, the subjects of the Most Christian King shall not be permitted to exercise the said fishery but at the distance of 15 leagues from the coasts of the Island of Cape Breton. (App., p. 8.)

Each of the seventeen colonies owned the fisheries on its own coasts, and colonial laws regulative of them were of frequent occurrence.

The Colonial System and the Navigation Laws.—Another factor in the situation in 1783 must be remembered, namely, the mutually exclusive policy which all European nations had for many years pursued with reference to the trade of their respective colonies. The clause of the 1818 treaty permitting American fishermen to enter British bays and harbours (App., p. 31)—

for the purpose of shelter and of repairing damages therein, and of purchasing wood, and of obtaining water, and for no other purpose whatever

can scarcely be appreciated, at the present day, unless the fact is borne in mind that, in 1818, no foreign vessel of any kind was, unless under exceptional circumstances, permitted to enter a colonial harbour.

Nationality.—One other factor in the situation should be mentioned, namely, the strength of the conception which at that date prevailed as to the advantages to be derived by any nation from an increase in the number of its seamen.

It was with a view to naval strength that England had from an early period confined to British subjects residing on the European side of the Atlantic the right to dry and cure fish on Newfoundland shores. Such was the policy of the statute of 1699 (10 & 11 Wm. III, cap. 25), and the meaning of that statute was, by the statute of 1775 (15 Geo. III, cap. 31), rendered clear. Not only were foreigners excluded, but British subjects residing in the American colonies (other than Newfoundlanders) were refused liberty to exercise the privilege. (App., p. 525; App., p. 543.)

It was to prevent depletion of her force of sailors that Great Britain insisted upon the right to stop United States vessels on the high seas in order to search for British seamen. And it was the enforcement of that claim which was one of the causes of the war of 1812.

The exclusion of the Spaniards from the bank fisheries in 1763, and the partial exclusion of the French in the same year, were thought valuable to Great Britain, not simply because of the effect upon the business of fishing, but because of the loss to Spain and France of those "nurseries for seamen." (App., p. 10.)

1776-1782.—War of the American Revolution.

TREATY OF 1783.

1782-3.—Negotiations for the termination of the war were carried on in Paris—at first informally, between Mr. Richard Oswald (instructed by Lord Shelburne, British Colonial Minister) and Dr. Franklin (representing the United States). Afterwards, at various

periods, Mr. Oswald received assistance from Mr. Strachey, Mr. Vaughan, and Mr. Fitzherbert (British Minister at Paris). Dr. Franklin's colleagues, Mr. John Adams and Mr. John Jay, joined him towards the end of the summer, and Mr. Laurens (a third colleague) arrived late in November. Preliminary articles were signed on the 30th of that month. The final treaty bears date the 3rd September, 1783.

The following is the text of article 3 which relates to the fisheries (app., p. 13) :—

It is agreed, that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank and on all the other banks of Newfoundland; also in the Gulf of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish. And also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use, (but not to dry or cure the same on that island), and also on the coasts, bays, and creeks of all other of His Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same, or either of them, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlements, without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground.

Attention is called to the difference in the stipulations affecting the two sorts of fisheries. As to the bank-fisheries,—

It is agreed that the people of the United States shall *continue to enjoy unmolested the right*;

whereas, in regard to the coast fisheries, the agreement is—

that the inhabitants of the United States *shall have liberty* to take fish.

According to the contention of His Majesty's Government, the former was a recognition of a "right" to fish in the ocean and the gulf: the latter was a liberty or license to take fish in British territorial waters conceded by Great Britain for political reasons.

In addition to the fishing liberty, a grant was made at the same time of a large extent of territory that had been part of the Province of Quebec, and was at the date of the treaty in the occupation of Great Britain.

TREATY, GREAT BRITAIN AND FRANCE 1783.

On the same day a treaty of peace was signed by Great Britain and France. Among other provisions it was stipulated that French fishing rights should be exercised on the coast of Newfoundland from Cape St. John to Cape Ray, instead of from Cape Bonavista to Point Riche, as in the Treaty of Utrecht. (App., p. 11.)

1789.—A British statute (29 Geo. III, cap. 53) enacted (App., p. 563) —

that no fish, taken or caught by any of His Majesty's subjects, or other persons, arriving at *Newfoundland*, or its dependencies, or on the banks of the said island, except from *Great Britain*, or one of the *British dominions in Europe*, shall be permitted to be landed or dried on the said Island of *Newfoundland*,

but excepted the rights of the citizens of France.

This statute shows how jealously Great Britain guarded the shores of Newfoundland at this time.

DELAWARE BAY 1793.

1793.—The French frigate "L'Embuscade" captured the British ship "Grange" in Delaware Bay, at a distance from the shore of more than 3 miles. Declaring that the whole of the bay was within its jurisdiction, the United States required the restoration of the frigate. France complied. The bay has a headland width of 10½ miles.

9 UNITED STATES CLAIM TO TERRITORIAL WATERS, 1806.

1806.—During the negotiations with reference to freedom of United States vessels from British seizure, an attempt was made to fix the limit of United States jurisdiction upon its coasts, and the United States, suggesting that a fair distance would be as far out as (App., p. 60) —

the well-defined path of the Gulf Stream

asked that the following might be agreed to:—

It is agreed that all armed vessels belonging to either of the parties engaged in war, shall be effectually restrained by positive orders, and penal provisions, from seizing, searching, or otherwise interrupting or disturbing vessels to whomsoever belonging, whether outward or inward bound, within the harbours or the chambers formed by headlands, or anywhere at sea, within the distance of four leagues from the shore, or from a right line from one headland to another:

After negotiations the limit was fixed at "five marine miles from the shore"; but the convention never became effective.

1812.—War again broke out between the two nations.

1814.—The treaty of Ghent, which terminated the war, contained no provision as to the fisheries. Great Britain declined to renew the coast liberties except in return for equivalent concessions. The United States contended that renewal was not necessary—that the war had not affected the liberties of the previous treaty. (App., p. 25.)

TREATY OF 1818.

1818.—After long negotiations the treaty of 1818 was agreed to. It provided as follows (App., p. 30):—

Whereas differences have arisen respecting the liberty, claimed by the United States for the inhabitants thereof, to take, dry, and cure

fish on certain coasts, bays, harbours, and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties that the inhabitants of the said United States shall have, for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland; from the said Cape Ray to the Quirpon Islands; on the shores of the Magdalen Islands; and also on the coasts, bays, harbours, and creeks from Mount Joli, on the southern coast of Labrador, to and through the Straits of Belleisle, and thence northwardly, indefinitely, along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company: And that the American fishermen

shall also have liberty, for ever, to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland, hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce, for ever, any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America, not included within the above-mentioned limits: *Provided, however,* that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

Comparison of the two treaties.—It will be observed that the 1818 treaty is silent as to the bank fisheries. These were not then in dispute. Comparison of the provisions of the two documents, so far as relates to coast fisheries, may be made as follows:—

1783.

Liberty to Take Fish on:—

1. Such parts of Newfoundland coast as British fishermen shall use.
2. On the coasts, bays and creeks, of all other British dominions in America.

Liberty to Dry and Cure Fish in:—

Any bays, harbours, and creeks for the time being unsettled of—

1. Nova Scotia.
2. Magdalen Islands.
3. Labrador.

1818.

Liberty to Take Fish on:—

1. Coast of Newfoundland—Cape Ray to Rameau and Cape Ray to Quirpon.

2. Shores of Magdalen Islands.

- 11 3. Coasts, bays, harbours, and creeks of Labrador, from Mount Joli, eastwardly and northwardly.

Liberty to Dry and Cure Fish in—

Bays, harbours, and creeks for the time being unsettled of—

1. Coast of Newfoundland—Cape Ray to Rameau.

2. Coast of Labrador.

Renunciation of liberty to take, dry, or cure fish on or within three miles of all other coasts, bays, creeks, or harbours.

Proviso for entry to such bays or harbours for shelter, repairing damages, wood, and water, and for no other purpose whatever.

This comparison shows the following facts:—

1. The liberties of the 1818 treaty are very much more restricted than those of the 1783 treaty.

2. Some of the liberties of 1818 were new, that is, they had not been conceded in 1783.

REASONS FOR CONCESSION.

Concession of 1818.—The motives which actuated this new concession of fishing liberties are very clearly disclosed in the contemporaneous correspondence. The British Government absolutely repudiated all assertion of right upon the part of the United States, but yielded to the other considerations which were urged upon them, namely, friendship and regard for the benefits which would accrue to American fishermen, among whom were (App., p. 66)—

multitudes of people who were destitute of any other means of subsistence,

and who would thus be—

afforded the means of remittance to Great Britain in payment for articles of her manufactures exported to America.

BRITISH STATUTE, 59 G. III, C. 38.

1819.—The British Parliament passed a statute intituled “An Act to enable His Majesty to make regulations with respect to the taking and curing fish on certain parts of the coasts of Newfoundland, Labrador, and His Majesty’s other possessions in North America, according to a convention made between His Majesty and the
12 United States of America,” and in pursuance of that statute an Order-in-Council was passed (19th June) containing instructions of general character to the Governor of Newfoundland. (App., p. 565.)

SOVEREIGNTY IN NEWFOUNDLAND.

1822-3.—Question having arisen between the United States and France as to the validity of the latter’s claim to the exclusive right of

fishing upon that part of the Newfoundland coast upon which French fishermen had privileges under the treaty with the United Kingdom of 1783, and France having assumed to eject American vessels from such coasts, the United States asserted that the sovereignty over the territory was in the United Kingdom. (App., pp. 102-8.)

COMMERCIAL ENTENTE, 1830.

1830.—By mutual executive action, certain relaxation was made in the navigation laws of the two nations. United States vessels were permitted for the first time to (App., p. 570)—

import from the United States aforesaid, into the British possessions abroad, goods the produce of those States; and may export goods from the British possessions abroad to be carried to any foreign country whatever.

Fishing vessels were not within the purview of these arrangements.

NOVA SCOTIA STATUTE, 1836.

1836.—The great difficulty and expense of effective patrol of the very extensive coast-lines embraced in the convention of 1818 had produced wide-spread neglect of its limitations. A few seizures had been made during the period 1820-1830. Renewed depredations led to the passing in 1836 of legislation (App., p. 613) in Nova Scotia (afterwards declared by Imperial Order in Council to be regulations under the Imperial statute of 1819), and also to a more strict enforcement of its rights by the British Government. (App., p. 571.)

SEIZURE IN BAY OF FUNDY, 1843.

1843.—The United States fishing vessel "Washington" was seized for fishing in the Bay of Fundy.

BRITISH CONCESSION OF BAY OF FUNDY, 1845.

1845.—After some discussion the British Government announced their intention to allow American fishermen to fish within the Bay of Fundy as a matter of grace, although advised that it was a bay within the meaning of the treaty of 1818, and, therefore, water in which those fishermen could not claim to fish as of right. (App., p. 141.)

MR. WEBSTER, 1852.

1852.—The British Government having declined to make a similar relaxation as to bays other than the Bay of Fundy, Mr. Daniel Webster, United States Secretary of State, issued a notice dealing with the application of the treaty to bays. Subsequently the same subject was debated in Congress. Both these matters are further discussed under question No. 5. (App., p. 152.)

1853.—Mr. Marcy, United States Secretary of State, issued circular instructions as to the conduct of American fishermen, to which reference will be made hereafter. (App., p. 201.)

1854.—The treaty known as “the reciprocity treaty” was entered into. It admitted American fishermen to the enjoyment of all British coast fisheries in the Atlantic in exchange for admission of British fishermen to certain United States coast fisheries, and it provided also for reciprocal abatements in customs dues. During the currency of this treaty, American fishermen were permitted to purchase supplies in British ports; but light-dues were exacted and paid without objection. (App., p. 36.)

1855-6.—Mr. Marcy issued further circular instructions as to the conduct of American fishermen. (App., pp. 207, 209.)

BAY OF FUNDY ARBITRATION, 1856.

1856.—Arbitration took place with reference (amongst other things) to a claim by the owner of the “Washington” against the British Government in respect of the seizure in 1843. (App., p. 212.)

LICENCES, 1866.

1866.—The reciprocity treaty was terminated by the United States. Negotiations for its renewal ensued, and meanwhile the fishing privileges conferred by it upon United States fishermen were continued under a system of licenses for which an annual fee was charged.

DOMINION OF CANADA, CONSTITUTED, 1867.

1867.—Canada, Nova Scotia, and New Brunswick were united under the name “The Dominion of Canada.”

1870.—American fishermen having gradually ceased to take licences, the system was ended (Canadian Order in Council, 8th January). (App., p. 230.)

MR. BOUTWELL’S CIRCULAR, 1870.

1870.—Mr. Boutwell (United States Secretary of State) issued a circular of instructions (9th June), in which he said that (App., p. 237)—

Fishermen of the United States are bound to respect the British laws and regulations for the regulation and preservation of the fisheries, to the same extent to which they are applicable to British or Canadian fishermen.

This circular was re-issued two years later.

TREATY OF 1871.

1871.—A treaty, known as the treaty of Washington, made provisions somewhat similar in terms to the reciprocity treaty of

14 1854. The arrangements as to the fisheries lasted until 1885, when they were terminated on the initiative of the United States.

1873.—Prince Edward Island became part of the Dominion of Canada. Prior to this year it was a province by itself.

HALIFAX COMMISSION, 1877.

1877.—Great Britain having claimed that the fishing liberties conferred on the citizens of the United States by the treaty of 1871 were of greater value than the reciprocal advantages acquired by British subjects, the treaty provided that this claim should be referred to a commission, and that compensation should be awarded if found due. The Commission met at Halifax, and eventually awarded 5,500,000 dollars to Great Britain. The proceedings before this Commission are of some importance, and will hereafter be referred to. (App., p. 254.)

FORTUNE BAY, 1878.

1878.—Newfoundland inhabitants, wrongfully taking the law into their own hands, interrupted some American fishermen while carrying on their operations in Fortune Bay, under the treaty of 1871. The justification alleged was that the Americans were committing breaches of three of the provisions of Newfoundland statutes:—

1. Establishing a close season for taking herrings by certain methods;

2. Prohibiting the "barring" of herrings in coves, &c.; and

3. Prohibiting fishing on Sunday.

The amenability of American fishermen to these laws was asserted by the United Kingdom, and denied by the United States. In the end, Great Britain paid compensation, on the ground that individual citizens of Newfoundland had no right to take the enforcement of the law into their own hands, but the contention that the Newfoundland laws were binding on United States fishermen was expressly maintained. (App., p. 289.)

ARRANGEMENTS, 1885.

1885.—The fishery clauses of the treaty of 1871 having been terminated by the United States, temporary diplomatic arrangements continued the application of their provisions throughout the season of 1885.

CANADIAN STATUTE, 1886.

1886.—Further agreement not having been made, Canada adopted a statute (49 Vict., cap. 114) for the purpose of removing the doubt

caused by conflicting judicial decisions of 1870-1 as to whether the purchase of bait within British waters was "preparing to fish" there. The new statute provided for seizure in case of foreign fishing vessels having (App., p. 631)—

entered such waters for any purpose not permitted by treaty or convention of the United Kingdom or Canada for the time being in force.

UNITED STATES RETALIATORY STATUTE, 1887.

1887.—American fishermen having thus been prohibited from purchasing supplies in British waters, the United States passed retaliatory legislation, authorising the President by proclamation (App., p. 793)—

to deny vessels, their masters and crews, of the British dominions of North America, any entrance into the waters, ports, or places of, or within, the United States (with such exceptions in regard to vessels in distress, stress of weather, or needing supplies, as to the President shall seem proper), whether such vessels shall have come directly from said dominions on such destined voyage or by way of some port or place in such destined voyage elsewhere.

It will be observed that this statute was not confined (as was Canadian action) to fishing vessels, but applied to vessels of all kinds.

1887.—Newfoundland passed a statute, by which it was provided that no person should export, or catch for the purpose of exportation, any herring, caplin, squid, or other bait fishes without a licence. (App., p. 711.)

1888.—A convention was negotiated (known as the Chamberlain-Bayard convention). It dealt with the question of bays and commercial privileges. (App., p. 42.)

The United States Senate declined to ratify this convention, and it therefore never became operative.

The negotiators, however, had provided for a *modus vivendi* pending legislative action with regard to the treaty, which is still in operation in Canada.

1888.—Newfoundland passed a statute providing for the issue of licences to purchase bait, for bait purposes. (App., p. 712.)

1889.—Newfoundland passed a statute amending and consolidating the two previous statutes (1887 and 1888). This Act has been commonly known as the Bait Act. It prohibited (without licence) any dealing with bait fishes for the purpose of exporting them to be used either for consumption or as bait. (App., p. 713.)

1890.—A convention was arranged affecting the relations between the United States and Newfoundland (known as the Bond-Blaine convention), which, however, never became effective. (App., p. 45.)

1893.—Newfoundland passed a statute (known as the Foreign Fishing Vessels Act) having for its object the prohibition of the sale, to foreigners, without license, of herring, caplin, squid, or other bait fishes, ice, lines, seines, or other outfit or supplies for the fishery, and the engagement within British waters of persons to form part of the crew. (App., p. 730.)

CONVENTION, 1902.

1902.—Another convention was arranged as between the United States and Newfoundland (known as the Bond-Hay convention). It provided for reciprocal freedom from customs duty of certain articles, and for permission to American fishermen to purchase bait and other supplies in Newfoundland. The United States Senate declined to ratify the convention. It has, therefore, never become effective. (App., p. 46.)

1905.—Newfoundland repealed the provisions of the Foreign Fishing Vessels Act, and enacted a new statute which prohibited altogether the purchase of bait by foreign fishing vessels and the engagement by them of crews within Newfoundland waters. (App., p. 757.)

1906.—Newfoundland passed another statute repealing the Act of 1905, but re-enacting it with some amendments. This statute, however, did not come into force. (App., p. 758.)

1906.—Diplomatic correspondence resulted in a *modus vivendi* as to Newfoundland (App., pp. 504-6) :—

1. American fishermen were permitted to use purse seines.
2. American fishermen were permitted to hire Newfoundlanders outside the 3-mile limit.
3. American fishermen were to refrain from fishing on Sunday.
4. American fishermen were to pay light dues.
5. American fishermen were to make entries at custom-houses.
6. The Statute of 1906 was not to become effective, and parts of the statute of 1905 were not to be enforced against American fishermen.

1907.—A new *modus vivendi* as to Newfoundland was arranged. It was similar to that of the former year, except that American fishermen were not to use purse seines. (App., pp. 508-9.)

The above chronological survey will, it is hoped, be of use in the appreciation of the various parts of the arguments submitted in the Case on each of the questions on which the Tribunal is requested to decide.

RIGHT OF REGULATION.

THE QUESTION.

To what extent are the following contentions or either of them justified?

It is contended on the part of Great Britain that the exercise of the liberty to take fish, referred to in the said article, which the inhabitants of the United States have for ever in common with the subjects of His Britannic Majesty, is subject, without the consent of the United States, to reasonable regulation by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or rules, as, for example, to regulations in respect of

(1) the hours, days, or seasons when fish may be taken on the treaty coasts;

(2) the method, means, and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts;

(3) any other matters of a similar character relating to fishing; such regulations being reasonable, as being, for instance—

(a.) Appropriate or necessary for the protection and preservation of such fisheries, and the exercise of the rights of British subjects therein and of the liberty which by the said article 1, the inhabitants of the United States have therein in common with British subjects;

(b.) Desirable on grounds of public order and morals;

(c.) Equitable and fair as between local fishermen and the inhabitants of the United States exercising the said treaty liberty and not so framed as to give unfairly an advantage to the former over the latter class.

It is contended on the part of the United States that the exercise of such liberty is not subject to limitations or restraints by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or regulations in respect of

(1) the hours, days, or seasons when the inhabitants of the United States may take fish on the treaty coasts; or

(2) the method, means, and implements used by them in taking fish or in carrying on fishing operations on such coasts, or

(3) any other limitations or restraints of similar character—

(a.) Unless they are appropriate and necessary for the protection and preservation of the common rights in such fisheries and the exercise thereof; and

(b.) Unless they are reasonable in themselves and fair as between local fishermen and fishermen coming from the United States, and

not so framed as to give an advantage to the former over the latter class; and

(c.) Unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord, and the United States concurs in their enforcement.

NATURE OF THE QUESTION.

Stated in general terms, the question is, whether certain nationals, with treaty liberty to enter alien territory and do certain acts there, are exempt from all the local laws, applicable to persons engaged in those acts, in force in that alien territory, unless their appropriateness, necessity, reasonableness, and fairness have been passed upon, and their enforcement concurred in by the Government of their own country.

FORMULATION OF UNITED STATES CLAIM IN 1878.

This exemption was first formally claimed by the United States in 1878, on grounds which are set out in a report made by Mr. Evarts (App., pp. 269-277), then United States Secretary of State, to the President of the United States of date the 17th May, 1880. (App., p. 280.)

The controversy in which this occurred did not, however, relate to the treaty now under consideration, but to a treaty made in 1871, by which the North American coast fisheries of both countries had been mutually thrown open.

The incident out of which the controversy arose and the controversy itself will be noticed elsewhere in this Case. It is sufficient for the present purpose to state that the incident was closed, and the particular controversy terminated, without any agreement upon, or determination of the question then formulated; the conclusion then reached having been without prejudice to the contentions and opinions of either party in respect of that question.

21 With the exception of this incident, nothing occurred during the very considerable period that elapsed between 1818, the date of the treaty now under discussion, and 1905, to cast any doubt upon the principle now maintained by Great Britain, or upon its unqualified applicability to the rights and obligations arising out of that treaty. This will, hereafter, be more fully noticed and developed.

REFORMULATION IN 1906.

The question is now directly raised for decision. The doctrine has been reformulated on behalf of the United States, in the despatch from Mr. Root to the United States Ambassador in London of the 30th June, 1906. This despatch is printed in full in the Appendix.

For the present purpose it is sufficient to call attention to the following passages:—

“The Government of the United States fails to find in the treaty any grant of right to the makers of colonial law to interfere at all, whether reasonably or unreasonably, with the exercise of the American rights of fishery, or any right to determine what would be a reasonable interference with the exercise of that American right if there could be any interference.” (App., p. 499.)

* * * * *

“The treaty of 1818 either declared or granted a perpetual right to the inhabitants of the United States, which is beyond the sovereign power of England to destroy or change. It is conceded that this right is, and for ever must be, superior to any inconsistent exercise of sovereignty within that territory. The existence of this right is a qualification of British sovereignty within that territory. The limits of the right are not to be tested by referring to the general jurisdictional powers of Great Britain in that territory, but the limits of those powers are to be tested by reference to the right as defined in the instrument creating or declaring it. The Earl of Derby in a letter to the Governor of Newfoundland, dated the 12th June, 1884, said: ‘The peculiar fisheries rights granted by treaties to the French in Newfoundland, invest those waters during the months of the year when fishing is carried on in them, both by English and French fishermen, with a character somewhat analogous to that of a common sea for the purpose of fishery.’ And the same observation is applicable to the situation created by the existence of American fishing rights under the treaty of 1818. An appeal to the general jurisdiction of Great Britain over the territory is therefore a complete begging of the question, which always must be, not whether the jurisdiction of the Colony authorizes a law limiting the exercise of the treaty right, but whether the terms of the grant authorize it. (App., p. 500.)

* * * * *

The claim now asserted that the Colony of Newfoundland is entitled at will to regulate the exercise of the American treaty right is equivalent to a claim of power to completely destroy that right. This Government is far from desiring that the Newfoundland fisheries shall go unregulated. It is willing and ready now, as it has always been, to join with the Government of Great Britain in agreeing upon all reasonable and suitable regulations for the due control of the fishermen of both countries in the exercise of their rights, but this Government cannot permit the exercise of these rights to be subject to the will of the Colony of Newfoundland. The Government of the United States cannot recognize the authority of Great Britain or of its colony to determine whether American fishermen shall fish on Sunday. The Government of Newfoundland cannot be permitted to make entry and clearance at a Newfoundland Custom House and the payment of a tax for the support of Newfoundland lighthouses conditions to the exercise of the American right of fishing. If it be shown that these things are reasonable, the Government of the United States will agree to them, but it cannot submit to have them imposed upon it without its consent.” (App., p. 500.)

This despatch appears to concede that effective legislative regulation of the treaty territory and rights is both possible and necessary; and there can, of course, be no such regulation if any of the fishermen are not amenable to it. This must mean that such effective legislation was in the contemplation of the negotiators of the treaty, and is consistent with the treaty rights.

EFFECT OF UNITED STATES CONTENTION.

If the contention that the two Governments must agree upon joint regulations for the control of the fishermen of both countries be sound, it follows that, in the absence of agreement, the fishery is left without regulation at all, so far at least as American fishermen are concerned. This is equivalent to giving them a right to destroy the subject-matter of the treaty.

The logical result of the contention of the United States as formulated in this despatch would seem to be that:—

- (1.) Regulations are necessary.
- (2.) To be effective they must apply to all fishermen, both British and American.
- (3.) Legislation necessary to give validity to such regulations must be enacted by Great Britain; but by force of the treaty, Great Britain is prohibited from exercising this right of legislation until the United States has expressed approval or concurrence.

There is no trace in the treaty of any intention that the power of regulation by Great Britain should be curtailed. Great Britain does not claim the right to destroy that which is conceded by
 23 the treaty to American fishermen, but the right only to make regulations which are necessary or desirable for the preservation of the fisheries for the benefit of British and American fishermen alike.

CONTENTIONS OF HIS MAJESTY'S GOVERNMENT.

PROPOSITIONS.

The position assumed by His Majesty's Government is generally indicated by the following propositions:—

1. His Majesty has sovereign power over the territory in question.
2. The exclusive right to legislate with regard to the conduct of the fisheries in the territory in question resides with the British and Colonial legislatures.
3. The United States has no share in such sovereignty.
4. The treaty of 1818 did not transfer or abandon the complete sovereignty of Great Britain over the treaty waters and territory in question.
5. The sovereignty of Great Britain existed independently of the treaty altogether. It is in no way dependent upon the treaty.

6. Subjection to British legislative control was inherent in, and formed an essential part of, the very subject-matter of the treaty—the taking of fish in British waters.

7. The effect of the treaty stipulation was to confer upon inhabitants of the United States a liberty to participate in this subject-matter, with its necessary subjection to legislative control.

8. The language of the treaty does not suggest that the conferring of this liberty involved any surrender of control, or any alteration in the characteristic qualities of the subject-matter. On the contrary, the liberty granted was expressed to be a liberty in common with British fishermen, as to whom there could be no pretence that the treaty abandoned any attribute of sovereignty or changed any quality of its subject-matter.

9. The treaty simply operated as an agreement by which Great Britain undertook not to exercise her sovereignty so as to nullify the liberty conferred by the treaty to participate in taking fish in British waters, or so as to make unfair discrimination in favour of her own subjects, or against American inhabitants resorting to the treaty waters.

24 10. By the very fact of resorting to the treaty waters in assertion of the treaty liberty, American inhabitants come under the obligation to observe the regulative legislation found in operation there from time to time.

11. The contention of the United States appears to be that the British Government cannot make any regulations, however necessary for the preservation of the fisheries, without the concurrence of the United States. It is not, and cannot be contended that the United States can themselves make such regulations, and it is submitted that it is impossible to find in the treaty any provision that the sovereignty of His Majesty, in respect of the territory in question, is to be subject to the veto of the United States Government. Such a provision would be contrary to all principle, and unworkable in practice.

HISTORY OF THE QUESTION.

ABSENCE OF DIFFICULTY, 1783–1878.

From 1783 to 1878 British and Colonial laws, regulative of the fisheries, were enforced against British and American fishermen alike, without any contention being raised that American fishermen were exempt from their operation, or that, for their control, the concurrence of the United States was necessary.

According to present United States contention, regulations should have been drawn up in 1783, and again in 1818, and submitted to the United States for approval. That was not done. Nobody sug-

gested the doing of it. Everybody acted as though it were unnecessary. British officials enforced the existing laws. The legislatures amended them from time to time, as experience proved to be necessary. United States fishermen treated them as operative and binding. The United States Government made no complaint.

In 1856, and on several occasions between 1866 and 1872, the attention of the United States Government was called to the necessity of fishermen obeying Colonial laws, but no objection was taken. It was not until 1878 that the present contention was first raised.

BRITISH STATUTE, 1819.

1819.—Immediately after the execution of the treaty of 1818, the British Parliament passed a statute for the express purpose of providing for the making of such regulations as might be rendered
25 necessary by the access of United States fishermen to the shore fisheries. (App., p. 565.) After reciting the treaty, the statute (59 Geo. III, c. 38) enacted—

That from and after the passing of this Act, it shall and may be lawful for His Majesty, by and with the advice of His Majesty's Privy Council, by any order or orders in council, to be from time to time made for that purpose, to make such regulations, and to give such directions, orders, and instructions to the Governor of *Newfoundland*, or to any officer or officers on that station, or to any other person or persons whomsoever, as shall or may be from time to time deemed proper and necessary for the carrying into effect the purposes of the said convention, with relation to the taking, drying, and curing of fish by inhabitants of the United States of *America*, in common with *British* subjects, within the limits set forth in the said article of the said convention, and hereinbefore recited; any Act or Acts of Parliament, or any law, custom or usage to the contrary in anywise notwithstanding.

No protest or complaint was ever made by the United States with respect to that statute.

MR. MARCY'S CIRCULAR, 1853.

1853.—Encroachments by United States fishermen had rendered necessary greater vigilance in the protection of British rights, and some excitement having arisen among the American vessel owners, Mr. Marcy (United States Secretary of State) issued a circular to the Directors of Ports (9th July) for the guidance of the fishermen (App., p. 201):—

Any armed resistance on the part of the fishing vessels, either singly or combined, would be an act of private hostility which can never receive any countenance from this Government.

You will omit nothing that your knowledge of the circumstances may suggest, and which our good faith towards a Power with which

we are, and desire to remain, at peace demands, to prevent any rash or illegal movements intended or calculated to violate our obligations towards a friendly foreign Power and our colonial neighbours.

I have been directed by the President to invite your prompt and personal attention to this matter, and to assure you that he places entire confidence in your active and judicious exertions to soothe the present irritation of popular feeling, excited in some instances, it is said, by unfounded reports of alleged violation of our national rights. Every good citizen should be solicitous to prevent any occurrence which may further excite that feeling. No violation of the colonial local law should be attempted, and their civil authorities and other officers should have due respect paid to them within their jurisdiction.

In case of insult to the American flag or of injury to our
26 fishermen, you will request them to transmit the particulars, properly substantiated, to the Department of State instead of attempting to settle the difficulties themselves.

RECIPROCITY TREATY, 1854.

1854.—By the Reciprocity treaty of 1854, the British coast fisheries, which had been closed against United States fishermen, were opened to them, the operative words being that (App., p. 36)—

the inhabitants of the United States shall have in common with the subjects of Her Britannic Majesty the liberty to take fish.

Reciprocally, certain United States coast fisheries were opened to British fishermen.

MR. MARCY'S CIRCULAR, 1855.

1855.—At the commencement of the ensuing season, the United States Secretary of State (Mr. Marcy) sent (12th July, 1855) the following circular to the various Collectors of Customs (App., p. 207):—

It is understood that there are certain Acts of the British North American colonial legislatures, and also, perhaps, Executive Regulations, intended to prevent the wanton destruction of the fish which frequent the coasts of the colonies and injuries to the fishing thereon. There is nothing in the Reciprocity Treaty between the United States and Great Britain which stipulates for the observance of these regulations by our fishermen; yet, as it is presumed, they have been framed with a view to prevent injuries to the fisheries, in which our fishermen now have an equal interest with those of Great Britain, it is deemed reasonable and desirable that both should pay a like respect to those regulations, which were designed to preserve and increase the productiveness and prosperity of the fisheries themselves. It is, consequently, earnestly recommended to our citizens to direct their proceedings accordingly. You will make this recommendation known to the masters of such fishing vessels as belong to your port, in such manner as you may deem most advisable.

I am, &c.

W. L. MARCY.

It is believed that the principal regulations referred to above are the following, from the Revised Statutes of New Brunswick, vol. i, title 22, cap. 101:—

7. The wardens of any county shall, when necessary, mark out and designate in proper positions "gurry grounds," putting up notices thereof, describing their limits and position, in the several school houses and other most public places in the parish where the said gurru grounds are marked out, publishing the like notice in the "Royal Gazette;" and no person after such posting and publication shall cast overboard from any boat or vessel the offal of fish into the waters at or near the said parish at any place except the said gurru grounds.

27 12. Within the parishes of Grand Manan, West Isles, Campo Bello, Pennfield, and St. George, in the County of Charlotte, no seine or net shall be set across the mouth of any haven, river, creek, or harbour, nor in such place extending more than one-third the distance across the same, or be within 40 fathoms of each other, nor shall they be set within 20 fathoms of the shore at low-water mark.

15. No herrings shall be taken between the 15th of July and 15th of October in any year, on the spawning ground at the southern head of Grand Manan, to commence at the eastern part of Seal Cove, at a place known as Red Point; thence extending westerly along the coast and around the southern head of Bradford's Cove, about five miles, and extending one mile from the shore; all nets or engines used for catching herring on the said ground within that period shall be seized and forfeited, and every person engaged in using the same shall be guilty of a misdemeanour and punished accordingly.

It will be observed that the specified rules belonged to three classes:—(1) as to disposition of offal; (2) as to methods of fishing; and (3) as to close seasons. Attention of His Majesty's Government was called to this circular, and representations were at once made to Mr. Marcy on the subject.

The British Minister at Washington (Mr. Crampton) in his letter to the Earl of Clarendon (7th August, 1855) explained the view which, in these representations, he was urging upon Mr. Marcy—a view precisely the same as that now entertained by His Majesty's Government (App., p. 208):—

It appears to me that American citizens, while within British jurisdiction, would be subject to the penalties attached to the infringement of all legal regulations, local, as well as general, by which British subjects are bound; and not less to those affecting the fisheries, provided always that these latter did not trench upon the rights secured by treaty to citizens of the United States.—Did any such law or police regulation exist, or were any such to be enacted, the Government of the United States would no doubt be justified in demanding its abrogation;—but the principle now enounced by Mr. Marcy extends much further, for it goes to exonerate American citizens from the penalties attaching to the violation of all British laws and regulations, however unobjectionable, now affecting, or which may hereafter affect, the British fisheries; and leave their observance

to depend solely on the good feeling or good sense of the individuals who may at any time happen to be engaged in those fisheries.

In reply the Earl of Clarendon said (11th October, 1855) (App., p. 208) :—

28 By the Reciprocity Treaty between this country and the United States, American citizens are admitted to the benefit of certain fisheries carried on in British waters in common with Her Majesty's subjects. It follows as a necessary consequence that such American citizens are bound to observe the existing laws and regulations established for the conduct of such fisheries by which British subjects are bound. This is necessarily implied in the very words of the article of the treaty, but independently of all agreement, it would follow, on general principles, that American fishermen pursuing their occupation within British territory would be bound to observe the local laws and regulations in like manner as all foreigners are bound to observe the municipal laws of the country in which they are resident.

It is indeed literally true, as Mr. Marcy states, that there is no *express* stipulation in the Reciprocity Treaty which bids American citizens to observe the British colonial regulations, but the obligation to do so did *not require a stipulation*; it attaches upon American citizens as soon as they claim the benefit of the Treaty.

Upon those instructions Mr. Crampton had a conversation with Mr. Marcy. He pointed out the objections to the language of the circular, and proceeded as follows (App., p. 210.) :—

I admitted, I said, that if any of those laws were framed or executed so as to make an unfair discrimination in favour of British fishermen, or directly or indirectly to deprive American fishermen of the privileges secured to them by the Reciprocity Treaty, this would afford just ground for representation to Her Majesty's Government by the Government of the United States. But I called Mr. Marcy's attention to the danger of allowing to each individual the right to judge for himself whether a regulation was in conformity with the provisions of the Treaty or not, and at once to object to observe it.

Mr. Marcy appeared entirely to concur in this view of the matter, and said that he would cause such an alteration to be made in the wording of the circular instruction to be issued for the approaching fishing season as would obviate the objection which I had put forward.

MR. MARCY'S NEW CIRCULAR, 1856.

Mr. Marcy shortly afterwards sent to Mr. Crampton the draft of a new circular in which Mr. Crampton made certain amendments, and Mr. Marcy issued (28th March, 1856) another circular, in which he said (App., pp. 209, 211.) :—

It is deemed reasonable and desirable that both United States and British fishermen should pay a like respect to such laws and regulations, which are designed to preserve and increase the productiveness of the fisheries on those coasts. Such being the object of
29 these laws and regulations, the observance of them is enjoined

upon the citizens of the United States in like manner as they are observed by British subjects. By granting the mutual use of the inshore fisheries, neither party has yielded its right to civil jurisdiction over a marine league along its coast. Its laws are as obligatory upon the citizens or subjects of the other as upon its own. The laws of the British provinces, not in conflict with the provisions of the Reciprocity Treaty, would be as binding upon citizens of the United States within that jurisdiction as upon British subjects. Should they be so framed or executed as to make any discrimination in favour of the British fisherman, or to impair the rights secured to American fishermen, by that Treaty, those injuriously affected by them will appeal to this Government for redress.

The circular carried the same appendix as that of the previous season, indicative of the effect of the existing British regulations.

THE STATUS QUO ANTE.

The *status quo ante* was thus recognised, and the present contention of His Majesty's Government is, in effect, adopted in Mr. Marcy's revised circular.

Among the regulations which were recognized as not "impairing the rights secured to American fishermen by that treaty" were such as those which then existed in New Brunswick (1) as to disposal of offal, (2) as to methods of fishing, and (3) as to close seasons.

The regulations to which Mr. Marcy specifically referred were, however, only some of those then in force in the colonies. Mr. Marcy was aware of that fact, for the appendix to his circular commenced with the words (App., p. 209.)—

It is believed that the principal regulations, &c.

But whatever the nature of them might be, Mr. Marcy recognized that they were binding upon United States fishermen, unless they were in conflict with the provisions of the treaty.

MR. CARDWELL'S INSTRUCTIONS.

1866-1870.—Mr. Cardwell (British Colonial Secretary) in a letter to the Lords of the Admiralty (12th April, 1866) said (App., p. 221.) :—

. . . . Americans who exercise their right of fishing in Colonial waters in common with subjects of Her Majesty are also bound, in common with those subjects, to obey the law of the country, including such colonial laws as have been passed to ensure the peaceable and profitable enjoyment of the fisheries by all persons entitled thereto.

30 The enforcement of the colonial laws must be left as far as the exercise of rights on shore is concerned, to the colonial authorities, by whom Her Majesty's Government desire they shall be enforced with great forbearance, especially during the present season. In all cases they must be enforced with much forbearance and

consideration, and they must not be enforced at all by Imperial officers if they appear calculated to place the Americans at a disadvantage in comparison with British fishermen in the waters which, by the Treaty of 1818, are opened to vessels of the United States. On the contrary, their unequal operation should, in this case, be reported to their Lordships, a copy of the Report being at the same time sent to the Governor of the colony.

Upon this letter were based the instructions to naval officers in British North American waters. It was brought to the attention of the United States Government in the summer of 1870, and no exception was taken by them to its terms in relation to the matter now under consideration.

LICENCES, 1866–1870.

After the expiration of the reciprocity treaty in 1866, and prior to the treaty of 1871, United States fishermen were permitted, for the seasons 1866–9, access to the shore fisheries upon payment of licence fees.

MR. BOUTWELL'S CIRCULAR, 1870.

In 1870, seeing little hope of a renewal of treaty arrangements, the Canadian Government determined (8th January) to end the licence system, and to exclude United States fishermen from the coasts not included in the 1818 treaty. The United States Secretary of the Treasury (Mr. Boutwell) issued a circular to the Collectors of Customs (16th May, 1870) advising them of the altered situation.

On the 9th June he issued another circular, inserting in it the extremely important words (App., p. 237.) :—

Fishermen of the United States are bound to respect the British laws and regulations for the regulation and preservation of the fisheries to the same extent to which they are applicable to British or Canadian fishermen.

MR. BOUTWELL'S CIRCULAR RE-ISSUED.

1872, *March 6*.—Mr. Boutwell re-issued the same circular—having in it the words just quoted.

Particular attention is called to this very clear and very definite statement on the subject of regulations—a statement that is in entire uniformity with the contention of His Majesty's Government.

NEWFOUNDLAND, 1873–4.

1873.—The treaty of 1871 again opened up the coast fisheries of the United States to colonial fishermen, and the fisheries on the colonial nontreaty coasts to American fishermen; and Newfoundland, under the power reserved in the treaty, passed a statute providing for suspension of all laws which might operate to

prevent the articles of the treaty from taking full effect. To this enactment was added the following clause (App., p. 706) :—

Provided that such laws, rules, and regulations relating to the time and manner of prosecuting the fisheries on the coasts of this island, shall not be in any way affected by such suspension.

The United States Secretary of State, Mr. Fish, objected to this proviso, and properly so. for clearly it was either unnecessary, or else it was a modification of the treaty. If, by the treaty, United States fishermen were bound to observe the local regulations, the proviso was unnecessary and mere surplusage; and if they were not so bound, the proviso altered the treaty. The statute was therefore re-enacted without this proviso. (App., p. 706.)

FIRST ASSERTION BY UNITED STATES OF PRESENT CLAIM.

1878.—In 1878 (ninety-five years after the treaty of 1783, and sixty years after the treaty of 1818) the United States, for the first time, raised the contention that (App., p. 270)—

If there are to be regulations of a common enjoyment, they must be authenticated by a common or a joint authority.

FORTUNE BAY.

The question arose out of a fishermen's quarrel in Fortune Bay (Newfoundland). United States fishermen on a Sunday, and during the close season, stretched their nets across the bay, from one shore to the other, thus "barring" all the herring then in the bay; and for that purpose landed upon the shores of the bay. They had no right to operate from the shore, and, in addition to that, they were committing a breach of three local laws: (1) Fishing on Sunday; (2) fishing in close season; (3) "barring" herring. Their operations were forcibly stopped by Newfoundland fishermen, and the Government of the United States made a claim in consequence of such interruption.

The long diplomatic correspondence which ensued ended by payment to the United States of damages for the seizure, on the ground that, whether or not the United States fishermen were wrong (as to which both parties maintained their own opinion), British private subjects had no right to take the law into their own hands.

32 The following extracts from the correspondence sufficiently indicate the positions assumed. Mr. Evarts (United States Secretary of State) said (28th September, 1878) (App., p. 270) :—

This Government conceives that the fishery rights of the United States, conceded by the Treaty of Washington, are to be exercised wholly free from the restraints and regulations of the statutes of Newfoundland now set up as authority over our fishermen, and from any other regulations of fishing now in force or that may hereafter be enacted by that Government.

It may be said that a just participation in this common fishery by the two parties entitled thereto, may, in the common interest of preserving the fishery and preventing conflicts between the fishermen, require regulation by some competent authority. This may be conceded. But should such occasion present itself to the common appreciation of the two Governments, it need not be said that such competent authority can only be found in a Joint Convention, that shall receive the approval of Her Majesty's Government and our own.

LORD SALISBURY, 1878.

Lord Salisbury replied (7th November, 1878) (App., p. 271):—

I hardly believe, however, that Mr. Evarts would, in discussion, adhere to the broad doctrine which some portions of his language would appear to convey, that no British authority has a right to pass any kind of laws binding Americans who are fishing in British waters; for if that contention be just, the same disability applies *à fortiori* to any other Power, and the waters must be delivered over to anarchy. On the other hand, Her Majesty's Government will readily admit—what is, indeed, self-evident—that British sovereignty, as regards those waters, is limited in its scope by the engagements of the Treaty of Washington, which cannot be modified or affected by any municipal legislation. I cannot anticipate that with regard to these principles any difference will be found to exist between the views of the two Governments.

If, however, it be admitted that the Newfoundland Legislature have the right of binding Americans who fish within their waters by any laws which do not contravene existing Treaties, it must further be conceded that the duty of determining the existence of any such contravention must be undertaken by the Governments, and cannot be remitted to the discretion of each individual fisherman. If any American fisherman may violently break a law which he believes to be contrary to treaty, a Newfoundland fisherman may violently maintain it if he believes it to be in accordance with treaty. As the points in issue are frequently subtle, and require considerable legal knowledge, nothing but confusion and disorder could result
33 from such a mode of deciding the interpretation of the treaty.

* * * * *

“Her Majesty's Government prefer the view that the law enacted by the legislature of the country, whatever it may be, ought to be obeyed by natives and foreigners alike who are sojourning within the territorial limits of its jurisdiction; but that if a law has inadvertently been passed which is in any degree or respect at variance with rights conferred on a foreign Power by treaty, the correction of the mistake so committed, at the earliest period after its existence shall have been ascertained and recognized, is a matter of international obligation.”

MR. EVARTS, 1879.

Mr. Evarts (1st August, 1879) agreed with this view (App., p. 273):—

Removing, as this explicit language does, the only serious difficulty which threatened to embarrass this discussion, I am now at liberty

to resume the consideration of these differences in the same spirit, and with the same hopes so fully and properly expressed in the concluding paragraph of Lord Salisbury's despatch.

And he deprecated the ascription to him of a position different from that of Lord Salisbury (App., p. 273) :—

There is another passage of Lord Salisbury's despatch to which I should call your attention. Lord Salisbury says, 'I hardly believe, however, that Mr. Evarts would, in discussion, adhere to the broad doctrine which some portion of his language would appear to convey, that no British authority has a right to pass any kind of laws binding Americans who are fishing in British waters; for if that contention be just, the same disability applies, *à fortiori*, to any other Powers, and the waters must be delivered over to anarchy.' I certainly cannot recall any language of mine, in this correspondence, which is capable of so extraordinary a construction. I have nowhere taken any position larger or broader than that which Lord Salisbury says: 'Her Majesty's Government will readily admit what is, indeed, self-evident, that British sovereignty as regards those waters is limited in its scope by the engagements of the Treaty of Washington, which cannot be affected or modified by any municipal legislation.' I have never denied the full authority and jurisdiction either of the Imperial or colonial Governments over their territorial waters, except so far as by Treaty that authority and jurisdiction have been deliberately limited by these Governments themselves.

Lord Salisbury replied (3rd April, 1880) that Her Majesty's Government (App., p. 280)—

have always admitted the incompetence of the colonial or the Imperial Legislature to limit by subsequent legislation the advantages secured by treaty to the subjects of another Power.

If it should be the opinion of the Government of the United States that any Act of the colonial legislature subsequent in date to the Treaty of Washington has trenched upon the rights enjoyed by the citizens of the United States in virtue of that instrument, Her Majesty's Government will consider any communication addressed to them in that view with a cordial and anxious desire to remove all just grounds of complaint."

MR. EVARTS AND LORD SALISBURY.

The two statesmen appeared, therefore, to concur in the principle involved, although differing as to its application to the particular facts then under discussion.

Mr. Evarts (*Ante*, p. 33)—

never denied the full authority and jurisdiction either of the Imperial or colonial Governments over their territorial waters, except so far as by treaty that authority and jurisdiction have been deliberately limited by these Governments themselves.

He claimed no jurisdiction or share of sovereignty on behalf of the United States. On the other hand, Lord Salisbury admitted as self-evident (*Ante*, p. 32)—

that British sovereignty as regards those waters is limited in its scope by the engagements of the treaty which cannot be modified or affected by any municipal legislation.

They agreed, too, that if (*Ante*, p. 32)—

the Newfoundland legislature have the right of binding Americans who fish within their waters by any laws which do not contravene existing treaties, it must further be conceded that the duty of determining the existence of any such contravention must be undertaken by the Governments, and cannot be remitted to the judgment of each individual fisherman.

MR. EVARTS.

Both in assertion of principle and in tone, Mr. Evarts' letters display wide divergence from the attitude always theretofore assumed by the United States, and so clearly stated by Mr. Marcy twenty-two years before (1856). Until and during the period covered by Mr. Evarts' letters, British cruisers had enforced, and were enforcing, British laws as against United States fishermen, and were regulating their actions. Some Government had to supply the police power necessary for the purpose. Without demur, for nearly a century the British Government had done it; and the United States had agreed that the British Government was but exercising its right and discharging its duty.

35

MR. EVARTS.

Mr. Evarts, in his letters, avoided reference to the unbroken practice; and Mr. Marcy's circular, he disposed of (in his report to the President, 17th May, 1880) as follows (*App.*, p. 283):—

In the full copy of this circular, which is appended (No. 5) to the Babson and Foster report, the fishery regulations of the provinces to which it relates are recited, and a reference to these is sufficient to displace any inference that this Government has assented to any curtailment, past or previous, by provincial legislation of the freedom of the inshore fishery as conceded to our fishermen by the terms of the Reciprocity Treaty or the Treaty of Washington. One of these regulations relates to the demarcation of "gurry grounds," and the other to reservation of spawning grounds, during the spawning season, from invasion. "Gurry," or the offal of fish, was supposed to infect the waters, and the regulation was not of the right of taking fish, but of poisoning them. The care of the spawning beds in spawning season, in like manner was a regulation of the breeding of fish, not a regulation of modes of American fishing. Both these regulations met the approval of this Government, and were required by Mr. Marcy to be respected by our fishermen, for this reason, and in

the sense of being within the reasonable province of local civil jurisdiction, and not encroaching upon the province of freedom of the fishery as imparted by the Reciprocity Treaty. But the right of this Government to inspect all such laws and pass upon them, as falling one side or other of the line thus firmly drawn, is explicitly stated by Mr. Marcy. He says:—

Should they be so framed or executed as to make any discrimination in favour of British fishermen, or to impair the rights secured to American fishermen by that Treaty, those injuriously affected by them will appeal to this Government for redress.

Accordingly, the fishermen are directed to make complaint, upon the case arising, either in respect to any law or its execution, "in order that the matter may be arranged by the two Governments."

This language is in some respects important, and in some not quite accurate:—

(1.) Mr. Evarts says that regulations (1) of the disposition of offal and (2) of close season upon the spawning grounds were regarded as—

being within the reasonable province of local civil jurisdiction, and not encroaching upon the province of freedom of the fishery, as imparted by the Reciprocity Treaty.

This admission covers the whole case. For all that His Majesty's Government contends for is authority to make "reasonable" regulations.

36 (2.) It is incorrect to treat Mr. Marcy's circular as referring merely to (1) gurry grounds and (2) close seasons. In addition to those, it specifically mentioned a regulation prohibiting the setting of seines "across the mouth of any haven, river, creek, or harbour." The case which Mr. Evarts was dealing with was one of setting a seine across a whole bay. Mr. Marcy thought that that too was—

within the reasonable province of local civil jurisdiction.

(3) And it is incorrect to say that one of the reasons which actuated Mr. Marcy in requiring obedience to local laws was that they had "met the approval of this Government." For although Mr. Marcy, in the appendix to his circular, referred specifically to the three local laws which he had seen, his injunction of obedience applied to those which he had not seen. He commenced his appendix with the words:—

It is believed that the principal regulations referred to above are the following:—

This was Mr. Evarts' last word upon the subject. And we may take him as admitting that (*Ante*, p. 32)—

1. The common interest of preserving the fishery and preventing conflicts between the fishermen require regulation by some competent authority.

2. Some of such regulations are (*Ante*, p. 35)—
within the reasonable province of local civil jurisdiction.

3. Those that are within the “province of local civil jurisdiction” are those which do not modify or affect “the engagements of the treaty.”

4. If (*Ante*, p. 32)—

the Newfoundland legislature have the right of binding Americans who fish within their waters by any laws which do not contravene existing treaties, it must be further conceded that the duty of determining the existence of such contraventions must be undertaken by the Governments, and cannot be remitted to the judgment of each individual fisherman.

It is not pretended that, in his letters, Mr. Evarts says nothing inconsistent with these admissions, or, indeed, contradictory of them. But it is contended that Mr. Evarts so admitted, and that these admissions cover the point now in controversy. For Mr. Evarts’ language suffices to show that—

MR. EVARTS.

37 (1.) The liberty accorded by the treaty was an ordered and regulated liberty, and not an unlimited licence.

(2.) It was one which was to be subject to such laws as were—
within the reasonable province of local civil jurisdiction.

(3.) And such laws would, therefore, not modify or affect “the engagements of the treaty;” but, on the contrary, would be a fulfilment of it. Would not the United States have had fair ground of complaint if the United Kingdom had failed to do that which was essential for the preservation of the fisheries, fisheries in which the United States were interested, but which they themselves could not protect?

LORD SALISBURY’S DESPATCH, 1880.

Reliance has been placed by the Government of the United States upon some expression in Lord Salisbury’s despatch of the 3rd April, 1880, which refers to the fact that American fishermen took the rights conferred by the treaty subject to any restrictions upon British fishermen which existed at the date of the treaty. It is, however, submitted that Lord Salisbury’s despatch, read as a whole, contains no admission that regulations with regard to the exercise of the fishing could not be passed by the British or Colonial legislatures subsequent to the treaty. Confirmation of this is to be found in the passages which have been already quoted from the letter of Lord Salisbury to Mr. Welsh of the 7th November, 1878. (*Ante*, p. 32.)

LORD GRANVILLE'S STATEMENT, 1880.

The position of His Majesty's Government is summed up with perfect clearness by Lord Granville, who succeeded Lord Salisbury as Foreign Secretary, in his despatch of the 27th October, 1880, to Mr. Lowell. Lord Granville said (App., p. 289) :—

In the first place, I desire that there should be no possibility of misconception as to the views entertained by Her Majesty's Government respecting the conduct of the Newfoundland fishermen in violently interfering with the United States fishermen, and destroying or damaging some of their nets. Her Majesty's Government have no hesitation in admitting that this proceeding was quite indefensible, and is much to be regretted. No sense of injury to their rights, however well founded, could, under the circumstances, justify the British fishermen in taking the law into their own hands, and committing acts of violence; but I will revert by and by to this feature in the case and will now proceed to the important question

38 raised in this controversy, whether, under the Treaty of Washington, the United States fishermen are bound to observe the fishery regulations of Newfoundland in common with British subjects.

Without entering into any lengthy discussion on this point, I feel bound to state that, in the opinion of Her Majesty's Government, the clause in the Treaty of Washington which provides that the citizens of the United States shall be entitled, "in common with British subjects," to fish in Newfoundland waters within the limits of British sovereignty, means that the American and the British fishermen shall fish in these waters upon terms of equality; and not that there shall be an exemption of American fishermen from any reasonable regulations to which British fishermen are subject.

Her Majesty's Government entirely concur in Mr. Marcy's circular of the 28th March, 1856. The principle therein laid down appears to them perfectly sound, and as applicable to the fishery provisions of the Treaty of Washington as to those of the treaty which Mr. Marcy had in view. They cannot, therefore, admit the accuracy of the opinion expressed in Mr. Evarts' letter to Mr. Welsh of the 28th September, 1878, "that the fishery rights of the United States conceded by the Treaty of Washington are to be exercised wholly free from the restraints and regulations of the statutes of Newfoundland," if by that opinion anything inconsistent with Mr. Marcy's principle is really intended. Her Majesty's Government, however, fully admit that, if any such local statutes could be shown to be inconsistent with the express stipulations, or even with the spirit of the treaty, they would not be within the category of those reasonable regulations by which American (in common with British) fishermen ought to be bound; and they observe, on the other hand, with much satisfaction, that Mr. Evarts, at the close of his letter to Mr. Welsh of the 1st August, 1879, after expressing regret at "the conflict of interests which the exercise of the treaty privileges enjoyed by the United States appears to have developed," expressed himself as follows:—

There is no intention on the part of this [the United States'] Government that these privileges should be abused, and no desire that their full and free enjoyment should harm the colonial fishermen.

While the differing interests and methods of the shore fishery and the vessel fishery make it impossible that the regulation of the one should be entirely given to the other, yet if the mutual obligations of the treaty of 1871 are to be maintained, the United States' Government would gladly co-operate with the Government of Her Britannic Majesty in any effort to make those regulations a matter of reciprocal convenience and right, a means of preserving the fisheries at their highest point of production, and of conciliating a community of interest by a just proportion of advantages and profits.

Her Majesty's Government do not interpret these expressions in any sense derogatory to the sovereign authority of Great Britain in the territorial waters of Newfoundland, by which only regulations having the force of law within those waters can be made. So regarding the proposal, they are pleased not only to recognize in it an indication that the desire of Her Majesty's Government to arrive at a friendly and speedy settlement of this question is fully reciprocated by the Government of the United States, but also to discern in it the basis of a practical settlement of the difficulty; and I have the honour to request that you will inform Mr. Evarts that Her Majesty's Government, with a view to avoiding further discussion and future misunderstandings, are quite willing to confer with the Government of the United States respecting the establishment of regulations under which the subjects of both parties to the Treaty of Washington shall have the full and equal enjoyment of any fishery which under that treaty is to be used in common. The duty of enacting and enforcing such regulations, when agreed upon, would, of course, rest with the Power having the sovereignty of the shore and waters in each case.

CESSATION OF DISCUSSION, 1880-1905.

Discussion as to regulations was apparently found to be unnecessary, and was never undertaken; Mr. Blaine succeeded Mr. Evarts as Secretary of State; indemnity for the Fortune Bay affair was agreed upon (with special reservation of respective opinions as to treaty rights); and the suggestion of joint regulations disappeared. British cruisers continued to patrol the fishing grounds; the local laws were enforced as before; and for many years no complaint or protest was heard of.

CORRESPONDENCE, 1905-6.

1905.—The United States objected (19th October, 1905) to a Newfoundland statute, upon the ground that, under its provisions, United States fishing vessels might be seized for doing that which the treaty permitted them to do. (App., p. 757.) In reply, Sir Edward Grey (2nd February, 1906) pointed out that the clauses of the statute to which objection had been taken, were controlled by another clause which preserved (App., p. 494)—

the rights and privileges granted by treaty to the subjects of any State in amity with His Majesty.

On behalf of the United States, Mr. Root in his despatch of 19th October, 1905, asserted that (App., p. 492)—

The only concern of the Government of Newfoundland with such a vessel (a United States vessel) is to call for proper evidence that she is an American vessel, and, therefore, entitled to exercise
40 the treaty right, and to have her refrain from violating any laws of Newfoundland not inconsistent with the treaty.

To that statement, admitting (as it does) that some Newfoundland laws may properly be enforced against United States fishermen, no objection could be taken.

Sir Edward Grey, in his reply (2nd February, 1906), quoted it with approval, and said that (App., p. 495)—

His Majesty's Government, however, agree that no law of Newfoundland should be enforced on American fishermen which is inconsistent with the rights under the convention.

* * * * *

They hold that the only ground on which the application of any provisions of the colonial law to American vessels engaged in the fishery can be objected to, is that it unreasonably interferes with the exercise of the American right of fishery.

What seemed to remain, therefore, was not a question of principle, but the application of the principle. In his later letter (the 30th June, 1906), however, Mr. Root dispelled that idea by declaring that (App., p. 499)—

The Government of the United States fails to find in the Treaty any grant of right to the makers of colonial law to interfere at all, whether reasonably or unreasonably, with the exercise of the American rights of fishery, or any right to determine what would be a reasonable interference with the exercise of that American right if there could be any interference.

And referring to some specific local laws, he added (App., p. 501):—

If it be shown that these things are reasonable, the Government of the United States will agree to them; but it cannot submit to have them imposed upon it without its consent.

And thus have arisen the issues which the Tribunal is requested to consider.

ARGUMENT.

It is submitted that the contentions of His Majesty's Government are supported by a consideration of the terms of the treaty of 1818, and by reference to usage in its analogous cases.

As to the general principle which governs the construction of treaties such as this, it is submitted that the mere grant of a right or liberty to subjects of one State to do certain acts in the territory of another State, does not itself confer any exemption from the

41 jurisdiction of the State in which those acts are done. There is hardly a nation in the world which is not bound by treaty to permit the subjects of some other Power to have access to its territories for some purposes—a liberty to trade is a common instance. But it has never been contended that grants such as these carry with them any immunity from the laws of the country which makes them, or that aliens trading under treaty liberties are not subject to the municipal laws which regulate the trade of the country. Grants of this kind are made on the understanding that they must be exercised subject to such laws and regulations as apply to the subjects of the State which makes them. No State can be presumed to have been willing to put aliens in a better position than its own subjects, or to have renounced the right to regulate trade within its own territories, in the absence of express words to that effect, and the same argument applies equally to other liberties, including such a liberty as that which is now under discussion. This principle is clearly stated, and is illustrated by a reference to the very matter now in dispute, by Mr. Hall in a passage to which His Majesty's Government begs leave to refer the tribunal:—

“Whenever, or in so far as, a state does not contract itself out of its fundamental legal rights by express language, a treaty must be so construed as to give effect to those rights. Thus, for example, no treaty can be taken to restrict by implication the exercise of rights of sovereignty, or property, or self-preservation. Any restriction of such rights must be effected in a clear and distinct manner. A case illustrative of this rule is afforded by a recent dispute between Great Britain and the United States. By the treaty of Washington of 1871, it was provided that the inhabitants of the United States should have liberty, in common with the subjects of Great Britain, to take fish upon the Atlantic coasts of British North America. Subsequently to the conclusion of the treaty, the Legislature of Newfoundland passed laws with the object of preserving the fish off the shores of the colony; a close time was instituted, a minimum size of mesh was prescribed for nets, and a certain mode of using the seine was prohibited. These regulations were disregarded by fishermen of the United States; disturbances occurred at Fortune Bay between them and the colonial fishermen, and the matter became a subject of diplomatic correspondence, in the course of which the scope of the treaty came under discussion. It was argued by the United States that the fishery rights conceded by the treaty were absolute, and were to be ‘exercised wholly free from the restraints and regulations

42 of the statutes of Newfoundland now set up as authority over our fishermen, and from any other regulations of fishing now in force or that may hereafter be enacted by that Government;’ in other words, it was contended that the simple grant to foreign sub-

jects of the right to enjoy certain national property in common with the subjects of the state carries with it by implication an entire surrender, in so far as the property in question is concerned, of one of the highest rights of sovereignty, viz., the right of legislation. That the American Government should have put forward the claim is scarcely intelligible. There can be no question that no more could be demanded than that American citizens should not be subjected to laws or regulations, either affecting them alone, or enacted for the purpose of putting them at a disadvantage."^a

The transactions between Great Britain and the United States are wholly inconsistent with the contention that liberties granted to aliens of themselves confer exemption from municipal laws.

ANALOGIES—TREATY OF 1783.

The treaty of 1783.—In the treaty of 1783 (between the United Kingdom and the United States) there is the following section (App., p. 13):—

It is agreed that the Congress shall earnestly recommend it to the Legislatures of the respective States, to provide for the restitution of all estates, rights, and properties which have been confiscated belonging to real British Subjects; and also of the estates, rights, and properties of persons resident in districts in the possession of His Majesty's arms, and who have not borne arms against the said United States: and that Persons of any other description shall have free liberty to go to any part or parts of any of the thirteen United States, and therein to remain twelve months, unmolested, in their endeavours to obtain the restitution of such of their estates, rights, and properties as may have been confiscated;

No one imagined that these British subjects were to be exempted from United States law, or that they were not to be "molested" if they did not conform to it. No one ever did pretend that the United States would require British concurrence before enacting laws applicable to such people. It might, indeed, have been urged that, if British subjects were to be "unmolested" they must be free from all regulations. But the sufficient reply would have been that the treaty gave them no other freedom than that enjoyed by United States citizens, when engaged in similar employment.

Jay's treaty of 1794.—Prior to the treaty of 1783 (at the end of the revolutionary war) the territory lying south of the great lakes in America, and between the Ohio and the Mississippi, was a part of the British Empire. It was within the boundaries of Canada (forming part of the Province of Quebec); and at the end of the revolutionary war was very largely (by virtue of military occupation of various

^a W. E. Hall, "International Law," 5th ed., pp. 339-340.

posts there), in possession of Great Britain. By the treaty of 1783, Great Britain ceded the territory to the United States; but evacuation of it was delayed pending the execution by the United States of other stipulations of the agreement. The later treaty of 1794 (Jay's treaty) provided for delivery up of the territory to the United States, and as to the British people there, section two provided as follows (App., p. 16) :—

All settlers and traders, within the precincts or jurisdiction of the said posts, shall continue to enjoy unmolested, all their property of every kind, and shall be protected therein. They shall be at full liberty to remain there, or to remove with all or any part of their effects; and it shall also be free to them to sell their lands, houses or effects, or to retain the property thereof, at their discretion; such of them as shall continue to reside within the said boundary lines, shall not be compelled to become citizens of the United States, or to take any oath of allegiance to the Government thereof; but they shall be at full liberty so to do if they think proper, and they shall make and declare their election within one year after the evacuation aforesaid. And all persons who shall continue there after the expiration of the said year, without having declared their intention of remaining subjects of His Britannic Majesty, shall be considered as having elected to become citizens of the United States.

This is a case which presents many analogies to that under discussion. Of the territory it refers to (much more accurately than of the fisheries now under discussion), it might be said that prior to the war it had been the common property of the British Empire; that, by the treaty, the territory was assigned to the United States, subject to certain rights of certain British subjects; that there is not in the treaty any grant of right to the United States to interfere at all, whether reasonably or unreasonably, with the exercise of the British rights in the territory; and that, therefore, the United States could not have had any authority to regulate the rights of citizens of Great Britain within the territory.

44 To any such argument, the answer of the United States would have been that which His Majesty's Government now makes to the United States: Liberty to foreigners to trade, or fish, or carry on any other occupation, in national territory or waters is not an abandonment of authority to regulate the actions of those foreigners there; in order to maintain and continue that power of regulation, no grant of it from the foreign Power is necessary; such foreigners must conform to the laws of the country to which they go, or in which they remain; and the only obligation imposed by the treaty upon the sovereign Power is that it will not so exercise its authority as to nullify the liberty which it has accorded.

Another clause in the treaty of 1794 was as follows (App., p. 16) :—

It is agreed that it shall at all times be free to His Majesty's subjects, and to the citizens of the United States, and also to the

Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation into the respective territories and countries of the two parties on the continent of America (the country within the limits of the Hudson's Bay Company only excepted), and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other.

In such a case, no one would suggest that British subjects were to be free from United States law when trading upon United States territory. No one would pretend that the only United States laws that could apply to them were those that were in force at the date of the treaty. No one would argue that the treaty permission was a qualification of United States sovereignty. And no one would doubt that the United States could afterwards enact (without anticipation of British remonstrance) such laws as it pleased, regulative of all the actions of British subjects while upon United States territory, provided that no discrimination, injurious to British subjects, were made between them and United States citizens, and that the rights conferred by the treaty were not nullified.

Some of such laws, indeed, the British Government might possibly not have approved, but Her Majesty's Government could not question the right of the United States to settle such questions for its own people, and for all persons coming within its jurisdiction.

The Reciprocity Treaty of 1854.—Still more applicable and pertinent is the illustration afforded by the Reciprocity Treaty between Great Britain and the United States, section one of which provided as follows (App., p. 36):—

It is agreed by the High Contracting Parties that in addition to the liberty secured to the United States fishermen by the above-mentioned convention of October 20, 1818, of taking, curing, and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind, except shell-fish, on the sea-coasts and shores and in the bays, harbours, and creeks of Canada, New Brunswick, Nova Scotia, Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the coasts and shores of those colonies and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property or with British fishermen in the peaceable use of any part of the said coast in their occupancy for the same purpose.

Upon this language, which, so far as the present controversy is concerned, cannot be validly distinguished from the language of the treaty under discussion, no such contention was ever made as that which the United States now puts forward.

As has already been shown in detail, American fishermen were uniformly held to be subject to the local regulations; and that they were so subject was explicitly recognized in Mr. Marcy's circular. (Ante, p. 28.)

THE ST. LAWRENCE.

Navigation Regulations in the Gulf of St. Lawrence.—On account of their ownership of territory abutting on a part of the River St. Lawrence, the United States always claimed a natural right to navigation of that part of the river between them and the sea, and finally a certain right was conceded to them. But the United States never asserted that the natural right which they claimed exempted their vessels from amenability to the local regulations as to navigation.

TREATY OF 1871.

Again, section 27 of the Washington treaty of 1871, between Great Britain and the United States, provided for the use by citizens of the United States—

46 of the Welland, St. Lawrence, and other canals in the Dominion on terms of equality with the inhabitants of the Dominion; and the Government of the United States engages that the subjects of Her Britannic Majesty shall enjoy the use of the St. Clair Flats Canal on terms of equality with the inhabitants of the United States.

But it has never been contended that citizens of either country were to be exempt from the local laws of the other country when within its territory. No one has suggested that "on terms of equality" (similar in meaning to the words "in common" in the treaty under discussion) meant that although the citizens of both countries were subject to law when at home, they were free from law when abroad.

ARGUMENT.

The true construction of the treaty of 1818 is opposed to the contention of the United States. The terms of article one are not ambiguous: they give certain definite liberties, and they give nothing more. There is no suggestion of any exemption from British jurisdiction, nor is there any expression in that article, or any other article, which in any way points to such a construction. If it had been intended to derogate from British sovereignty, express provisions would have been introduced, such, for instance, as are to be found in the treaties with Eastern Powers which confer extra-territorial rights.

Not only are there no express words in article one to limit British sovereignty, but the terms of the article are inconsistent with any

implied reservation of that kind. The liberty granted is expressed to be a liberty "in common" with British fishermen. Now, there can be no pretence that British fishermen are not subject to the sovereign power of His Majesty, and these words show that American fishermen are to have the same liberty as British fishermen, but no more. If they were to have the liberty free from the control of the sovereign power, the liberty to fish at any time or at any season, in any place, and with any kind of net or other instrument, then it is evident that they would have, not a common liberty, but a liberty much greater than that enjoyed by British fishermen.

Liberty to enter foreign territory, and to trade there, or fish there, does not imply exemption from the local law, nor freedom to act as each one pleases. It means, of course, to trade or fish subject to the local laws regulative of such actions.

47 Under the treaty in question United States fishermen have liberties on the land as well as on the water. They have "the liberty to take fish" in the water, and "to dry and cure fish" on the land. And they are either free from, or subject to, the local laws both afloat and ashore; for it is clear that their operations may be reasonably controlled in one place and not in the other.

It can not be contended that a treaty which gives to an alien liberty to enter United States territory (for example) and to do certain acts there, renders him exempt from all the municipal laws of the United States which have never been sanctioned by the alien's Government. Japanese, for example, have treaty liberty to enter the United States and transact business there; does the United States ask Japan's approbation of its laws before applying them to Japanese?

The argument is, of course, quite as strong when applied to territorial waters as when applied to land, for as Hautefeuille says:—

Les parties de la mer qui baignent les côtes, qui les avoisinent immédiatement et leur servent en quelque sorte de frontières, sont ce que tous les publicistes ont appelé les mers territoriales. D'après les principes du droit primitif, l'océan est libre. Il n'en est pas de même pour les mers territoriales; elles sont, au contraire, soumises à la souveraineté de la nation maîtresse de la côte baignée par elles; elles sont sous sa domination de la même manière et au même titre que la terre. Ce n'est pas une dérogation aux règles immuables de la loi primitive, c'est seulement une exception au principe général, exception dérivée de cette loi même, et qui repose sur la nature de la mer territoriale, de l'absence des conditions qui mettent l'océan hors de la possession humaine."

Article one of the treaty under discussion gives to the inhabitants of the United States, liberty to fish on certain parts of the coasts of British territory. The term "liberty," as here used, is equivalent merely to permission. It is true that when granted by treaty it

^a "Des droits et des Devoirs des Nations Neutres," 2nd ed. vol. 1, p. 83.

became as between Great Britain and the United States a matter of right, but there can be no question as to the extent of what was granted. It was merely permission to fish, in common with British fishermen, and was necessarily subject to the right of regulation by the Government of the country, inasmuch as, in the absence of such regulation, the subject-matter of the grant might itself be destroyed.

48

EFFECT OF UNITED STATES CONTENTION.

The view contended for by the United States would appear to involve the most extraordinary consequences. They assert that only with the consent of the United States, can American fishermen be subjected to regulations made by the British parliament. It follows that, failing such consent, either the American fishermen are to be subject to no regulations at all, or that the American Government is to have the exclusive right of framing regulations which are to govern the action of American fishermen in British territory. Both alternatives are equally impossible. It is obvious that American fishermen must be subject to regulation, and that anarchy on these fisheries is impossible. It is equally obvious that the American Government cannot have the right to frame regulations to be enforced within British territory. Any provision conferring such power would amount to a partition of sovereignty such as has found place only in treaties with Oriental States, and is wholly out of place as between such countries as Great Britain and the United States. Indeed, no such contention appears to be put forward on behalf of the United States, and the point is referred to here only as illustrating the inherent absurdity of the contention that, for the purpose of such regulations, the concurrence of the American Government is necessary.

EFFECT OF WAR OF 1812.

It has from time to time been earnestly contended by the United States that the war of 1812 did not terminate the liberties to take and dry and cure fish which were granted by the treaty of 1783; that the treaty of 1783 merely recognised and continued the rights which the fishermen of the United States possessed as subjects of the British Crown before the Declaration of Independence; and that the treaty of 1818, in its turn, recognised and continued existing rights. This view has always been repudiated by Great Britain, and, for reasons which will be submitted to the Tribunal if reliance is placed on this contention in the United States Case, cannot be sustained.

49

But even if this suggestion on the part of the United States were sound, it is difficult to see how it is reconcilable with their contention on the question which is now under consideration. For if the citizens of the United States are now enjoying the rights

which they formerly enjoyed as subjects of the British Crown, and their present rights are merely in continuation of those former rights, the rights which they can now assert are not greater than those which they could have maintained in the period before the Declaration of Independence; for the contention is that they are the same rights recognised and continued by the two treaties. Now, before the war of Independence it is indisputable that these rights of fishing were subject to control and regulation by the British parliament, which could have prescribed the times, the seasons, and the manner in which the fishing was to be carried on; and any such legislation would have bound the inhabitants of the thirteen colonies, which subsequently became the United States of America, in the same way and to the same extent as it would have been binding upon any other subjects of the British Crown. If, then, the right or liberty of fishing which is enjoyed by the inhabitants of the United States under the treaty of 1818 is the same, in respect of the more limited area defined by the treaty, as the right which they enjoyed as British subjects, that right or liberty is subject to regulation by British legislation.

CONCLUSION.

It is therefore submitted on the part of Great Britain that the exercise of the liberty conferred by the treaty is subject to reasonable regulation by Great Britain, Canada, and Newfoundland with reference to the various matters mentioned in question No. 1, and that, for the validity of such regulations, the consent of the United States is not necessary.

QUESTION TWO.

AMERICAN FISHERMEN.

Have the inhabitants of the United States, while exercising the liberties referred to in said article, a right to employ, as members of the fishing crews of their vessels, persons not inhabitants of the United States?

PRELIMINARY.

By article one of the treaty of 1818, the liberty to take fish on the treaty coasts is given to "the inhabitants of the United States." The short question is whether those inhabitants may employ fishermen of other nationalities to fish on their behalf. Great Britain contends that the article means what in terms it says, and that it confers the right to fish on the inhabitants of the United States only. The United States contend that the liberty to fish is conferred on American fishing-vessels, and that if it once be established by proper evidence that a vessel is an American vessel, then there is no right to question the nationality of fishermen employed on her.

NEWFOUNDLAND FISHERMEN.

The question has been recently discussed in regard to the employment of British subjects in the fisheries on those coasts of Newfoundland. Americans carry on a large trade in herrings, which are found on those coasts. The fish are caught in nets worked from small boats; they are then put on board American fishing-vessels, packed, and carried direct to the United States.

So long as the fishermen actually engaged in this trade are Americans, there can be no difficulty, but it has become common to send American vessels to the fishing grounds with crews sufficient only to handle the vessels themselves, and to rely for the catching of fish on Newfoundland fishermen. The operations are controlled by Americans: they provide the capital; and the fish caught are their property; but the actual fishing is done by inhabitants of Newfoundland. In this way, under cover of the fishing rights given by the treaty,
 52 a business is in many cases carried on in which, so far as the actual fishing is concerned, American fishermen take little or

no part. Great Britain holds that Americans employing Newfoundlanders to fish for them are not within the convention and that there is nothing to prevent her prohibiting British subjects from joining American vessels for this purpose.

OTHER FISHERMEN.

The question, however, is not confined to the employment of British subjects. The crews of American vessels are largely composed of foreigners—Norwegians, Portuguese, &c. And it is now claimed, as of right, that any number of such foreigners may be employed upon American vessels in British waters.

DIPLOMATIC CORRESPONDENCE.

The contentions of the two Governments are stated in the diplomatic correspondence of 1905–6, and it will be seen that they deal with the general question as well as with the particular case. Mr. Root, in a letter to Sir M. Durand of the 19th October, 1905, formulated certain propositions indicative of the United States' view upon the matters involved in the situation.

The first, third, and fourth of these asserted that (App., p. 492):—

1. Any American vessel is entitled to go into the waters of the treaty coast and take fish of any kind. She derives this right from the treaty (or from the conditions existing prior to the treaty and recognised by it), and not from any permission or authority proceeding from the Government of Newfoundland.

3. The only concern of the Government of Newfoundland with such a vessel is to call for proper evidence that she is an American vessel, and, therefore, entitled to exercise the treaty right, and to have her refrain from violating any laws of Newfoundland not inconsistent with the treaty.

4. The proper evidence that a vessel is an American vessel and entitled to exercise the treaty right is the production of the ship's papers of the kind generally recognised in the maritime world as evidence of a vessel's national character.

In answer to these assertions, Sir Edward Grey, in a memorandum sent to Mr. Whitelaw Reid (the 2nd February, 1906), said (App., p. 494):—

The privilege of fishing conceded by article 1 of the convention of 1818 is conceded, not to American vessels but to inhabitants of the United States and to American fishermen. His Majesty's Government are unable to agree to this, or any of the subsequent propositions if they are meant to assert any right of American vessels to prosecute the fishery under the convention of 1818, except when the fishery is carried on by inhabitants of the United States. The

53 convention confers no rights on American vessels as such. It enures for the benefit only of inhabitants of the United States.

Mr. Root replied in a letter to Mr. Whitelaw Reid (the 30th June, 1906) (App., p. 498)—

Yet we may agree that ships, strictly speaking, can have no rights or duties, and that whenever the memorandum, or the letter upon which it comments, speaks of a ship's rights and duties, it but uses a convenient and customary form of describing the owner's or master's right and duties in respect of the ship. As this is conceded to be essentially "a ship fishing," and as neither in 1818, nor since, could there be an American ship not owned and officered by Americans, it is probably quite unimportant which form of expression is used.

I find in the memorandum no substantial dissent from the first proposition of my note to Sir Mortimer Durand on the 19th October, 1905, that any American vessel is entitled to go into waters of the treaty coast and take fish of any kind, and that she derives this right from the treaty and not from any authority proceeding from the Government of Newfoundland.

Nor do I find any substantial dissent from the fourth, fifth, and sixth propositions, which relate to the method of establishing the nationality of the vessel entering the treaty waters for the purpose of fishing, unless it be intended, by the comments on those propositions, to assert that the British Government is entitled to claim that when an American goes with his vessel upon the treaty coast for the purpose of fishing, or with his vessel enters the bays or harbours of the coast for the purpose of shelter and of repairing damages therein, or of purchasing wood, or of obtaining water, he is bound to furnish evidence that all the members of his crew are inhabitants of the United States. We cannot for a moment admit the existence of any such limitation upon our treaty rights. The liberty assured to us by the treaty plainly includes the right to use all the means customary or appropriate for fishing upon the sea, not only ships and nets and boats, but crews to handle the ships and the nets and the boats. No right to control or limit the means which Americans shall use in fishing can be admitted unless it is provided in the terms of the treaty, and no right to question the nationality of the crews employed is contained in the terms of the treaty. In 1818, and ever since, it has been customary for the owners and masters of fishing-vessels to employ crews of various nationalities. During all that period, I am not able to discover that any suggestion has ever been made of a right to scrutinise the nationality of the crews employed in the vessels through which the treaty right has been exercised.

The language of the treaty of 1818 was taken from the 3rd article of the treaty of 1783. The treaty made at the same time between

Great Britain and France, the previous treaty of the 10th
54 February, 1763, between Great Britain and France, and the

Treaty of Utrecht of the 11th April, 1713, in like manner contained a general grant to "the subjects of France" to take fish on the treaty coast. During all that period no suggestion, so far as I can learn, was ever made that Great Britain has a right to inquire into the nationality of the members of the crew employed upon a French vessel.

Nearly 200 years have passed during which the subjects of the French King and the inhabitants of the United States have exercised

fishing rights under these grants made to them in these general terms, and during all that time there has been an almost continuous discussion in which Great Britain and her colonies have endeavoured to restrict the right to the narrowest possible limits, without a suggestion that the crews of vessels enjoying the right, or whose owners were enjoying the right, might not be employed in the customary way without regard to nationality. I cannot suppose that it is now intended to raise such a question.

In Sir Edward Grey's reply (addressed to Mr. Whitelaw Reid, the 20th June, 1907) he said (App., p. 507) :

His Majesty's Government, on the one hand, claim that the treaty gave no fishing rights to American vessels as such, but only to inhabitants of the United States, and that the latter are bound to conform to such Newfoundland laws and regulations as are reasonable and not inconsistent with the exercise of their treaty rights. The United States Government, on the other hand, assert that American rights may be exercised irrespectively of any laws or regulations which the Newfoundland Government may impose, and agree that as ships, strictly speaking, can have no rights or duties whenever the term is used it is but a convenient or customary form of describing the owner's or master's rights. As the Newfoundland fishery, however, is essentially a ship fishery they consider that it is probably quite unimportant which form of expression is used.

By way of qualification, Mr. Root goes on to say that if it is intended to assert that the British Government is entitled to claim that, when an American goes with his vessel upon the treaty coast for the purpose of fishing, or with his vessel enters the bays or harbours of the coast for the purpose of obtaining shelter and of repairing damages therein, or of purchasing wood or of obtaining water, he is bound to furnish evidence that all the members of the crew are inhabitants of the United States, he is obliged entirely to dissent from any such proposition.

The views of His Majesty's Government are quite clear upon this point. The convention of 1818 laid down that the inhabitants of the United States should have, for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every
55 kind on the coasts of Newfoundland within the limits which it proceeds to define.

This right is not given to American vessels, and the distinction is an important one from the point of view of His Majesty's Government, as it is upon the actual words of the convention that they base their claim to deny any right under the treaty to American masters to employ other than American fishermen for the taking of fish in Newfoundland treaty waters.

Mr. Root's language, however, appears to imply that the condition which His Majesty's Government seeks to impose on the right of fishing is a condition upon the entry of an American vessel into the treaty waters for the purpose of fishing. This is not the case. His Majesty's Government do not contend that every person on board an American vessel fishing in the treaty waters must be an inhabitant of the United States, but merely that no such person is entitled to take fish unless he is an inhabitant of the United States. This appears to meet Mr. Root's argument that the contention of His Maj-

esty's Government involves as a corollary that no American vessel would be entitled to enter the waters of British North America (in which inhabitants of the United States are debarred from fishing by the convention of 1818) for any of the four specified purposes, unless all the members of the crew are inhabitants of the United States.

Whatever may be the correct interpretation of the treaty as to the employment of foreigners generally on board American vessels, His Majesty's Government do not suppose that the United States Government lay claim to withdraw Newfoundlanders from the jurisdiction of their own Government so as to entitle them to fish in the employment of Americans in violation of Newfoundland laws. The United States Government do not, His Majesty's Government understand, put their claim higher than that of a "common" fishery, and such an arrangement cannot override the power of the colonial legislature to enact laws binding on the inhabitants of the colony.

It can hardly be contended that His Majesty's Government have lost their jurisdiction not only over American fishermen fishing in territorial waters of Newfoundland, but also over the British subjects working with them.

It may be as well to mention incidentally in regard to Mr. Root's contention that no claim to place any such restriction on the French right of fishery was ever put forward by Great Britain, that there was never any occasion to advance it, for the reason that foreigners other than Frenchmen were never employed by French fishing vessels.

ARGUMENT.

THE TREATY IS CLEAR.

1. His Majesty's Government submits that this question must
56 be determined by the terms of the article, and by those terms alone. The article confers the liberty to take fish on the "inhabitants of the United States." These words are not ambiguous; they specify, quite clearly, the persons who are to be entitled to fish; and it is submitted that those persons, and no others, are so entitled.

VESSELS HAVE NO RIGHTS.

2. The article makes no reference to vessels, and confers no rights on fishing-vessels as such. The qualification necessary for the exercise of the liberty to take fish is the nationality of the fisherman, and not the flag of the vessel on which he happens to be engaged.

INTENTION OF NEGOTIATORS OF CONVENTION.

3. This construction gives effect to the intentions of the convention. It was the sole object of the American negotiators to secure the liberty to take fish in British waters for the fishermen of the United States. Their claim was supported by arguments which could apply only to men who were inhabitants of the United States and were fishermen by trade. They stated that there was a large population in the United

States wholly dependent for their means of livelihood on the fisheries, and they appealed to the benevolence and humanity of Great Britain to preserve this industry to this community. Mr. John Quincy Adams, in an eloquent passage,^a spoke of the 10,000 men, and of their wives and children, for whom the fisheries provided daily bread, and repeated stress was laid in the transactions of the time on the necessity of maintaining the fishing population. Equally important, in the view of the negotiators, was the fact that the fisheries were a nursery for the seamen of the country; in the words of Mr. Rush, one of the negotiators of the convention of 1818, the fishing privileges—

were of great magnitude to the United States; besides affording profitable fields of commerce they fostered a race of seamen conducive to the national riches in peace and to defence and glory in war.^b

These were reasons, and reasons of weight, for giving liberties to fishermen dwelling in the United States to ply their calling on the treaty shores, but they were no reasons for giving liberties to trade in fish taken by the fishermen of other countries. That was not the object the negotiators had in view.

MR. EVARTS' VIEW.

4. Mr. W. M. Evarts, Secretary of State, in a memorandum
57 addressed to the President of the United States dated the 17th May, 1880, laid emphasis on the point that the corresponding liberty in the Washington treaty of 1871 was not intended to confer any access to the fisheries upon foreigners. Speaking of that treaty he said (App., p. 284):—

There was, to be sure, a restriction imposed upon both countries which excluded both equally from extending the enjoyment of either's share of the common fishery beyond the "inhabitants of the United States" on the one side, and "Her Britannic Majesty's subjects" on the other, thus disabling either Government from impairing the share of the other by introducing foreign fishermen into the common fishery.

But the contention of the United States to-day is that they can, under the treaty of 1818, do the very thing which Mr. Evarts stated was contrary to the corresponding provisions of the treaty of 1871. They contend that they can introduce foreign fishermen into these fisheries, although by so doing they must impair the share of the British fishermen therein.

OTHER PROVISIONS OF TREATY.

5. Other provisions of the article are consistent only with this construction. The liberty to dry and cure fish is confined to American fishermen (and it is inconceivable that it was intended that the inhabitants of the United States might take fish by means of persons

^a "Fisheries and the Mississippi," p. 204.

^b "Residence at the Court of London," ed. 1833, p. 324.

who were not entitled to dry and cure the fish taken. The inhabitants of the United States, spoken of in the earlier part of the article, are obviously the same persons as those who are spoken of in the later part of the article as American fishermen.

TREATIES OF 1854 AND 1871.

6. The treaties of 1854 and 1871 speak of the liberty to take fish conferred in 1818 as a liberty to United States fishermen, that is, as is submitted, to inhabitants of the United States actually taking part in the fishing.

SITUATION IN 1818.

7. It is material to remember that in 1818 the question of the employment of foreign seamen had been the subject of recent discussion between Great Britain and the United States, and that the latter Power had decided to exclude British subjects from their commercial marine.^a A liberty confined to fishermen inhabiting America was consistent with this policy.

EFFECTS OF UNITED STATES CONTENTION.

8. If the treaty were to be construed in the manner contended for by the United States, then there would practically be no limit to the amount of fish that could be taken under it from
58 British territorial waters. A liberty to a specific class of persons to take fish themselves is necessarily restricted according to the number and ability of those persons; but there is no ascertainable limit to the amount of fish that may be taken if those persons can employ others to act for them. It cannot be assumed, in the absence of express words, that Great Britain conceded a right so indefinite in extent, and so greatly to the prejudice of British fishermen.

9. If the nationality of the ship or of the owner of it, and not the nationality of the fishermen actually engaged in fishing, be the test of the right to fish under the treaty, then fishermen of other countries can obtain access to these fisheries, subject to such restrictions as the law of the United States may from time to time impose. They may, by charter or arrangement, obtain control of an American vessel, or they may engage to serve on an American vessel. Once on board, their nationality, according to the contention of the United States, becomes of no importance; the moment they have entered British waters under the American flag they become entitled to the full rights conferred by the treaty. This is no fanciful objection. The British North American fisheries are of great value, and would be eagerly competed for by foreign fishermen if it became known that access could in any way be obtained to them.

^a State Papers, vii, 184, 191, 204, 208, 218, *et seq.*

10. In the case of British fishing-vessels, Great Britain has power to control the extent to which foreigners can take part in her coast fisheries, but in the case of American vessels, if the contention of the United States were to succeed, she would have no such power. His Majesty's Government submit that the treaty ought not to be so construed as to enable the United States to extend, indefinitely, the number of the persons who can exercise the liberties conferred by it in British waters and on British soil.

11. For these reasons it is submitted that persons other than inhabitants of the United States cannot be regarded as within the terms of the treaty, and that the rights conferred by article one with regard to fishing, and the drying and curing of fish, are confined to American fishermen.

BRITISH CONTROL OVER BRITISH SUBJECTS.

12. But, apart from the general question as to the employment of foreigners, it is submitted that the right of the British and
59 Colonial legislatures to prevent the employment of British subjects by Americans upon these fisheries is absolutely indisputable. The inhabitants of Newfoundland, or of any British colony, are subject to the legislation of that colony, and of the Imperial Parliament. It is within the competency of the legislature to which they are subject to forbid them to engage in any such industry. The treaty contains no expressions from which it can be inferred that His Majesty's Government parted with its control over its own subjects. The United States appear to contend that inhabitants of Newfoundland, for example, may disregard any enactments of the colonial legislature prohibiting their taking employment in American fishing-vessels, and that any such prohibition is a breach of the treaty. His Majesty's Government refrains at this stage from any detailed discussion of this contention. Although it has been advanced in the course of the correspondence to which reference has been made, it is difficult to anticipate on what grounds such contention can be supported, and His Majesty's Government therefore will reserve further discussion of the point until they are in possession of the case of the United States.

CONCLUSION.

For these reasons His Majesty's Government contends:—

(1) That article one means what in terms it says, and that it confers the liberty to take fish on the inhabitants of the United States, and not on the inhabitants of other countries.

(2) That the colonial legislatures and the Imperial Parliament retain the power of prohibiting any of His Majesty's subjects from engaging as fishermen in American vessels, and that the exercise of this power is in no way inconsistent with the treaty.

QUESTION THREE.

CUSTOMS ENTRIES AND LIGHT AND HARBOUR DUES IN TREATY WATERS.

Can the exercise by the inhabitants of the United States of the liberties referred to in the said article be subjected, without the consent of the United States, to the requirements of entry or report at custom-houses, or the payment of light, or harbour, or other dues, or to any other similar requirement, or condition, or exaction?

THE "LIBERTIES."

The "liberties" referred to in this question are:—

1. Liberty to "take fish" on certain coasts, bays, harbours, and creeks; and
2. Liberty to "dry and cure fish" in certain unsettled bays, harbours, and creeks—that is, upon the shore.
3. In addition to these two liberties, the United States asserts that its fishermen are entitled to have, for their fishing vessels, the same commercial privileges as are accorded by agreement or otherwise to United States trading vessels generally.

THE QUESTION.

The question then seems to be whether United States fishing vessels are entitled to frequent British coasts, bays, creeks, and even harbours, to land upon British territory, and (if the United States' contention be correct) to exercise all the privileges accorded to trading vessels, and yet be exempt from the supervision which all nations exercise over all vessels (not only foreign but their own) coming into their harbours and discharging upon their territory; and exempt also from contribution to the up-keep of lights necessary to the navigation of the waters.

BRITISH CONTENTION.

The position assumed by His Majesty's Government was stated by Sir Edward Grey in his memorandum of the 2nd February, 1906, as follows (App., p. 496):—

The United States Government would undoubtedly be entitled to complain if the fishery of inhabitants of the United States were seriously interfered with by a vexatious and arbitrary enforcement of the colonial customs laws, but it must be remembered that, in proceeding to the waters in which the winter fishery is

conducted, American vessels must pass in close proximity to several custom-houses, and that in order to reach or leave the grounds in the arms of the Bay of Islands, on which the fishery has been principally carried on during the past season, they have sailed by no less than three custom-houses on the shores of the bay itself. So that the obligation to report and clear need not in any way have interfered with a vessel's operations. It must also be remembered that a fishery conducted in the midst of practically the only centres of population on the west coast of the colony affords ample opportunities for illicit trade, and consequently calls for careful supervision in the interests of the colonial revenue.

The provisions in question are clearly necessary for the prevention of smuggling, and His Majesty's Government are of opinion that exception cannot be taken to their application to American vessels as an unreasonable interference with the American fishery, and they entertain the strong hope that the United States' Government will, on reconsideration, perceive the correctness of this view, and issue instructions accordingly for the future guidance of those in charge of American vessels.

It is, moreover, to the advantage of the American vessels engaged in the winter fishery in the Bay of Islands that they should report at a colonial customhouse. Owing to the extent and peculiar configuration of that bay, and owing to the prevalence of fogs, vessels that enter its inner waters may remain for days without the local officers becoming aware that they are on the coast unless they so report. In such circumstances it is difficult for the Colonial Government to ensure to American fishermen that protection against lawless interference for which Mr. Root calls in the concluding part of his note.

His Majesty's Government desire further to invite the attention of the United States' Government to the fact that certain United States' vessels engaged in the fishery refused to pay light dues. This is the first time, His Majesty's Government are informed, that American vessels have refused to pay these dues, and it is presumed that the refusal is based on the denial by the Colonial Government of the trading privileges allowed in past years. His Majesty's Government, however, cannot admit that such denial entitles American vessels to exemption from light dues in the ports in which they fish. As already stated, American fishing-vessels engaged in the fishery under the convention of 1818 have no treaty status as such, and the only ground on which, in the opinion of His Majesty's Government, the application of any colonial law to such vessels can be objected to is that such

application involves an unreasonable interference with the
63 exercise of the treaty rights of the American fishermen on

board. The payment of light dues by a vessel on entering a port of the colony clearly involves no such interference. These dues are payable by all vessels of whatever description and nationality, other than coasting and fishing-vessels owned and registered in the colony (which are, on certain conditions, exempt either wholly or in part). His Majesty's Government trust that in these circumstances such directions will be issued as will prevent further refusals in the future, and they would point out generally that it is the duty of all foreigners sojourning in the limits of the British jurisdiction to obey that law, and that if it is considered that the local jurisdiction is being exercised in a manner not consistent with the enjoyment

of any treaty rights, the proper course to pursue is not to ignore the law, but to obey it, and to refer the question of any alleged infringement of their treaty rights to be settled diplomatically between their Government and that of His Majesty.

Replying to this memorandum, Mr. Root said (App., p. 501):—

The Government of Newfoundland cannot be permitted to make entry and clearance at a Newfoundland custom-house, and the payment of a tax for the support of Newfoundland lighthouses, conditions to the exercise of the American right of fishing.

ENTRY AT CUSTOMS.

SITUATION PRIOR TO THE TREATIES

It is important that the situation prior to the American Revolution, and the treaties of 1783 and 1818, should be understood.

British navigation laws formerly excluded all foreign countries from any trade or intercourse with British plantations and colonies. The most important of these navigation laws was 12 Car. II, cap. 18, 1660. (App., p. 514.) It provided that no goods or commodities should be imported into, or exported out of any British possessions in Asia, Africa or America, in any vessels except such as belonged to the people of England, Ireland, or Wales, or the town of Berwick, and whereof the master and three-quarters of the mariners were English.

In 1696, the British statute 7 and 8 Wm. III, cap 22 (App., p. 520), made further provisions to prevent frauds, and to regulate abuses in His Majesty's customs in the plantation trade. By section 6 of that Act, it was provided that all ships coming into, or going out of, the plantations, and loading or unloading their commodities, should be subject and liable to the same rules, visitations, searches, penalties, and forfeitures as the commanders and
64 masters of ships were subject and liable to in Great Britain under 14 Car. II, cap. 11.

In 1736, the British statute 9 Geo. II, cap 35 (App., p. 530), made still more effectual provisions for preventing frauds. It provided for the arrest and imprisonment of persons lurking within five miles of the coast suspected of assisting in carrying on a contraband trade; for the forfeiture of vessels found at anchor or hovering within two leagues of the shore, with tea and other prohibited articles on board; and for the forfeiture of vessels and goods, in case foreign goods were taken on board or discharged within four leagues of the coast without paying customs.

In 1763, the British statute 4 Geo. III, cap. 15, sec. 33, (App., p. 531) adopted somewhat similar measures for the colonies. It provided that any foreign ship found at anchor, or hovering within two leagues of the shore of any of His Majesty's dominions, which

should not depart on her voyage within forty-eight hours after being required so to do by a customs officer, unless unavoidably detained, should with all the goods on board be forfeited.

1755.—The provisions of the British statute 15 Geo. III, cap. 31, (App., p. 544) are important:—

V. And it is hereby further enacted by the authority aforesaid That it shall and may be lawful for any of His Majesty's subjects residing in *Ireland* to ship and lade there, and to transport directly from thence to *Newfoundland*, or to any part of *America* where the fishery is now, or shall hereafter be, carried on, on board any ship or vessel which may lawfully trade or fish there, any provisions, and also any hooks, lines, netting, or other tools or implements necessary for and used in the fishery by the crews of the ships or vessels carrying out the same, and the craft belonging to and employed by such ships or vessels in the said fishery, such provisions, hooks, lines, netting, or other tools or implements being the product and manufacture of *Great Britain* or *Ireland*; and that it shall and may be lawful for any of His Majesty's subjects residing in the *Isle of Man* in like manner to export directly from thence any of the articles hereinbefore mentioned for the purpose aforesaid, such articles being the product or manufacture of *Great Britain* or the said *Isle of Man*, any law, custom, or usage to the contrary notwithstanding.

VI. Provided always, and it is hereby further enacted by the authority aforesaid, that the master or other person taking charge of such ship or vessel shall produce to the proper officer of the customs in the colony or plantation where he shall arrive, a certificate, under the hand and seal of the collector or other principal officer of
65 the customs in the port where he shall have fitted out, that oath hath been made before him by the shipper of such provisions, hooks, lines, netting, or other tools and implements, that the same are of the product and manufacture of *Great Britain* or *Ireland* or the *Isle of Man*, respectively, as the fact may be, and that the several articles before mentioned (except the provisions), specifying the quantities and particulars of each sort, are to be used in the fishery by the crews of the respective ship or vessel carrying out the same, and by the craft belonging to and to be employed by such ship or vessel in the said fishery, and for no other use or purpose whatsoever (which oath and certificate such collector or other officer is hereby authorised and required to administer and grant without fee or reward); and on failure of producing such certificate, or if any such hooks, lines, netting, tools and implements are used or disposed of for any other purpose, the same, and the ship or vessel having the same on board, shall be liable to be seized and forfeited in the same manner as they would have been subject and liable to if this Act had not been made, anything herein contained to the contrary notwithstanding.

VII. And it is hereby further enacted by the authority aforesaid that from and after the 1st day of *January*, 1776, all vessels fitted and cleared out as fishing-ships in pursuance of this Act, or of the before-mentioned Act, made in the tenth and eleventh years of the reign of the late King *William III*, and which shall be actually employed in the fishery there, or any boat or craft whatsoever employed in carrying coastwise, to be landed or put on board any ships

or vessels any fish, oil, salt, provisions, or other necessities for the use and purpose of that fishery, shall not be liable to any restraint or regulation with respect to days or hours of working, nor to make any entry at the custom-house at *Newfoundland*, except a report to be made by the master on his first arrival there, and at his clearing out from thence; and that a fee not exceeding 2s. 6d. shall and may be taken by the officers of the customs at *Newfoundland* for each such report; and that no other fee shall be taken or demanded by any officer of the customs there upon any other pretence whatsoever relative to the said fishery, any law, custom, or usage to the contrary notwithstanding.

Provided always, and be it enacted, that in case any such fishing ship or vessel shall at her last clearing out from the said island of *Newfoundland* have on board, or export any goods or merchandise whatsoever except fish, or oil made of fish, such ship or vessel, and the goods thereon laden, shall be subject and liable to the same securities, restrictions, and regulations, in all respects, as they would have been subject and liable to if this Act had not been made, anything hereinbefore contained to the contrary notwithstanding.

UNITED STATES INDEPENDENCE, 1776.

1776.—Immediately prior to the date of the American dec-
 66 laration of independence, the situation therefore was that no foreign vessels could visit *Newfoundland* at all; that all British vessels were subject to British customs laws requiring entry at *Newfoundland* custom houses; and that the partial relief of fishing vessels, from the rigour of those laws and payment of certain fees, applied not to colonial vessels, but to those only which arrived from the British Islands.

By their declaration of independence the people of the thirteen American colonies abandoned all privileges which they previously had as British subjects, and the only question for discussion is whether when, afterwards, they were permitted to exercise certain privileges in British waters and on British territory, they were impliedly granted immunity from those safeguards against smuggling with which every nation finds it necessary to surround itself.

EFFECT OF UNITED STATES CONTENTION.

The effect of admitting the validity of the United States contention would be that, after the date of the treaty, American fishermen would not only have been in a very much better position as aliens than they had previously been in as British subjects, but that they would have been free from all the supervision which the British parliament thought was continually necessary in respect of British fishermen. They would have been exempt also from visitation under the hovering statutes which form part of the protective legislation of all maritime nations.

It is submitted that there is nothing in the treaties of 1783 or 1818 which has such effect.

Legislation which is common to every maritime country for the protection of its sea-coast, and is aimed at permitting foreign vessels to enter, rather than to exclude them from its bays, harbours, and coast waters, cannot be, in any sense, treated as unreasonable or as embarrassing to persons who have been expressly or impliedly granted the privilege of entering by treaty, statute, or otherwise.

The slightest consideration will indicate the great importance of such legislation in the present British American colonies. Their large extent of sea-coast, their thickly-wooded shores, their numerous bays and harbours, their scattered population, and the prevalence of fog, render it of the utmost importance, not only that there should be

67 customs laws, but that these laws should be capable of being simply but strictly enforced. This can be accomplished only

by requiring the master of each vessel to enter or report at customs immediately on arrival, and by enforcing obedience to this regulation by penalties.

It is submitted on the part of Great Britain that the implied obligations cast upon Great Britain by the treaty with respect to American fishing vessels is fully met by affording to the inhabitants of the United States reasonable facilities for bringing and maintaining vessels in treaty waters, and that a fair line may be drawn, which, on the one hand, gives American fishermen all necessary rights and privileges to carry on their fishing operations, and, at the same time, affords the British colonies a fair measure of protection against such liberties being used for any improper or fraudulent purpose.

UNITED STATES LEGISLATION.

That customs laws, having somewhat similar provisions to those now in force in Canada, were reasonably within the contemplation of the treaty, is made clear by the legislation, on parallel lines, enacted by the United States between the treaties of 1783 and 1818. Some of the enactments then made were as follows:—

1789, July 31, cap. 5.—The master of every vessel from a foreign port was required to deliver two signed manifests to the first United States officer coming on board, and to report at customs within forty-eight hours after arrival. (App., p. 777.)

1790, August 4, cap. 35.—The master of every vessel was required, within twenty-four hours after arrival in a port of the United States, to report to the chief officer of customs, and within forty-eight hours after arrival to make a further report in writing, unless all the required information had been given at the time of the first report. All collectors, naval officers, surveyors, inspectors, and the officers of

revenue cutters were authorised to board vessels in any port of the United States, or within four leagues of the coasts thereof, if bound to the United States, to demand manifests, examine the officers, and search the vessels. The master of every vessel bound for a foreign port was required to obtain a customs clearance before departure. (App., p. 779.)

1793, *February 18, cap. 8*.—The masters of licensed fishing vessels intending to touch and trade in any foreign port were required to obtain permission from the collector of customs before sailing, and they were obliged to deliver manifests and make entries both
68 of the ship and vessel and of the goods on board within the same time and under the same penalty as if arriving from a foreign port. (App., p. 782.)

1799, *March 2, cap. 22*.—The master and person next in command of every vessel from a foreign port compelled by distress of weather or other necessity to put into any port of the United States were required to make protest upon oath of the cause or circumstance of such distress within twenty-four hours after arrival, and the master was required to report in writing to the collector of customs within the same time. (App., p. 782.)

The fishery clauses of the treaty of 1871 opened to British fishermen a certain part of the United States coast-fishing (App., p. 39), and the language of the concession is very much the same as that of the article of the 1818 treaty now under consideration. Those fishery clauses remained in force until 1885 (App., p. 788), and during all those years the following statute of the United States was operative:—

And be it further enacted that it shall be the duty of the master of any foreign vessel, laden or in ballast, arriving in the waters of the United States from any foreign territory adjacent to the northern, north-eastern, or north-western frontiers of the United States, to report at the office of any collector or deputy collector of the customs, which shall be nearest to the point at which such vessel may enter said waters; and such vessel shall not proceed further inland, either to unlade or take in cargo, without a special permit from such collector or deputy collector, issued under and in accordance with such general or special regulations as the Secretary of the Treasury may, in his discretion, from time to time, prescribe. And for any violation of this section such vessels shall be seized and forfeited.

It cannot be doubted that the provisions of this Act would have been applied in the case of any British or colonial fishermen availing themselves of the privilege conceded by treaty, to fish in American waters.

UNITED STATES ENDORSEMENT OF COLONIAL ACTION.

At a time of diplomatic tension—when the United States Congress was actively investigating and discussing the whole subject of colonial action, Mr. Daniel Manning, the United States Secretary of the

Treasury, in a report to the Speaker of the House of Representatives (10th January, 1887), while characterising some colonial conduct as actuated by "unworthy and petty spite," fully endorsed the British view as to the reasonableness of colonial customs laws. He said (App., p. 372) :—

The head of this department, having the responsibility of enforcing the collection of duties upon such a vast number of imported articles, under circumstances of so long a sea-coast and frontier line to be guarded against the devices of smugglers, should not be inclined to under-estimate the solicitude of the local officers of the Dominion of Canada to protect its own revenue from similar invasion. The laws for the collection of duties on imports in force in the United States and in the Dominion of Canada, respectively, will be found on comparison to be on many points similar in their objects and methods. They should naturally be similar, for both had, in the beginning, the same common origin. In the United States, Congress has divided the territory of each State by metes and bounds, usually by towns, cities, or counties into collection districts, for the purpose of collecting duties on imports, and in each collection district has established a port of entry and ports of delivery. In that manner all our sea-coast frontier is sub-divided for revenue purposes. The object of our law is to place every vessel arriving from a foreign port in the custody of a customs officer immediately upon her arrival, in order that no merchandise may be unladen therefrom without the knowledge of the Government. The Canadian law is much the same as our own in that regard, and in comparison with our own does not seem to me [to] be unnecessarily severe in its general provisions. Our own law provides, for example (section 2774 Rev. Stat.) that:—

Within twenty-four hours after the arrival of any vessel from any foreign port, at any port of the United States established by law, at which an officer of the customs resides, or within any harbour, inlet, or creek thereof, if the hours of the business of the office of the chief officer of customs will permit, or as soon thereafter as such hours will permit, the master shall report to such officer, and make report to the chief officer of the arrival of the vessel; and he shall within forty-eight hours after such arrival make a further report in writing to the collector of the district, which report shall be in the form, and shall contain all the particulars required to be inserted in and verified like the manifest. Every master who shall neglect or omit to make either of such reports or declaration, or to verify any such declaration as required, or shall not fully comply with the true intent and meaning of this section, shall, for each offence, be liable to a penalty of one thousand dollars.

Condemnation does not, in the opinion of this Department justly rest upon the Dominion of Canada because she has upon her statute-books and enforces a law similar to the foregoing, but because she refuses to permit American deep sea fishing vessels, navigating and using the ocean, to enter her ports for the ordinary purposes of trade and commerce, even though they have never attempted to fish within the territorial limits of Canada, and intend obedience to every requirement of the customs laws, and of every other law of the port which such vessel seek to enter.

LIGHT AND HARBOUR DUES.**INTERNATIONAL RULE.**

The general principles of the law of nations have always sanctioned the levying of a moderate tax on vessels to defray the expense of improving harbours, and establishing and maintaining lighthouses, sea marks, and other things necessary to the safety of mariners. The furnishing of these facilities to navigation has always been deemed a sufficient consideration for imposing and collecting reasonable dues on vessels using them.

It is not necessary to discuss the question whether foreign merchant-vessels, merely passing through a nation's maritime belt, come under any obligation to pay light dues, as it does not arise in connection with a consideration of this question. The vessels used by American fishermen in their fishing operations do not merely pass through the maritime belt of the Colonies, they remain and carry on their business there. By merely passing through the territorial waters it might be argued that they do not come under British supremacy, but by remaining and carrying on fishing operations it must be conceded that they do. The only question, therefore, is are they, by reason of the treaty, exempt from any liability to contribute light dues when they come within treaty waters to exercise their treaty right, and from light dues and harbour dues when they enter and anchor in any port or place in the Colony.

Before discussing the question it is desirable to refer briefly to some of the legislation that has been in force in England, in the Colonies, and also in the United States.

LIGHT DUES IN ENGLAND.

The practice of levying light dues on vessels, home and foreign, was well established in England before the inhabitants of the United States repudiated British allegiance. Lighthouses, there, were not erected at the public expense, but under patents or leases, granted to certain individuals or corporations, the grantees being given the right to recompense themselves by levying tolls.

71 Lighthouses, in England, are under the jurisdiction of Trinity House, an ancient corporation, brought into existence, no doubt, by the rise of maritime commerce, and the consequent necessity of supervision of navigation.

The first British statute dealing with lighthouses in England, was 8 Eliz., cap. 13 (1565). It empowered Trinity House to erect and maintain beacons, marks and signs for the sea. That the object of the legislation was the security of navigation and the saving of life and property is shown by the following recital to the Act:—

by the destroying and taking away of certain steeples, woods, and other marks standing up on the main shores adjoining to the sea—

coasts of this realm of England and Wales, being as beacons and marks of ancient time accustomed for sea-faring men, to save and keep them and the ships in their charge from sundry dangers thereto incident: divers ships with their goods and merchandises, in sailing from foreign parts towards this realm of England and Wales, and especially to the port and river of Thames, have, by the lack of such marks, of late years been miscarried, perished and lost in the sea, to the great detriment and hurt of the common weal, and the perishing of no small number of people.

The power to levy light dues was not given to Trinity House under this Act. It was granted chiefly by Crown patents, and partly by Acts of Parliament, including, 4 Anne, cap. 20 (1705) (App., p. 528); 8 Anne, cap. 17 (1709); and 18 Geo. III, cap. 42 (1778) (App., p. 552). At that time, many lighthouses were in the hands of private individuals under patents or leases from the Crown or from Trinity House, these individuals paying a rent and being entitled to collect tolls. Some of these were ratified by certain Acts, including 3 Geo. II, c. 36 (1730); 6 Geo. III, c. 31 (1766); 12 Geo. III, cap. 29 (1772); and 42 Geo. III, cap. xliii (local and personal). In 1822, Trinity House by statute, 3 Geo. IV, cap. cxi (local and personal), received power to purchase private interests in lighthouses. In 1836 (6 and 7 Wm. IV, cap. 79), the Crown conveyed its rights in certain lighthouses to Trinity House, and granted further powers to that corporation to purchase the interests of private individuals, and from that time the rights of private parties were practically ended.

In England, prior to the Merchant Shipping (Mercantile Marine Fund) Act, 1898, the light dues were levied in respect of each light which the vessel passed on her journey, that is, each light from which the vessel might derive benefit. But that system proved to be cumbersome and unsatisfactory, and the dues are now levied in respect of the voyage, irrespective of the number of lights passed.

LIGHT DUES IN COLONIES PRIOR TO 1783.

Prior to the treaty of 1783, lighthouses were erected on the coasts of Massachusetts Bay and Nova Scotia, and by various statutes, certain tolls were authorised to be collected for the maintenance thereof. Under some of these, fishing vessels were exempt, and under others, fees were charged, but at a lower rate than in the case of ordinary merchant vessels.

1715-16, *Massachusetts Bay* (cap. 4).—A statute of the colony recited that the want of a lighthouse at Boston Harbour had, by the loss of life and property, discouraged navigation, and for remedy thereof

provided that a lighthouse should be erected at the expense of the province, and that after (App., p. 773)

kindling a light in it, useful for shipping coming into or going out of the harbor of Boston, or any other harbour within the Massachusetts Bay, there shall be paid to the receiver of impost, by the master of all ships and vessels, except coasters, the duty of one penny per ton, inwards, and also one penny per ton, outwards.

"Coasters" meant such vessels as imported provisions, tar, pitch, turpentine, or lumber, and whose owners belonged to Massachusetts Bay, Rhode Island, Connecticut, New York, Jerseys, Pennsylvania, Maryland, Virginia, North Carolina, or Nova Scotia. They were to pay 2s. each time they cleared out. All

fishing vessels, wood-sloops, &c., employed in bringing of fish, wood, stones, sand, lime or lumber, from any of the parts within this province,

were to pay 5s. yearly at their first coming in or going out. Certificates of payment were to be supplied at a charge of 6d., and vessels were not to be cleared until the certificate was presented to the naval officer. The ship and the master were charged with the duty till paid.

1751-52, *Massachusetts Bay* (cap 2).—The lighthouse at Boston Harbour having been damaged by fire, and (App., p. 774)

it being reasonable that the charge of such repairs should be borne by those who receive the immediate benefit thereof,

73 all vessels clearing out from a port within, to a port without, the province, within two years, were required to pay additional dues (2s., 3s., or 4s., according to tonnage), to be applied to the uses aforesaid.

1759.—Nova Scotia passed a statute (23 Geo. II., cap. 2) for regulating and maintaining a lighthouse on Sambro Island, at Halifax Harbour. Light dues were levied at the rate of 6d. per ton on merchant vessels coming into or going out of the harbour; but if the vessel wholly belonged to a freeholder or inhabitant of the province, only 4d. a-ton was charged. Vessels wholly employed in fishing were exempt, and coasters wholly employed within the province were charged 20s. per annum in lieu of dues. (App., p. 587.)

1770-71.—A statute of Massachusetts (cap. 35) provided for the erection of a lighthouse either at Thatcher's Island or on the mainland of Cape Ann, and the masters of all vessels belonging to, or entering any of the harbours in the province, to whom the said light should be useful, were required to pay the like duty, or light money, as was payable under the Act respecting the lighthouse at Boston Harbour (1715-16, cap. 4). If any vessels, belonging to any of the harbours referred to, arrived at Boston and paid light money there,

it was not to be demanded again. Payment was to be made before the vessel was cleared, and the vessel and the master both stood charged with the duty till paid. (App., p. 774.)

1774.—An Act of Massachusetts Bay (cap. 2) for maintaining a lighthouse upon Brant Point, at the entrance of the harbour of Nantucket, contained the following recital (App., p. 775):—

Whereas the inhabitants of the island of Nantucket, at their own cost and charge, have, at different times, erected three lighthouses upon Brant Point, at the entrance of the harbour of Nantucket, the first of which was destroyed by fire and the second by a violent gust of wind; the third is now standing, and is absolutely necessary for all vessels coming in and going out of said harbour, but the inhabitants of said island have hitherto borne all the charge of erecting and maintaining the said lighthouse, which burthen ought, in equity, to be borne by all vessels receiving advantage from that light, belonging to strangers as well as to the said inhabitants who have humbly petitioned this court for relief.

Each vessel of 15 tons burthen and upwards was required to
74 pay 6s. yearly on its first coming in or going out, the proceeds to be used for the support of the lighthouse. Vessels were not to be entered or cleared till the dues were paid.

LEGISLATION BETWEEN 1783 AND 1818.

Between the treaty of 1783 and the treaty of 1818, further legislation was passed by the United States and by Nova Scotia and New Brunswick authorizing the collection of additional light dues.

1787.—Nova Scotia Statute, 28 Geo. III, cap. 3, was passed to regulate and maintain a lighthouse on McNutt's Island at the entrance to Shelburne harbour. Dues were levied on merchant vessels, other than coasters and fishing vessels belonging to the province, of 4*d.* a ton, or 3*d.* if wholly belonging to any freeholder or inhabitant of the province. No vessel was to be deemed a fishing-vessel unless wholly employed in that business. (App., p. 591.)

1793.—Nova Scotia passed an Act (33 Geo. III, c. 16) to amend the Acts relating to Sambro and Shelburne lighthouses. It recited that the previous laws for maintaining these lighthouses had proved ineffectual for that purpose, and, that many ships and vessels which derived great benefits were not, by the said Act, compelled to pay. It enacted that (App., p. 594)—

all registered vessels owned by any person or persons within this Province, and not wholly employed in the fisheries thereof, which did not come into the harbour at Halifax or Shelburne, and pay dues there, should pay 4*d.* per ton in the port to which they belonged, and that—

every ship or vessel, His Majesty's ships of war, and such transports or other vessels employed in His Majesty's service, as shall by their charter party be exempted from paying port charges excepted, which

shall, from and after the publication hereof, come into any port, harbour, creek, or river within this Province not being to the north eastward of Cape Canso, and not owned by some person or persons belonging to this Province,

should pay the same dues as would be payable on a merchant vessel at Shelburne Harbour. Provision was made for the appointment of collectors in the several ports, harbours, creeks, and rivers to the south and west of Cape Canso, a penalty was imposed for refusal to pay the dues, and provision was made for seizing and detaining the vessel till the fine, dues and expenses were paid or secured.

1795.—The Acts of Nova Scotia relating to the Sambro and Shellburne lighthouses were amended (35 Geo. III, cap. 3) so as to make the light dues payable immediately after arrival. Non-payment resulted in a penalty, and seizure and detention of the vessel. (App., p. 597.)

1803.—An Act of Nova Scotia (43 Geo. III, cap. 4) provided for the support of a lighthouse at Annapolis Basin. All ships entering the Gut of Annapolis Basin were to pay the same tonnage dues as were then payable at Halifax. The dues at Shelburne were put upon the same basis. (App., p. 600.)

1804.—The United States passed a statute (cap. 57) imposing certain duties on articles, and levying and collecting light money on foreign ships and vessels. It enacted that a duty of 50 cents per ton, to be denominated "light money," should be levied and collected on all vessels not of the United States, which entered any port of the United States. Such light money was to be levied and collected in the same manner and under the same regulations as the tonnage duties. (App., p. 783.)

1809.—A light-house having been erected on Briar Island, at the entrance of the Bay of Fundy, which, as the Act recited, would be highly beneficial to all vessels going into that bay, it was provided, by a statute of Nova Scotia (49 Geo. III, cap. 9) that all vessels entering the Bay of Fundy and arriving at any port, harbour, or creek, or bay in Nova Scotia within the said Bay of Fundy, north of Cape Saint Mary's, should pay the same rate of tonnage duties as were then payable by all vessels entering Halifax. Should the light-house at the entrance to the Gut of Annapolis be rebuilt, all vessels which should enter and pay duties there were to be exempted from those imposed by the Act. (App., p. 602.)

1812. (52 Geo. III, cap. 4.)—A statute of Nova Scotia provided support for a lighthouse then being erected on the south end of Coffin's Island on the eastern side of the entrance of Liverpool Harbour, by levying the same rate of tonnage duties, on all vessels entering that harbour, as were then payable at Halifax. (App., p. 604.)

POSITION IN 1818.

It will thus be seen that not only in 1783, when the treaty of Paris was entered into, but in 1818, when the treaty of that year
 76 came into effect, legislation was in force in the British colonies, whereby dues were levied on vessels entering colonial ports and harbours. After the convention, further lighthouses were established on the coasts of the British colonies, and Acts were passed from time to time providing for the imposition of light dues to maintain them.

The necessity for lighthouses and sea-marks, and the fairness of charging part of the cost to American fishing vessels was pointed out by the United States consul at Pictou in 1852. In a letter to Sir A. Bannerman, Lieutenant-Governor of Prince Edward Island, he said (App., p. 198) :—

2d. It has been satisfactorily proved, by the testimony of many of those who escaped from a watery grave in the late gales, that had there been beacon lights upon the two extreme points of the coast, extending a distance of 150 miles, scarcely any lives would have been lost, and but a small amount of property been sacrificed. And I am satisfied, from the opinion expressed by your Excellency, that the attention of your Government will be early called to the subject, and that but a brief period will elapse before the blessing of the hardy fishermen of New England, and your own industrious sons, will be gratefully returned, for this most philanthropic effort to preserve life and property, and for which benefit every vessel should contribute its share of light-duty.

3rd. It has been the means of developing the capacity of many of your harbours, and exposing the dangers attending their entrance, and the necessity of immediate steps being taken to place buoys in such prominent positions that the mariner would in perfect safety flee to them in case of necessity, with a knowledge that these guides would enable him to be sure of shelter and protection.

NEWFOUNDLAND LEGISLATION.

Newfoundland legislation regarding lighthouses commenced in 1834. The statute 4 Wm. IV, cap. 4, recited that there was (App., p. 694)—

already erected and provided at the entrance of the Port of St. John's in this island, a building for the purpose of a lighthouse, and other apparatus necessary for lighting the same, but which cannot be put in operation for want of adequate means to defray the expense thereof.

Dues were accordingly levied to pay the cost of maintenance, but coasting and fishing vessels were exempt.

In the following year (5 Wm. IV, cap. 7) (App., p. 695), dues
 77 were established for the maintenance of Harbor Grace light-

house; fishing vessels were obliged to pay, but they were excused from paying more than once in each year. In 1839, Newfoundland passed an Act (3 Vic., cap. 5) (App., p. 697) compelling all vessels entering any port between Cape Ray and Cape John to pay certain dues according to tonnage for the maintenance of lighthouses. Coasting, sealing, and fishing vessels were required to pay, but the dues were smaller than in the case of other vessels.

In 1852, the statute 15 Vic., cap. 3, altered the rate of dues, but preserved the former distinction between the different classes of vessels. (App., p. 699.)

The Act now in force (62 and 63 Vic., cap. 19, 1899) requires the payment, by merchant vessels entering any port in the colony, of certain dues according to tonnage. Coasting, sealing, or fishing vessels owned and registered in the colony are exempt whilst not engaged otherwise than in the fisheries or coasting trade. (App., p. 754.)

EXEMPTION OF NEWFOUNDLAND FISHING VESSELS.

This total exemption of the Newfoundland fishing-vessels has existed since 1899. It is contended by Great Britain that this exemption of colonial fishing-vessels does not in any way affect the propriety of the dues imposed upon vessels used by American fishermen. No objection has been taken at any time to the amount of the light dues on the ground that they were excessive, or as being out of proportion to the expense to which Newfoundland is put to maintain her lighthouses. The light dues collected do not at all compensate Newfoundland for the expense of erecting and maintaining the lighthouses, and, in addition to dues received from merchant-vessels and from American fishing-vessels, Newfoundland contributes every year considerably more than the amount local fishing-vessels would pay on the same basis as American vessels contribute.

It is therefore submitted that so long as the fair share of these fishing-vessels is contributed by or for them, no objection can be made to the dues levied on American vessels on the ground of inequality. If the United States contributed an amount estimated to be a fair equivalent for what the masters of American fishing-vessels now pay, the positions of the fishermen of Newfoundland and of the United States would then be identical.

MODUS VIVENDI.

Under the *modus vivendi* which has been in force from 1906 until the present time, light dues have been paid by American fishermen.

In his despatch of the 20th June, 1907, in discussing the terms on which the *modus vivendi* should be continued, Sir

Edward Grey made the suggestion that American fishermen should be exempted in cases in which Newfoundland fishermen are exempted from their light dues. This, however, must be a matter of arrangement, and, on the question of right, it is submitted that there is nothing inconsistent with the treaty in requiring the payment of such light dues by American fishermen, irrespective of the question whether colonial fishermen do, or do not enjoy exemption.

CONCLUSION.

The position with regard to entry or report at customs, and as to payment of light and harbour dues may be summarised as follows:—

(1.) Laws requiring vessels to enter or report at customs, and to pay fair tolls towards establishing and maintaining the usual aids to navigation are reasonably incidental to laws admitting vessels into a nation's coast waters, and do not partake of the nature of exclusion.

(2.) A requirement that American fishermen, who bring vessels, fishing-gear, and supplies into the treaty waters, shall enter or report them at customs, assuming that reasonable facilities are supplied by the colonies for that purpose, is in no sense inconsistent with the treaty.

(3.) Nor is it inconsistent with the treaty that such fishermen should be required to pay dues for the support of lighthouses and of harbour improvements from which they derive benefit.

(4.) The exercise by American fishermen of the rights granted them by the treaty is subject to their observance of these requirements in this sense only, that in default of payment the vessel in respect of which default occurs is subject to the appropriate proceedings.

CUSTOMS ENTRIES AND LIGHT AND HARBOUR DUES IN NON-TREATY WATERS.

Under the provisions of the said article, that the American fishermen shall be admitted to enter certain bays or harbours for shelter, repairs, wood, or water, and for no other purpose whatever, but that they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein or in any other manner whatever abusing the privileges thereby reserved to them, is it permissible to impose restrictions making the exercise of such privileges conditional upon the payment of light or harbour or other dues, or entering or reporting at custom-houses or any similar conditions?

ARGUMENT.

The considerations which have been advanced in support of the contention made by Great Britain under the third question apply equally here, and are adopted for the purposes of this question.

A grant of liberty to enter a bay or harbour, whether by statute or treaty, confers the right to enter, subject to the usual obligations of entry, that is compliance with the rules and regulations in force there.

Every vessel entering a harbour, whether under a legal right or by privilege merely, is obliged, in the absence of express exemption, to observe all pilotage, quarantine, and anchorage rules, and, it is submitted, is equally bound to comply with all regulations requiring entry or report at customs, and payment of all dues or tolls charged to defray the expense of establishing and maintaining any maritime improvements.

As already pointed out, these are usual incidents of laws permitting vessels to enter ports or harbours, and unless special exemption therefrom is given, they must be observed. A grant of the right to enter a harbour does not in any way relieve from the performance of such obligations as the entry itself imposes.

EXCLUSION IN 1818.

80 And this is particularly so as applied to a grant, made in or prior to 1818, permitting foreign vessels to enter colonial harbours. At that time strict navigation laws were in force, involving exclusion of foreign vessels from colonial harbours. A grant of liberty to enter harbours under those circumstances, granted free-

dom from those laws, but did not, in the absence of express stipulation, bestow freedom from the conditions or obligations that resulted from entry. It gave no liberty to enter under exceptional conditions.

THE TREATY PROVISION.

American vessels entering harbours for shelter, repairs, wood, or water are given no special immunities, on the contrary, they are expressly subjected to—

such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

Under this provision American fishermen may be subjected to special restrictions in addition to those applied generally to the masters of all vessels. It cannot, however, be contended that the liability to these special powers of restriction confers any immunity from the usual conditions that attend entry into such bays, creeks, or harbours. One of the chief abuses to be guarded against is the carrying on of a contraband trade, and the regulation of first importance, to prevent smuggling, is that which requires all foreign vessels to report at customs. Such regulations are in force in both Canada and Newfoundland.

ABSENCE OF COMPLAINT.

No complaint was made against the enforcement of such statutes in Newfoundland waters prior to 1905. Protests have been made against the action of the Canadian customs authorities, but the ground of complaint has been that the regulations were enforced too strictly, not that they were invalid. Mr. Phelps, in his letter to the British Foreign Secretary, of the 26th January, 1887, put the matter thus (App., p. 399) :—

But what the United States Government complain of in these cases, is that existing Regulations have been construed with a technical strictness, and enforced with a severity, in cases of inadvertent and accidental violation where no harm was done, which is both unusual and unnecessary, whereby the voyages of vessels have been broken up, and heavy penalties incurred.

CANADIAN ORDERS-IN-COUNCIL.

The Canadian Government has in certain Orders-in-Council justified the application of these customs requirements to vessels exercising the privilege of entering harbours for shelter.

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Two of these Orders-in-Council may be referred to:—

The first of them (28th October. 1886) dealt with the boarding of the schooner "Rattler" in Shelburne Harbour, and compelling the

master to report her. After questioning the accuracy of the claim that the vessel put into the harbour through stress of weather, and after indicating the exceptional measures taken by the Canadian officers to cause as little inconvenience as possible to the master of the vessel, the Order defined the Canadian position in such matters as follows (App., p. 351) :—

The Minister observes, that under section 25 of the Customs Act, every vessel entering a port in Canada is required to immediately report at the Customs, and the strict enforcement of this regulation, as regards United States' fishing vessels, has become a necessity in view of the illegal trade transactions carried on by United States' fishing vessels when entering Canadian ports under pretext of their treaty privileges.

That under these circumstances a compliance with the Customs Act, involving only the report of a vessel, can not be held to be a hardship or an unfriendly proceeding.

The second Order-in-Council, dated the 15th January, 1887, dealt with the seizure in 1886 of the "Everitt Steele" and "Pearl Nelson," for neglect to report at customs. The following extract gives the chief grounds on which Canada claimed that American vessels entering for shelter, repairs, wood or water should report at customs (App., p. 373) :—

Canada has a very large extent of sea coast with numerous ports into which foreign vessels are constantly entering for purposes of trade. It becomes necessary in the interests of legitimate commerce that stringent regulations should be made, by compulsory conformity to which illicit traffic should be prevented.

These customs regulations, all vessels of all countries are obliged to obey, and these they do obey without in any way considering it a hardship. United States' fishing vessels come directly from a foreign, and not distant country, and it is not in their interests of legitimate Canadian commerce that they should be allowed access to our ports without the same strict supervision as is exercised over all other foreign vessels. Otherwise there would be no guarantee against illicit traffic of large dimensions, to the injury of honest trade and the serious diminution of the Canadian revenue. United States' fishing vessels are cheerfully accorded the right to enter Canadian ports

for the purposes of obtaining shelter, repairs, and procuring wood and water, but in exercising this right they are not, and cannot be, independent of the customs' laws.

They have the right to enter for the purposes set forth, but there is only one legal way in which to enter, and that is by conformity to the customs' regulations.

REGULATIONS ARE REASONABLE.

A requirement that vessels entering a port or harbour shall pay reasonable dues for the lighthouses and harbour improvements and facilities which it enjoys is, it is submitted, in itself reasonable, and not inconsistent with the terms of the article.

These lights and improvements are established and maintained for the safety of vessels. Reasonable dues levied on vessels coming into, and using a harbour to assist in supporting these aids to navigation are regarded as proper by all nations.

The argument may be concluded by a quotation from a report of a Committee of the United States' House of Representatives (January 18, 1887) (App., p. 382) :—

It may be conceded that, apart from the right of American fishermen to take fish of all kinds within certain clearly defined British waters, American deep-sea fishermen have no greater rights, by treaty or public law, in British ports, than British fishermen have in American ports, so far as concerns revenue police, maritime tolls or taxes, pilotage, lighthouses, quarantine, and all matters of ceremonial.

CONCLUSION.

It is submitted that it is permissible, in the case dealt with in this question, to require the payment of light and other dues, entry and report at custom-houses, and to impose any similar conditions.

QUESTION FIVE.

BAYS.

From where must be measured the "3 marine miles of any of the coasts, bays, creeks, or harbours," referred to in the said article?

In considering this subject, it will be well, for convenience' sake, to speak of those portions of Canadian and Newfoundland coasts, in respect of which American fishermen have now certain treaty fishing liberties, as the "treaty-coasts;" and, of the other Canadian and Newfoundland coasts, as the "non-treaty" coasts.

THE QUESTION.

The issue relates to the non-treaty coasts only; and the real question for determination is the meaning of the word "bays" in the following clause of article one of the convention of 1818:—

the United States hereby renounce, for ever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on or within 3 marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America, not included within the above-mentioned limits.

His Majesty's Government contend that the negotiators of the treaty meant by "bays," all those waters which, at the time, everyone knew as bays. The United States contend that the word must be confined to coast indentations whose headlands are not more than 6 miles apart.

HISTORY OF THE QUESTION.

HISTORY.

For a considerable period after the convention was entered into, no one seems to have doubted that that which everyone knew as a bay was a "bay," within the meaning of the treaty.

VARIATIONS IN UNITED STATES' CONTENTION.

But as the inshore mackerel fishing on the British coasts became more valuable, the United States at first advanced the argument that the 3-mile limit should be measured not from the bay (as the treaty in terms said), but from the shore of the bay.

This view, however, was not insisted on, and it would seem that the British contention, with an exception in favour of the Bay of Fundy, was officially accepted by the United States Government, at least it was accepted by Mr. Everett, United States

Minister in London, and by Mr. Webster, United States Secretary of State.

At a later period, however, the present contention was formulated, and it was argued that the renunciation clause applied only to bays not more than 6 miles wide at their opening.

UNITED STATES VIEW, 1779-82.

1779-82.—The general position of the United States as to jurisdiction over territorial waters in the years preceding the treaty is material. It appears that in 1779 Congress was willing to concede to Great Britain jurisdiction over 3 leagues (9 miles) of the sea^a; and a report (16th August, 1782) of a Committee of Congress showed the widely divergent opinions then entertained—some asserting 30 leagues, some 100 miles, some 60 miles, some 14 miles, and some, as far as could be seen from land on a fine day.

DELAWARE BAY, 1793.

1793.—The French frigate "l'Embuscade" captured the British ship "Grange" in Delaware Bay at a distance, from the shore, of more than 3 miles. Declaring that the whole of the bay was within its jurisdiction, the United States required the restoration of the frigate. France complied. The bay has a headland width of 10½ miles.

Having been requested by the French Government to state its view as to the limits of its jurisdiction in the ocean on unindented coasts, the United States, after pointing to the unsettled condition of opinion (ranging from 1 sea league to 20 miles), declined (App., p. 56)—to fix on the distance to which we may ultimately insist on the right of protection,

but gave instructions to its officers—

to consider those heretofore given them as restrained for the present to the distance of 1 sea league.

The President of the United States further declared that, as to rivers and bays (App., p. 56)—

the laws of the several States are understood to have made provision, and they are, moreover, as being landlocked, within the body of the United States.

UNITED STATES CONTENTIONS, 1804.

1804.—The question of the extent of territorial waters became important in connection with the British assertion of the right of search for British seamen in United States ships on the high seas.

^a See the Proceedings of Congress of July 22 and August 14, 1779, and January 8, 1782.

To the British assertion of supremacy over the "narrow seas" which surround the British Isles (and in consequence of a right of search there), the United States objected that the time in which such pretension could be sustained had passed. The Secretary of State said (App., p. 58):—

The progress of civilisation and information has produced a change in all those respects; and no principle in the code of public law is at present better established than the common freedom of the seas beyond a very limited distance from the territories washed by them. This distance is not, indeed, fixed with absolute precision.

The Secretary further said that—

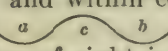
the only instances in which these seas (the narrow seas) are distinguished from other seas, or in which Great Britain enjoys within them any distinction over other nations, are: first, the compliment paid by other flags to hers; secondly, the extension of her territorial jurisdiction in certain cases to the distance of four leagues from the coast. The first is a relic of ancient usurpation, which has thus long escaped the correction, which modern and more enlightened times have applied to other usurpations.

* * * * *

The second instance is the extension of the territorial jurisdiction to four leagues from the shore. This, too, as far as the distance may exceed that which is generally allowed, rests on a like foundation, strengthened, perhaps, by the local facility of smuggling, and the peculiar interest which Great Britain has in preventing a practice affecting so deeply her whole system of revenue, commerce, and manufactures: whilst the limitation itself to four leagues necessarily implies that beyond that distance no territorial jurisdiction is assumed.

In the same year Mr. Jefferson (the President of the United States) wrote to the United States Secretary of State (8th September) defining the position of the United States in respect of bays as follows (App., p. 59):—

As we shall have to lay before Congress the proceedings of the British vessels at New York, it will be necessary for us to say to them, with certainty, which specific aggressions were committed within the common law, which within the Admiralty jurisdiction, and which on the high seas. The rule of the common law is

86 that wherever you can see from land to land, all the water within the line of sight is in the body of the adjacent county, and within common law jurisdiction. Thus, if in this curvature, , you can see from *a* to *b*, all the water within the line of sight is within common law jurisdiction, and a murder committed at *c* is to be tried as at common law. Our coast is generally visible, I believe, by the time you get within about twenty-five miles. I suppose that at New York you must be some miles out of the Hook before the opposite shores recede twenty-five miles from each other. The three miles of maritime jurisdiction is always to be counted from this line of sight.

CONVENTION OF 1806.

1806.—During the negotiations with reference to freedom of United States vessels from British seizure, an attempt was made to fix by agreement the limit of United States jurisdiction upon its coasts; and the United States, suggesting that a fair distance would be as far out as (App., p. 60)—“the well-defined path of the gulf stream,” asked that the following might be agreed to:—

It is agreed that all armed vessels belonging to either of the parties engaged in war shall be effectually restrained by positive orders, and penal provisions, from seizing, searching, or otherwise interrupting or disturbing vessels to whomsoever belonging, whether outward or inward bound, within the harbours or the chambers formed by headlands, or anywhere at sea, within the distance of four leagues from the shore, or from a right line from one headland to another.

After negotiations, the limit was fixed at “5 marine miles from the shore,” but the convention never became effective.

It is clear from these facts that the United States did not at this time claim that the jurisdiction of Great Britain over her territorial waters was limited to the extent that is now suggested.

PRACTICE OF UNITED STATES FISHERMEN, 1818.

In the early years after 1818, the defence always offered by the United States fishermen, when challenged for entering bays on the non-treaty coasts was, not that the bays were open ocean, but that they had entered for one of the four purposes mentioned in the treaty, namely, shelter, repairs, wood, or water. Taking advantage of the absence of a sufficient naval police force, they very frequently entered the bays in order to procure supplies of forbidden sorts; but they always protested their innocence of intention to exceed their treaty right. They never contended that they had a right to enter the larger bays for all purposes.

1828.—It was during this first period that Mr. Theodore Lyman published his valuable work on “Diplomacy of the United States.” The second edition (1828), dealing with the treaty of 1818, summarized its effects and concluded as follows:—

We have lost the Bay of Chaleurs fishing, so important formerly as to confer a name on a particular description of fish as well as vessels.^a

The only reason for the loss was that the Bay of Chaleurs was a “bay,” and that the United States had renounced “bays”; for the

^a Vol. 2, p. 100.

width between the headlands of the Bay of Chaleurs is 16, and not merely 6, miles. And Mr. Lyman must be taken as having expressed not his own opinion simply, but the general United States conviction. For he does not refer to the existence of any contrary interpretation. He combats no other theory. He merely states that which to him, and his contemporaries, appeared to be an indisputable fact.

MEASUREMENT FROM SHORES OF BAY, 1839.

1839.—At this time is first met the suggestion that the 3 miles of the treaty must run from the shore of the bays, and not from the bay itself. This construction makes nonsense of the article which provided that the United States renounced the liberty theretofore enjoyed or claimed within 3 marine miles of any of the coasts, bays, creeks, or harbours. It is obvious that the 3 marine miles must be measured not from the shores, but from the limits of the bay.

To Lord Falkland, Governor of Nova Scotia, this idea was, in 1841, quite new. Combating it, in a despatch (8th May) to Lord John Russell (Colonial Secretary), Lord Falkland quoted the language of the treaty and said (App., p. 128) :—

Indeed, the claim now set up, there is reason to believe, is *new*, as, in point of *practice*, the American fishermen when questioned for being within the waters of the province, have uniformly resorted to the pretexts afforded by the convention, viz., the want of shelter, repairs or wood and water, and *never*, it is believed, have asserted the *right* to fish within the *bays* or *harbours* of the coast.

Although Lord Falkland had not heard of the idea until 1841, it had evidently been broached some few years before. In 1836, Nova Scotia had succeeded in inducing the British Government to
88 exert greater activity in patrolling the fisheries; many seizures had been made; the question had become one of serious consideration by the United States; and, in 1839, Lieutenant-Commanding Paine was sent to inspect the situation. In his report (29th December, 1839), he said (App., p. 121) :—

In my late cruise on the coasts of Her Britannic Majesty's provinces, I found the convention of 1818, on the subject of fisheries, so variously construed, that I deemed it proper to address the Navy Department on the subject—the letters to which I alluded in conversation with you.

And he mentioned as one of “the questions on which dispute may arise” :—

The meaning of the word “bay,” in the convention of 1818, where the Americans relinquished the rights before claimed or exercised, of fishing in or upon any of the coasts, *bays*, &c., of Her Britannic Majesty's provinces not before described, nearer than three miles.

The authorities of Nova Scotia seem to claim a right to exclude Americans from all bays, including those large seas such as the Bay of Fundy and the Bay of Chaleurs; and also to draw a line from

headland to headland; the Americans not to approach within three miles of this line.

The fishermen, on the contrary, believe they have a right to work anywhere, if not nearer than three miles to the land.

And he added (App., p. 122) :—

If the grounds assumed by the British provincial authorities be carried out, it will be in their power to drive the Americans from those parts of the coast where are some of the most valuable fisheries: whereas, if the ground maintained by the Americans be admitted, it will be difficult to prevent their procuring articles of convenience, and particularly bait; from which they are precluded by the convention, and which a party in the provinces seems resolved to prevent.

DIPLOMATIC CORRESPONDENCE, 1836-1841.

No suggestion of this new claim is to be found in the correspondence that passed between the two Governments until after Lieutenant-Commanding Paine had made his report.

In 1836, the British Government made formal complaint to the United States, as stated in the report of the United States acting Secretary of State (14th August, 1839) :—

Its Chargé d’Affaires at Washington (App., p. 119) remonstrated against the encroachments of American citizens upon the fishing grounds secured exclusively to British fishermen by the convention of 1818. The result of this complaint was a circular letter (App., p. 115) addressed by the Secretary of the Treasury to the officers of Customs in districts where vessels are licensed for the
89 fisheries, directing them to impress the crews of fishing vessels with a sense of the treaty obligations of their Government, and of the dangers to which they exposed themselves by encroaching upon British rights.^a

This circular letter had not the desired effect, and it became necessary for the British Government to adopt stronger measures for protective purposes. Lord Palmerston afterwards (6th October, 1838) instructed Mr. Fox (British Minister at Washington) to give notice to the United States Government of the intention to take the necessary steps, and in doing so to say that (App., p. 117)—

the chief matter of complaint is that American citizens, in violation of the convention of 1818, enter the gulfs, bays, harbours, creeks, narrow seas, and waters of the colonies, and that they land on the shores of Prince Edward and the Magdalen Islands, and by force, aided by superior numbers, drive British fishermen from banks and fishing grounds solely and exclusively British.

Many seizures were made, and Lieutenant-Commanding Paine reported that (App., p. 122)—

the injustice and annoyance suffered by the fishermen have so irritated them that there is ground to believe that violence will be resorted to, unless some understanding be had before the next season.

^a The remonstrance was contained in a letter from Mr. Bankhead to Mr. Forsyth, January 6, 1836.

But the only official objection made at the time was that by the United States Secretary of State on the 14th August, 1839, as follows (App., p. 120) :—

In the absence of information of a character sufficiently precise to ascertain either, on the one side, the real motives which carried the American vessels into British harbors, or, on the other, the reasons which induced their seizure by British authorities, the department is unable to state whether, in the cases under consideration, there has been any flagrant infraction of the existing treaty stipulations. The presumption is that if, on the part of citizens of the United States, there has been a want of caution or care in the strict observance of those stipulations, there has been, on the other hand, an equal disregard of their spirit, and of the friendly relations which they were intended to promote and perpetuate, in the haste and indiscriminate rigour with which the British authorities have acted.

And two years afterwards (20th February, 1841), the United States Secretary of State, Mr. Forsyth, wrote to Mr. Stevenson
90 (American Minister at London) acknowledging that no specific complaint could be made against the conduct of the local authorities. He said (App., p. 124) :—

At the time of addressing you the instructions numbered 71, of 17th of April last, relating to the interruptions experienced by the vessels of our citizens employed in intercourse with the ports of Nova Scotia, and in the prosecution of the fisheries on the neighbouring coasts, it was deemed expedient, before presenting through you the latter branch of the subject to Her Majesty's Government in a formal manner, to await the communication to this department of a case in which the details of the seizure—the grounds on which it was made, and the consequent judicial and other proceedings should be fully set forth. Several cases of seizures and detention have, as was apprehended, occurred since the date of my letter, but none of those reported to the department have been presented in a form to fulfil the expectation entertained that the Government would be enabled to found upon it a specific complaint against the conduct of the local authorities, whilst protesting against the injurious operation of provincial law upon American interests brought involuntarily and unjustly within its jurisdiction.

In this letter, the United States for the first time adopted the argument suggested by Lieutenant-Commanding Paine. Mr. Forsyth said (App., p. 124) :—

From the information in the possession of the department, it appears that the provincial authorities assume a right to exclude American vessels from all their bays, even including those of Fundy and Chaleurs, and to prohibit their approach within three miles of a line drawn from headland to headland.

* * * * *

Our fishermen believe, and they are obviously right in their opinion, if uniform practice is any evidence of correct construction, that they can with propriety take fish anywhere on the coasts of the British provinces, if not nearer than three miles to land, and resort to their ports for shelter, wood, water, &c.

In pursuance of the instructions of this despatch, Mr. Stevenson sent a long letter (27th March, 1841) to Lord Palmerston, in which he said (App., p. 126) :—

It also appears, from information recently received by the Government of the United States, that the provincial authorities assume a right to exclude the vessels of the United States from all their bays (even including those of Fundy and Chaleurs) and likewise to prohibit their approach within three miles of a line *drawn from headland to headland, instead of from the indents of the shores of the provinces.*

91 No further diplomatic exchange took place at this time.

BAY OF FUNDY, 1843-5.

1843-5.—On the 10th May, 1843, the United States fishing-vessel "Washington" was seized for fishing in the Bay of Fundy, at a distance of more than 3 miles from the shore. Complaint was made (10th August, 1843), by letter from Mr. Everett (United States Minister in London) to Lord Aberdeen, Secretary of State for Foreign Affairs, in which he said that the seizure appeared to have been made (App., p. 131) —

on the ground that the lines within which American vessels are forbidden to fish are to run from headland to headland, and not to follow the shore. It is plain, however, that neither the words nor the spirit of the convention admits of any such construction; nor, it is believed, was it set up by the provincial authorities for several years after the negotiation of that instrument.

Lord Aberdeen replied to Mr. Everett (15th April 1844). He quoted the language of the treaty, and said (App., p. 133) :—

It is thus clearly provided that American fishermen shall not take fish within three marine miles of any bay of Nova Scotia, &c.

If the treaty was intended to stipulate simply that American fishermen should not take fish within three miles of the coast of Nova Scotia, &c., there was no occasion for using the word "*bay*" at all. But the proviso at the end of the article shows that the word "*bay*" was used designedly; for it is expressly stated in that proviso, that under certain circumstances the American fishermen may enter *bays*. By which it is evidently meant that they may, under those circumstances, pass the sea-line which forms the entrance of the bay. The undersigned apprehends that this construction will be admitted by Mr. Everett. That the Washington was found fishing within the Bay of Fundy is, the undersigned believes, an admitted fact, and she was seized accordingly.

It will be observed that there is no suggestion in this correspondence of the present contention of the United States as to the limit of 6 miles between headlands.

In reply (25th May) Mr. Everett said (App., p. 134) :—

The existing doubt as to the construction of the provision arises from the fact that a broad arm of the sea runs up to the north-east between the provinces of New Brunswick and Nova Scotia. This arm

of the sea, being commonly called the Bay of Fundy, though not in reality possessing all the characters usually implied by the term "bay," has of late years been claimed by the provincial authorities of Nova Scotia to be included among "the coasts, bays, creeks and harbours" forbidden to American fishermen.

An examination of the map is sufficient to show the doubtful nature of this construction. It was notoriously the object of the article of the treaty in question to put an end to the difficulties which had grown out of the operations of the fishermen from the United States along the coasts and upon the shores of the settled portions of the country, and for that purpose to remove their vessels to a distance not exceeding three miles from the same. In estimating this distance, the undersigned admits it to be the intent of the treaty, as it is itself reasonable, to have regard to the general line of the coast; and to consider its bays, creeks, and harbours (that is, the indentations usually so accounted) as included within that line. But the undersigned cannot admit it to be reasonable, instead of thus following the general direction of the coast, to draw a line from the south-western-most point of Nova Scotia to the termination of the north-eastern boundary between the United States and New Brunswick, and to consider the arm of the sea which will thus be cut off, and which cannot on that line be less than sixty miles wide, as one of the bays on the coast from which American vessels are excluded. By this interpretation the fishermen of the United States would be shut out from waters distant, not three, but thirty miles from any part of the colonial coast.

After some argument, Mr. Everett added (App., p. 135):—

The undersigned flatters himself that these considerations will go far to satisfy Lord Aberdeen of the correctness of the American understanding of the words "Bay of Fundy," arguing on the terms of the treaties of 1783 and 1818. When it is admitted that, as the undersigned is advised, there has been no attempt till late years to give them any other construction than that for which the American Government now contends, the point would seem to be placed beyond doubt. Meantime, Lord Aberdeen will allow that this is a question, however doubtful, to be settled exclusively by Her Majesty's Government and that of the United States.

In this letter the United States appears to take up a fresh position: while it is admitted that bays must be treated as included within the general line of coasts from which the 3 miles is to be measured, an attempt is made to treat the Bay of Fundy as exceptional.

BAY OF FUNDY CONCEDED, 1845.

Lord Aberdeen referred the question as to the Bay of Fundy to the Governor of Nova Scotia, and received a reply (17th September, 1844) in which the Governor (Lord Falkland) after discussing the objection to making any concession even in regard to the Bay of Fundy, said (App., p. 136):—

When, however, I perceive that Mr. Everett, in his note of the 25th May, 1844, addressed to Lord Aberdeen, admits that (in estimating

the distance of three miles from the shore within which American fishermen are not permitted to approach) it is "the intent of the treaty as it is in itself reasonable to have regard to the general line of the coast, and to consider its bays, creeks, and harbours, that is, the indentations so accounted, as included within that line," which I take to be an acquiescence in the opinion of Messrs. Dodson and Wilde, that the distance within which American fishermen must not approach is three miles from a line drawn from headland to headland, taking the general configuration of the coast, I cannot but conceive that a great portion of what I have contended for (in my despatch No. 75, dated 8th May, 1841, addressed to Lord John Russell) on the part of the province, is conceded; and it is therefore my unreserved opinion, provided always that this interpretation of Mr. Everett's phraseology be correct, that that which is now asked by the Americans may be granted, without evil consequences, if due care be taken that no further pretensions can hereafter be founded on the concession

On the 10th March, 1845, Lord Aberdeen addressed the following letter to Mr. Everett (App., p. 141) :—

The undersigned will confine himself to stating that after the most deliberate reconsideration of the subject, and with every desire to do full justice to the United States, and to view the claims put forward on behalf of United States' citizens in the most favourable light, Her Majesty's Government are nevertheless still constrained to deny the right of United States citizens, under the treaty of 1818, to fish in that part of the Bay of Fundy which, from its geographical position, may properly be considered as included within the British possessions.

Her Majesty's Government must still maintain, and in this view they are fortified by high legal authority, that the Bay of Fundy is rightfully claimed by Great Britain as a bay within the meaning of the treaty of 1818. And they equally maintain the position which was laid down in the note of the undersigned, dated the 15th of April last, that, with regard to the other bays on the British American coasts, no United States' fisherman has, under that convention, the right to fish within three miles of the *entrance* of such bays as designated by a line drawn from headland to headland at that entrance.

But while Her Majesty's Government still feel themselves bound to maintain these positions as a matter of right, they are nevertheless not insensible to the advantages which would accrue to both countries from a relaxation of the exercise of that right; to the United States as conferring a material benefit on their fishing trade; and to Great Britain and the United States conjointly and equally, by the removal of a fertile source of disagreement between them.

Her Majesty's Government are also anxious, at the same time that they uphold the just claims of the British Crown, to evince by every reasonable concession their desire to act liberally and amicably towards the United States.

The undersigned has accordingly much pleasure in announcing to Mr. Everett, the determination to which Her Majesty's Government have come to relax in favour of the United States fishermen, that

right which Great Britain has hitherto exercised, of excluding those fishermen from the British portion of the Bay of Fundy, and they are prepared to direct their colonial authorities to allow henceforward the United States fishermen to pursue their avocations in any part of the Bay of Fundy, provided they do not approach, except in the cases specified in the treaty of 1818, within three miles of the *entrance* of any bay on the coast of Nova Scotia or New Brunswick.

Mr. Everett replied on the 25th March, 1845 (App., p. 143):—

The Government of the United States, the undersigned is persuaded, will duly appreciate the friendly motives which have led to the determination on the part of Her Majesty's Government announced in Lord Aberdeen's note, and which he doubts not will have the natural effect of acts of liberality between powerful States, of producing benefits to both parties, beyond any immediate interest which may be favourably affected.

While he desires, however, without reserve, to express his sense of the amicable disposition evinced by Her Majesty's Government on this occasion in relaxing in favour of the United States the exercise of what, after deliberate reconsideration, fortified by high legal authority, is deemed an unquestioned right of Her Majesty's Government, the undersigned would be unfaithful to his duty did he omit to remark to Lord Aberdeen that no arguments have at any time been adduced to shake the confidence of the Government of the United States in their own construction of the treaty. While they have ever been prepared to admit that in the letter of one expression of that instrument there is some reason for claiming a right to exclude United States fishermen from the Bay of Fundy (it being difficult to deny to that arm of the sea the name of "bay" which long geographical usage has assigned to it), they have ever strenuously maintained that it is only on their own construction of the entire article that its known design, in reference to the regulation of the fisheries, admits of being carried into effect.

The undersigned does not make this observation for the sake of detracting from the liberality evinced by Her Majesty's Government in relaxing from what they regard as their right; but it would be placing his own Government in a false position to accept as
 95 mere favour, that for which they have so long and strenuously contended as due to them under the convention.

It becomes the more necessary to make this observation in consequence of some doubt as to the extent of the proposed relaxation. Lord Aberdeen, after stating that Her Majesty's Government felt themselves constrained to adhere to the right of excluding the United States fishermen from the Bay of Fundy, and also with regard to other bays on the British American coasts, to maintain the position that no United States fisherman has, under that convention, the right to fish within three miles of the *entrance* of such bays, as designated by a line drawn from headland to headland at that entrance, adds that "while Her Majesty's Government still feel themselves bound to maintain these positions as a matter of right, they are not insensible to the advantages which would accrue to both countries from the relaxation of that right."

This form of expression might seem to indicate that the relaxation proposed had reference to both positions; but when Lord Aberdeen

proceeds to state more particularly its nature and extent, he confines it to a permission to be granted to "the United States fishermen to pursue their avocations in any part of the Bay of Fundy, provided they do not approach, except in the cases specified in the treaty of 1818, within three miles of the *entrance* of any bay on the coast of Nova Scotia and New Brunswick," which entrance is defined, in another part of Lord Aberdeen's note, as being designated by a line drawn from headland to headland.

BOUNDARY IN THE PACIFIC, 1846.

1846.—By a convention between the United Kingdom and the United States made in this year, it was provided that the boundary between Canada and the United States should follow the 49th parallel of north latitude (App., p. 33)—

to the middle of the channel which separates the continent from Vancouver's Island; and thence southerly through the middle of the said channel, and of Fuca's Straits, to the Pacific Ocean; provided, however, that the navigation of the whole of the said channel and straits, south of the 49th parallel of north latitude, remain free and open to both parties.

By this convention the two countries assumed ownership over waters distant from the shore much more than three miles.

BRITISH ATTITUDE, 1852.

1852.—The withdrawal of efficient British naval protection had been followed by such continuous and persistent encroachment by American fishing-vessels upon acknowledged British waters that the British Government was again compelled to dispatch a very considerable armed force to the colonial coasts. The United States Government appears to have thought that this action indicated a
96 change of policy of the British Government. Such was, however, not the case. Lord Malmesbury, in a letter to Mr. Crampton, British Minister at Washington (10th August, 1852), said (App., p. 171):—

Her Majesty's Government intended to leave the matter precisely where it was left in 1845 by the Governments of Great Britain and the United States namely, that the relaxation as to bays applied, as is stated in Lord Aberdeen's note to Mr. Everett of the 21st of April, 1845, "to the Bay of Fundy alone," any further discussion of that question being a matter of negotiation between the two Governments.

NOTICE ISSUED BY MR. WEBSTER, 1852.

In consequence of this letter it became necessary for the United States to assume some clearly defined attitude towards the "bay" question, and Mr. Daniel Webster (United States Secretary of State)

issued a notice, in which, admitting that the term "bays," as "usually understood," was "applied equally to small and large tracts of water thus situated," he informed United States fishermen how the case then stood. In his notice he said (App., p. 153):—

It would appear that, by a strict and rigid construction of this article, fishing vessels of the United States are precluded from entering into the bays or harbours of the British provinces, except for the purposes of shelter, repairing damages, and obtaining wood and water. A bay, as is usually understood, is an arm or recess of the sea, entering from the ocean between capes or headlands, and the term is applied equally to small and large tracts of water thus situated. It is common to speak of Hudson's Bay, or the Bay of Biscay, although they are very large tracts of water.

The British authorities insist that England has a right to draw a line from headland to headland, and to capture all American fishermen who may follow their pursuits inside of that line. It was undoubtedly an oversight in the convention of 1818 to make so large a concession to England, since the United States had usually considered that those vast inlets or recesses of the ocean ought to be open to American fishermen as freely as the sea itself to within three marine miles of the shore.

Attempt has been made to minimise the effect of Mr. Webster's declaration, and it is sometimes said that Mr. Webster indicated in his notice that the "strict and rigid construction" was not the true construction. But Mr. Webster said nothing to that effect. His language was (App., p. 153):—

Not agreeing that the construction thus put upon the treaty is conformable to the intentions of the contracting parties, this information is, however, made public to the end that those concerned in the American fisheries may perceive how the case at present stands, and be upon their guard.

97 In Mr. Webster's view, the British interpretation of the language of the treaty appears to be conceded; but he suggested that possibly the language had not properly expressed that which its authors had intended.

That Mr. Webster meant, by the language of his circular, precisely what he said, is shown (if that be necessary) by a despatch from Mr. Crampton (British Minister at Washington) to Lord Malmesbury (2nd August, 1852) (App., p. 157):—

I observe with satisfaction that Mr. Webster now clearly perceives, and fairly admits, the correctness of the construction of the convention of 1818 maintained by Her Majesty's Government. The opinion of the Queen's Advocate and of the Attorney-General is, Mr. Webster said, "undoubtedly right":—and he afterwards informed me that the President, from whom he had just received a letter on the subject, now concurred in that opinion.

DEBATES IN CONGRESS, 1852.

The action of Mr. Webster was the subject of debates in Congress, and some of the speeches are material as showing the real cause of the difficulty. The speakers pointed out that the fisheries had changed since 1818, and that the mackerel fishery, an inshore fishery, which was then of no account, had since become important. Representative Tuck, for example, said:—

From the September to the close of the season the mackerel run near the shore, and it is next to impossible for our vessels to obtain fares without taking fish within the prohibited limits. We differ with England in regard to the measurement of these "limits," they claiming to run from "headland to headland" and we to follow the indentations of the coast. But the real difficulty is not here. I do not think it generally known that the whole difficulty about the fisheries is about our right to take mackerel. The cod-fishing privileges are adequate already, and no vessel in that business has ever been seized or interfered with.

I think it is proper to go still further, and to state frankly what, after a patient investigation of every source of authentic information within my reach, I believe to be the real difficulty. The truth is, our fishermen need absolutely, and must have, the thousands of miles of shore fishery which have been renounced, or they must always do an uncertain business. If our mackerel men are prohibited from going within three miles of the shore, and are forcibly kept away (and nothing but force will do it), then they may as well give up their business first as last. It will be always uncertain and generally unsuccessful, however well pursued.

Perhaps I shall be thought to charge the commissioners of 98 1818 with overlooking our interests. They did so in the important renunciation which I have quoted; but they are obnoxious to no complaints for so doing. In 1818 we took no mackerel on the coasts of the British possessions, and there was no reason to anticipate that we should ever have occasion to do so. Mackerel were then found as abundantly on the coast of New England as anywhere in the world, and it was not till years after this that this beautiful fish, in a great degree, left our waters. The mackerel on the provincial coasts has principally grown up since 1838, and no vessel was ever licensed for that business in the United States since 1838. The commissioners of 1818 had no other business but to protect the cod fishery; and this they did in a manner generally satisfactory to those most interested.^a

During the debate in the Senate the present contention of the United States was formulated for the first time. Senator Soulé said (App., p. 178):—

"Such bay," says an eminent writer, "must communicate with the ocean only by a strait so narrow that it must be reputed as being a part of the maritime domain of the State to which the coast belongs;

^a Appendix to Congressional Globe, 1852, 32nd Congress, 1st Session, vol. xxv, p. 1186.

so that you cannot enter it without going through the territorial sea of that State, which means twice the distance of a gun-shot, or six miles. It is required besides that *all* the coasts bordering on such bay be subject to the State claiming such strait. The two conditions must unite to give to any part of the ocean the character of an internal sea, or a *mare clausum*."

* * * * *

The convention of 1818, therefore, excludes us from no part of the littoral seas washing Her Majesty's dominions, without three marine miles of the coast of such littoral seas, be they bays, gulfs, or other inlets, unless the coast bordering the same be all under her sovereignty, and unless the strait formed by the headlands at their entrance exceeds six miles in length. The question is here entirely solved and put to rest. It only remains to be ascertained how distant be the headlands at the entrance of the Bays of Fundy, of Chaleurs, and elsewhere. Are they more widely apart than six miles? Then the bays are as open and free as the main ocean itself. Are they within the line of six miles? Then they are private bays, bays shut up from the commerce of the rest of mankind, at the will of the riparious sovereign, provided he be the lord of the whole coast surrounding them, and not otherwise. Now we know that is not the case with the bays just named. Both have an entrance too wide to be claimed as private seas; and, independent of this, the Bay of Fundy is bounded in part by the State of Maine, a circumstance which alone would preclude all pretensions on the part of England to make it hers.

I am done with this part of my subject.

99 In reply, Senator Seward said as follows (App., p. 187):—

Now, sir, this argument seems to me to prove too much. I think it would divest the United States of the harbour of Boston, all the land around which belongs to Massachusetts or the United States, while the mouth of the bay is six miles wide. It would surrender our dominion over Long Island Sound—a dominion which I think the State of New York and the United States would not willingly give up. It would surrender Delaware Bay; it would surrender, I think, Albemarle Sound, and the Chesapeake Bay; and I believe it would surrender the Bay of Monterey, and, perhaps, the Bay of San Francisco, on the Pacific coast.

BAY OF FUNDY, 1856.

1856.—In this year, arbitration proceedings between the two countries took place, the legality of the seizure of the "Washington" in the Bay of Fundy being one of the questions involved. A majority of the arbitrators decided in favour of the United States claim. Mr. Upham (appointed by the United States) delivered a long opinion, holding that the Bay of Fundy was not a bay within the meaning of the treaty. Mr. Hornby (appointed by the United Kingdom) held otherwise. Mr. Bates (the umpire) agreed with the United States arbitrator, saying as follows (App., p. 217):—

The question turns, so far as relates to the treaty stipulations, on the meaning given to the word "bays" in the treaty of 1783. By

that treaty, the Americans had no right to dry and cure fish on the shores and *bays* of Newfoundland, but they had that right on the coasts, *bays*, *harbours*, and *creeks* of Nova Scotia; and as they must land to cure fish on the shores, bays, and creeks, they were evidently admitted to the shores *of the bays*, &c. By the treaty of 1818, the same right is granted to cure fish on the coasts, bays, &c., of Newfoundland, but the Americans relinquished that right, *and the right to fish within three miles of the coasts, bays, &c., of Nova Scotia*. Taking it for granted that the framers of the treaty intended that the word "bay" or "bays" should have the same meaning in all cases, and no mention being made of headlands, there appears no doubt that the "Washington," in fishing ten miles from the shore, violated no stipulations of the treaty.

It was urged on behalf of the British Government, that by coasts, bays, &c., is understood an imaginary line, drawn along the coast from headland to headland, and that the jurisdiction of Her Majesty extends three marine miles outside of this line; thus closing all the bays on the coast or shore, and that great body of water called the Bay of Fundy, against Americans and others, making the latter a

British bay. This doctrine of the headlands is new, and has
100 received a proper limit in the convention between France and Great Britain of 2nd August, 1839, in which "it is agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland."

The Bay of Fundy is from 65 to 75 miles wide, and 130 to 140 miles long; it has several bays on its coast; thus the word bay, as applied to this great body of water, has the same meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume sovereignty. One of the headlands of the Bay of Fundy is in the United States, and ships bound to Passamaquoddy must sail through a large space of it. The islands of Grand Menan (British) and Little Menan (American) are situated nearly on a line from headland to headland. These islands, as represented in all geographies, are situated in the Atlantic Ocean. The conclusion is, therefore, in my mind irresistible, that the Bay of Fundy is not a British bay, nor a bay within the meaning of the word as used in the treaties of 1783 and 1818.

Mr. Bates was a banker, and not a lawyer, and it is not thought necessary to discuss the legal points on which he expressed an opinion. The doctrine of headlands on which he lays stress was, of course, not new. It is the same question as that of bays, for if bays are territorial waters then there is a right of sovereignty over the whole of them, that is, over all the space within the line drawn from headland to headland. On the question of fact he spoke with greater authority, and on that, he found that the headlands of the Bay of Fundy were not both British. It followed, in his opinion, from that finding, that the bay was not a bay of His Majesty's dominions within the meaning of the Convention.

1854-66.—All debate ceased during this period. The reciprocity treaty was then in operation.

PROPOSALS FOR RENEWAL 1866.

1866-71.—The reciprocity treaty having been terminated by the United States, the question again became the subject of diplomatic correspondence, and Mr. Seward (United States Secretary of State) in 1866 proposed to the Earl of Clarendon the appointment of commissioners to settle the difficulties. Pending negotiations little effort was made by the United Kingdom to enforce the provisions of the convention. The instructions of the Colonial Secretary (Mr. Cardwell) were as follows:—

101

COLONIAL SECRETARY'S INSTRUCTIONS, 1866.

It is, therefore, at present, the wish of Her Majesty's Government neither to concede, nor, for the present, to enforce any rights in this respect which are in their nature open to any serious question. Even before the conclusion of the Reciprocity Treaty, Her Majesty's Government had consented to forgo the exercise of its strict right to exclude American fishermen from the Bay of Fundy; and they are of opinion that during the present season that right should not be exercised in the body of the Bay of Fundy, and that American fishermen may not be interfered with, either by notice or otherwise, unless they are found within three miles of the shore, or within three miles of a line drawn across the mouth of a bay or creek, which is less than ten geographical miles in width, in conformity with the arrangement made with France in 1839.

American vessels found within these limits should be warned that by engaging or preparing to engage in fishing they will be liable to forfeiture, and should receive the notice to depart which is contemplated by the laws of Nova Scotia, New Brunswick, and Prince Edward Island, if within the waters of one of these colonies under circumstances of suspicion. But they should not be carried into port except after wilful and persevering neglect of the warnings which they may have received; and in case it should become necessary to proceed to forfeiture, cases should, if possible, be selected for that extreme step in which the offense of fishing has been committed within three miles of land.

Her Majesty's Government do not desire that the prohibition to enter British bays should be generally insisted on, except when there is reason to apprehend some substantial invasion of British rights. And in particular they do not desire American vessels to be prevented from navigating the Gut of Canso (from which Her Majesty's Government are advised they might be lawfully excluded), unless it shall appear that this permission is used to the injury of colonial fishermen, or for other improper objects.

I have it in command to make this communication to your Lordships as conveying the decision of Her Majesty's Government on this subject. (App., p. 222.)

This letter was embodied in instructions issued by the Dominion Government to its fishery officers in 1868.

WASHINGTON TREATY, 1871.

1871-85.—During this period the rights of the parties were regulated by the treaty of Washington.

UNITED STATES PROPOSAL FOR SETTLEMENT, 1886.

1886.—On the 15th November, 1886, the United States Secretary of State, Mr. Bayard, instructed Mr. Phelps (the United States Minister at London) to suggest a general limitation of bays to those with 10-mile headlands. He said (App., p. 358) :—

102 In proposing the adoption of a width of ten miles at the mouth as a proper definition of the bays in which except on certain specified coasts, the fishermen of the United States are not to take fish, I have followed the example furnished by France and Great Britain in their convention signed at Paris on the 2nd August, 1839. This definition was referred to and approved by Mr. Bates, the Umpire of the Commission under the treaty of 1853, in the case of the United States fishing schooner "Washington," and has since been notably approved and adopted in the convention signed at The Hague in 1882, and subsequently ratified in relation to fishing in the North Sea between Germany, Belgium, Denmark, France, Great Britain, and the Netherlands.

The clause which he proposed was as follows (App., p. 417) :—

1. To agree upon and establish, by a series of lines, the limits which shall separate the exclusive from the common right of fishing on the coast and in the adjacent waters of the British North American colonies, in conformity with the 1st article of the convention of 1818, except that the bays and harbours from which American fishermen are in the future to be excluded, save for the purposes for which entrance into the bays and harbours is permitted by said article, are hereby agreed to be taken to be such bays and harbours as are 10, or less than 10 miles in width, and the distance of 3 marine miles from such bays and harbours shall be measured from a straight line drawn across the bay or harbour, in the part nearest the entrance, at the first point where the width does not exceed 10 miles, the said lines to be regularly numbered, duly described, and also clearly marked on charts prepared in duplicate for the purpose.

CANADIAN REPLY.

The Canadian reply (1st February 1887) to this proposal was the same as the United States would have made to a proposal to forgo sovereignty over a number of their bays (App., p. 402) :—

This provision would involve a surrender of fishing rights, which have always been regarded as the exclusive property of Canada, and would make common fishing grounds of territorial waters, which by the law of nations have been invariably regarded both in Great Britain and the United States as belonging to the adjacent country.

In the case, for instance, of the Baie des Chaleurs, a peculiarly well-marked and almost land-locked indentation of the Canadian coast, the 10-mile line would be drawn from points in the heart of Canadian territory, and almost 70 miles distant from the natural entrance or mouth of the bay. This would be done in spite of the fact that, both by Imperial legislation and by judicial interpretation, this bay has been declared to form a part of the territory of Canada (see Imperial Statute, 14 & 15 Vict., cap. 63, and *Mowat v. McPhee*, 5, Supreme Court of Canada Reports, p. 66)

CONVENTION OF 1888.

1888.—A convention was negotiated (known as the Cham-
103 berlain-Bayard convention). It provided that the limits of exclusion of United States fishermen from British waters should be as follows:—

Certain named bays whose headlands are as follows: Bay of Chaleurs, 16 miles; Miramichi Bay, $14\frac{1}{2}$ miles; Egmont Bay, 17 miles; St. Ann's Bay, $17\frac{1}{3}$ miles; Fortune Bay, $10\frac{2}{3}$ and 11 miles; Sir Charles Hamilton Sound, $5\frac{5}{8}$ and $6\frac{1}{2}$ miles.

Three marine miles seaward from lines drawn across headlands of other bays as follows: Barrington Bay, $6\frac{5}{8}$ and $7\frac{3}{8}$ miles; Chedabucto and St. Peter's Bays, $8\frac{2}{3}$ and 9 miles; Mira Bay, Placentia Bay, $7\frac{7}{8}$ and $10\frac{3}{8}$ miles.

As to bays, creeks, or harbours (App., p. 42.)—

“not otherwise specifically provided for in this treaty, such three marine miles shall be measured seaward from a straight line drawn across the bay, creek, or harbour, in the part nearest the entrance at the first point where the width does not exceed ten marine miles.”

The United States Senate did not ratify this convention, and it never became operative.

Since 1888 the question has not been further discussed.

THE ARGUMENT.

BRITISH CONTENTION.

His Majesty's Government contends that the term “bays,” as used in the renunciation clause of article one, includes all tracts of water on the nontreaty coasts which were known under the name of bays in 1818, and that the 3 marine miles must be measured from a line drawn between the headlands of those waters.

It will be seen, on reference to a map, that the shores of His Majesty's Dominions, to which article one applies, are indented to a very marked extent.

These indentations had all been surveyed and named at the time the convention was entered into. They were well known to mariners

and fishermen and were known under the names which they now bear. In other words, the waters to which this discussion relates were known as bays in 1818.

Maps of the coasts had been published before that date. Of these, probably the most important were a wall map known as Mitchell's map (1755), and a book of maps called "The American Atlas,"
 104 prepared by "Thomas Jeffreys, geographer to the King and others." In the appendix to this Case will be found reproductions of Mitchell's map, and of such of Jeffreys's maps as cover the territory in question. Not only were these maps available to the negotiators in 1783, but the report of the American Commissioners proves that the Mitchell map was actually being used by them during the negotiations. They said: "The map used in the course of our negotiations was Mitchell's."^a

When, therefore, in 1783, an agreement was entered into with reference to the "bays" in these territories, no one could have been in the slightest doubt as to what was intended. The maps showed it, and every fisherman knew it without looking at the maps. And the word was used in the same sense in 1818. It appears from an entry in Mr. John Quincy Adams' diary, 8th July, 1823, that the same map (Mitchell's) was made use of in subsequent negotiations. A minority report of a committee of the United States Senate said in 1888 (App., p. 462):—

The treaty had reference to extensive lines of seacoast, upon which the bays, harbours, and creeks were as well known by name and location in 1818 as they are now. . . .

The negotiators of the convention were dealing, therefore, with tracts of water on the shores of His Majesty's dominions which were known to everyone under the name of "bays"—tracts of varying size and of varying conformation, some with greater and some with less width between their headlands, ranging from inclosures of considerable extent to inlets of small size. They used the term "bays" without any qualification whatever, and the inference is irresistible, as His Majesty's Government submits, that the term was intended to apply to all the waters on those shores which were known to the negotiators and to the public, and were marked on the maps at the time,
 as "bays." If it had been intended that the term should apply
 105 only to a limited class of the waters which were then called "bays," an express limitation would have been inserted to give effect to that intention.

^a Rev. Dip. Corresp., vol. vi, p. 133. A letter from the British Peace Commissioner, Mr. Oswald, dated the 29th October, 1782, shows that Mr. Strachey took maps with him from London to Paris for use in the negotiations there. These maps were probably Jeffreys's maps.

COMPARISON OF OTHER PASSAGES.

This construction is supported by a comparison of other passages in which the term "bays" occurs in the same article. It is clear from them that the term is used generally of all bays. For instance, the right given to American fishermen to dry and cure fish on the shores of any of the unsettled bays on certain specified coasts, could hardly be read as limited to the smaller bays only; yet apart from the convention there could be no such right in any bays. Again, the proviso at the end of the article, that American fishermen should be permitted to enter bays on the non-treaty shores of His Britannic Majesty's dominions in America for the purposes, amongst other things, of repairing damages, purchasing wood, and obtaining water, cannot reasonably be construed as applying to the smaller bays only. If it were, American fishermen would have no right to resort to the larger bays for those purposes; for even if a right to fish in bays existed apart from the treaty, there would have been no right to land in the absence of an agreement to that effect.

It is submitted that the term must have the same meaning throughout the whole article, and that it is used throughout to include all bays.

JUDICIAL DECISIONS.

The construction of article one has been on two occasions the subject of decision. The first of them is the award made in 1853 in the case of the "Washington," to which reference has already been made. (Ante, p. 100.) In that case it was held, as before stated, that the Bay of Fundy was not a British bay, because one of its headlands belonged to the United States. Mr. Dana, the counsel for the United States, arguing before the Halifax Commission in 1877, stated that this was the real ground of the award. (App., p. 266.) The decision related therefore to the Bay of Fundy, rather than to the general construction of article one. His Majesty's Government have contended that the Bay of Fundy is within article one equally with the other bays on the coasts affected, but for reasons of policy they have not insisted on that view, and since the year 1845 have made no objection to American fishermen plying their trade within the headlands of the bay. It is not necessary, therefore, for the Tribunal to take into consideration the question of this particular bay, nor to re-examine the issue of fact decided by the award of 1853, as to whether the headlands are or are not both within British territory. Indeed the understanding between the arbitrating Powers is

that no question as to the Bay of Fundy, considered as a whole, apart from its bays or creeks, or as to innocent passage through the Gut of Canso, is included in this question as one to be raised in the present

arbitration, it being the intention of the parties that their respective views or contentions on either subject shall be in no wise prejudiced by anything in the present arbitration.

CONCEPTION BAY.

The second decision related to Conception Bay on the coast of Newfoundland, and the argument in the case involved the consideration of the very question now before this tribunal. It was a decision of Her Majesty's Privy Council^a composed of Lord Blackburn, Sir J. A. Colville, Sir Barnes Peacock, Sir Montagu Smith, and Sir Robert Collier. On the general question of the meaning of the term "bays" they held that it was impossible to doubt that the convention of 1818 applied to all bays whether large or small.

The opinion of these eminent jurists is an exact authority in favour of the contention which His Majesty's Government submits to this tribunal.

LINE TO BE MEASURED FROM HEADLANDS.

Assuming that the term "bays" is construed to include all bays, then it is clear that the 3-mile limit must start from a line drawn between the headlands of all those bays.

The reference to the discussions which have taken place and which have already been summarised in this case, show that Great Britain has from the first put forward the contention which is urged before this tribunal to-day; she has from the first contended that all bays on the coasts affected by article one are within that article, and to that contention she adheres. They also show that the United States have more than once accepted this construction of the language of the convention.

UNITED STATES CONTENTION.

The contention of the United States, so far as it is at present known to His Majesty's Government, is to be found in its "answer" laid before the Halifax Commission in 1877. It is as follows (App., p.

256) :—

107 For the purposes of fishing, the territorial waters of every country along the sea-coast extend three miles from low-water mark; and beyond is the open ocean, free to all. In the case of bays and gulfs, such only are territorial waters as do not exceed six miles in width at the mouth, upon a straight line measured from headland to headland. All larger bodies of water, connected with the open sea, form a part of it. And wherever the mouth of a bay, gulf, or inlet exceeds the maximum width of six miles at its mouth, and so loses the character of territorial or inland waters, the jurisdictional or proprie-

^a The Direct United States Cable Co. v. The Anglo-American Telegraph Co. L.R., 2 App., Cas. 394.

tary line for the purpose of excluding foreigners from fishing is measured along the shore of the bay, according to its sinuosities, and the limit of exclusion is three miles from low-water mark.

It is stated in the report of the Senate Committee of 1887 in the following terms (App., p. 390) :—

It would seem to be clear that by the universally recognised public law among civilised nations, territorial jurisdiction of every nation along the sea is limited to 3 marine miles from its coasts, as they may happen to be, whether embracing long lines of open coast or embracing great curvatures of sea-shore, which may, and often do, almost surround vast bodies of the waters of the ocean. The phrase of the treaty, therefore, speaking of bays, creeks, and harbours of His Britannic Majesty's dominions, must be understood as being such bays, creeks, and harbours as by the public law of nations were, and are, within the territorial jurisdiction of the British Government. The committee is therefore clear in its opinion that any pretension that exclusive British jurisdiction exists, either by force of public law or of this treaty, within headlands embracing such great bodies of water, and more than 6 marine miles broad, must be quite untenable.^a

The contention in effect is that in 1818 when the convention was entered into, no nation could claim territorial rights over bays, creeks, or harbours on its coasts, if the lines between the headlands of such waters were more than 6 marine miles in length.

REPLY OF GREAT BRITAIN.

His Majesty's Government submits that there is no principle or practice of the law of nations under which the right of a State to exercise territorial sovereignty over bays, creeks, or harbours
108 on its coasts is limited to those bodies of waters only which are contained within headlands not more than 6 miles apart. At the time when the treaty of 1818 was entered into, the dominion of States over enclosed waters was claimed, and admitted, to a much greater extent than is the case at the present day, but His Majesty's Government believes that in no single instance, either before or since that time, has any such limitation been accepted.

The usage of nations is absolutely opposed to the existence of a 6-mile limit; and the discussions of jurists show that no general rule has ever been agreed on. It is not too much to say that if the present contention of the United States were to receive the sanction of this tribunal, difficulties and disputes would at once arise in every part of the world.

^a See also Sabine's Report, December 6, 1852, House of Rep., Mis. Doc., No. 32, 42nd Congress, 2nd sess., p. 244; and an article by Professor Pomeroy, *Am. Law Rev.*, vol. 5.

RIGHT OF A STATE OVER THE OPEN SEA ADJOINING ITS COAST.**UNINDENTED COASTS.**

It is undoubted law that a State has territorial sovereignty over a belt of sea adjoining its coast, subject to the right of passage by the commercial vessels of other nations. The extent of this belt was not definitely fixed by international law at the time the treaty was entered into, and though a width of 3 miles has since become generally accepted as the minimum limit of the waters over which sovereignty may be exercised, there is not even now universal agreement on the point. Wider claims are put forward by some nations and by some writers, and the Institute of International Law in 1894 unanimously agreed to recommend 6 miles as the maximum. It is not necessary, however, to discuss this question on the present occasion: it has no bearing on the subject now under discussion, namely, the extent of the bays referred to in the last clause of article one of the treaty.

RIGHT OVER ENCLOSED WATERS**BAYS.**

It is also undoubted law that a State can exercise sovereignty over certain portions of the sea enclosed within its territory by headlands or promontories.

But different considerations apply in the case of enclosed waters from those which affect the open sea. The possession of headlands gives a greater power of control over waters contained
 109 within them than there can be over the open sea, and the safety of a State necessitates more extended dominion over the bays and gulfs enclosed by its territories than over open waters. Moreover, the interest of other nations in bays and gulfs is not so direct if, as is commonly the case, they lie off the ocean highways. For these reasons the 3-mile rule has never been applied to enclosed waters, nor has any defined limit been generally accepted in regard to them. It is true that the understanding of nations has imposed some restrictions on the exercise of sovereignty over these waters, and that States do not now assert claims, such as were common in former times, over waters, which from their size or configuration can not be effectively controlled, or which from their situation can not be fairly held to be the exclusive property of any one State. But these restrictions must depend on the particular circumstances of each case; they have never become formulated in any rule of general application. There was therefore no definite meaning which could have been assigned in 1818 to the term "bays in His Majesty's dominions" unless it were the meaning which His Majesty's Government contends should be put

upon it; and there was no principle of the law of nations under which the meaning could be limited to bays of a certain extent only.

USAGE OF NATIONS.

The usage of nations is consistent only with this conclusion. The United States and Great Britain have both continuously insisted on claims which would not have been tenable if there had been any such limit as is now suggested by the former Power, and other States have exercised sovereignty over territorial waters equally extensive.

UNITED STATES.

Turning first to the United States, it will be found that they have claimed wide rights in respect of bays.

DELAWARE BAY.

In 1793, France seized a British vessel, the "Grange," in Delaware Bay more than 3 miles from land.

This bay has a width between its headlands of $10\frac{1}{2}$ miles, and it extends in length about 30 miles before the distance between its
110 shores reduces to 6 miles. The United States demanded the release of the vessel on the ground that the seizure had been made in neutral waters—because Delaware Bay was United States territory. Chancellor Kent, in his "Commentaries," refers to this incident in the following terms:—

The executive authority of that country in 1793 considered the whole of Delaware Bay to be within its territorial jurisdiction, resting its claim upon those authorities which admit that gulfs, channels, and arms of the sea belong to the people with whose lands they are encompassed, and it was intimated that the law of nations would justify the United States in attaching to their coasts an extent into the sea beyond the reach of cannon-shot.^a

Since that time the United States have continuously treated Delaware Bay as their territory, and have prescribed regulations for fishing which apply to the whole of the bay. (App., p. 788.)

UNITED STATES CLAIM, 1804.

In 1804, in the discussions which arose as to the right asserted by Great Britain to search American vessels for British seamen, Mr. Jefferson, the President of the United States, writing to the United States Secretary of the Treasury on the 8th September, put forward a claim to sovereignty over enclosed waters which included bays 25 miles in width. An extract from this letter has been set out at p.

^a Kent's "International Law" (Abdy's 2nd ed.), p. 101.

85 of this case, and a larger part of it will be found in the appendix at p. 59. Its terms are absolutely inconsistent with the claim now put forward by the United States.

FUCA STRAITS.

In 1846, by the treaty of Washington made between Great Britain and the United States, it was stipulated that the boundary between the United States and British North America should follow the forty-ninth parallel of latitude (App., p. 33)—

to the middle of the channel which separates the continent from Vancouver's Island; and thence southerly through the middle of the said channel and of Fuca's Straits, to the Pacific Ocean.

Disputes involving the title to various islands having arisen, the boundary question at issue between the two nations was submitted to the arbitration of the German Emperor, and in 1873 a protocol was signed at Washington for the purpose of marking out the frontier in accordance with his arbitral decision. Under this protocol the

boundary after passing the islands which had given rise to
111 dispute is carried across a space of water 35 miles long by 20 miles broad, and is then continued for 50 miles down the middle of a strait 15 miles broad, until it touches the Pacific Ocean midway between Bonilla Point on Vancouver's Island and Tatooch Island lighthouse on the American shore, the waterway being there $10\frac{1}{2}$ miles in width. The United States in this case, therefore, continue to claim as territorial their share of the waters of a strait which is much more than 6 miles in width, and recognised the right of Great Britain to the other moiety.^a

CHESAPEAKE BAY.

In 1885, it was held by the United States Court of Commissioners of Alabama Claims, that Chesapeake Bay was American territory, and that seizures made by the Confederate cruisers within any part of Chesapeake Bay were not made on the high seas.^b The headlands of Chesapeake Bay are 12 miles apart, and its length is over 114 miles before its waters narrow to 6 miles. The fishing in this bay is controlled by State legislation. (App., p. 793.)

GREAT BRITAIN.

Great Britain, for her part, at the time the treaty of 1818 was made, was asserting sovereignty not only over enclosed waters, but

^a Hall, pp. 157, 158.

^b The *Alleganean*: *Statson v. The United States*, 32 Albany Law Jour., p. 494; *Moore's Int. Arb.*, vol. iv, p. 4333, vol. v., p. 4675.

over open seas surrounding her coasts of a wide extent. It is true that at the beginning of the 19th century she was not insisting on her claim to sovereignty over the four seas with the same vigour as she had done at an earlier period, but so late as 1803 the negotiations with the United States for a settlement of the right of search had been broken off because the English Government would not concede freedom from search within the British seas, and so late as 1805 the British Admiralty regulations contained an order that His Majesty's ships should insist on foreign ships striking their top-sails, and taking in their flags, in acknowledgment of His Majesty's sovereignty in his seas, which extended to Cape Finisterre. In 1818, claims to British sovereignty over St. George's Channel and the King's Chambers, which include the waters within lines drawn from headland to headland as from Orfordness to the Foreland and from Beachy Head to Dunnose Point, were admitted without dispute. De Martens states that nobody in his time (1821) contested the exclusive right of Great Britain over St. George's Channel.^a It was insisted to the full in 1818, and was admitted by Chancellor Kent to be a proper claim. (App., p. 58.)

BRISTOL CHANNEL.

By the common law of England, all enclosed waters are within the realm. Thus the Bristol Channel was decided by the Court of Queen's Bench in 1859 to be within the counties which bound it.^b This case is the leading English authority on the point, and it was accepted as good law by the Privy Council in 1877.^c The Court stated in their judgment, which was delivered by Chief Justice Cockburn, that they proceeded on the principle that the whole of this inland sea between the counties of Somerset and Glamorgan is to be considered as within the counties by the shores of which its several parts are respectively bounded.

It is clear, therefore, that by the common law of England enclosed waters on the coasts of the British dominions are within the sovereignty of the British Crown.

REGINA v. KEYN.

The question of the extent of the jurisdiction which English courts have, by the municipal law, over the open seas adjoining the coast, as distinct from enclosed waters was considered by the Court of Crown Cases Reserved in the case of *Regina v. Keyn* in 1876.^d But that case

^a Précis de Droit des Gens moderne de l'Europe, ed. 1821, p. 87.

^b Rex. v. Cunningham. Bell's Crown Cases, p. 72.

^c Direct U. S. Cable Co. v. Anglo-American Telegraph Co., L. R., 2 App., Cas., p. 394.

^d L. R., 2 Ex Div., p. 63.

turned solely on the question whether, under the law of England as it then stood, English courts had jurisdiction over foreigners in foreign ships on the open sea adjoining the English coasts; it in no way affected the law as to jurisdiction over enclosed waters. The Territorial Waters Jurisdiction Act of 1878,^a passed in consequence of that decision, deals with offences on the open seas only; and Lord Cairns, the Lord Chancellor, in introducing the Bill in the House of Lords, observed that the jurisdiction to which he desired to call attention was not the jurisdiction in relation to rivers, bays, or harbours (because in respect of them no controversy had arisen), but the jurisdiction over the territorial waters in that belt or zone of the high seas which surrounds the shores of the Empire.^b

BAYS IN QUESTION.

113 Turning to the particular shores now in question, it will be found that Great Britain has always claimed and exercised exclusive jurisdiction over the bays on them. The statute 59 Geo. III, cap. 38, passed in 1819 to give effect to the treaty, makes it an offence for foreigners in foreign vessels to fish within 3 marine miles of the bays, creeks, or harbours of the non-treaty shores, and has been enforced in respect of all bays since that time irrespective of their width. The Privy Council in the case to which reference has been made^c observed on that statute as follows:—

But the Act already referred to, 59 Geo. III, cap. 38, though passed chiefly for the purpose of giving effect to the convention of 1818, goes further. It enacts not merely that subjects of the United States shall observe the restrictions agreed on by the convention, but that all persons not being natural born subjects of the King of Great Britain shall observe them under penalties. And, in particular, by section 4 it enacts that if 'any person' upon being required by the governor or any officer acting under such governor, in the execution of any order or instructions from His Majesty in Council, shall *inter alia* refuse to depart from such bays, he shall be subject to a penalty of 200*l*.

CONCEPTION BAY.

No stronger assertion of exclusive dominion over these bays could well be framed. As has been already observed, Conception Bay is in every sense of the words a bay within Newfoundland, though of considerable width, and as there is nothing to justify a construction of the Act limiting it to bays not exceeding any particular width, this is an unequivocal assertion of the British Legislature of exclusive dominion over this bay as part of the British territory. And as this assertion of dominion has not been questioned by any nation from

^a 41 and 42 Vict., c. 73.

^b Cited Halleck (Ed. Baker, 1908), vol. 1, p. 191.

^c L. R., 2 App., Cas., p. 421.

1819 down to 1872, when a fresh convention was made, this would be very strong in the tribunals of any nation to show that this bay is by prescription part of the exclusive territory of Great Britain.

BAY OF CHALEURS.

The Bay of Chaleurs has a headland width of 16 miles. It has been treated as British territory by the Legislatures both of Great Britain and Canada.^a By the Imperial Statute of 1851, 14 and 15 Vict., c. 63 (App., p. 572), the boundary between the province of Canada and New Brunswick was settled as running down the centre of the Bay of Chaleurs, thus treating the whole bay as territorial waters. Canadian statutes have been passed assuming jurisdiction over the whole bay.^b (App., pp. 600, 607.)

114 The Supreme Court of Canada has held that the bay is all within British territory.^c

MIRAMICHI BAY.

Miramichi Bay is situate in New Brunswick, and has a headland width of 14½ miles. By a New Brunswick statute of 1799^d (App., p. 597), this bay was treated as being within the adjoining county of Northumberland, and subsequent amending acts have confirmed this claim.^e (App., pp. 603, 607, 609, 612.)

In no single instance has the jurisdiction of Great Britain over these bays been challenged by any other Power than the United States, and the objection of the United States has been limited to the sole question of the extent of the fishing liberties given by the treaty of 1818.

OTHER NATIONS.

Claims to maritime jurisdiction much more extensive have been made by other nations. They are referred to in Hall on International Law,^f and in the works of other writers. It is enough to say here, in order to show the extent of the claims that were made at the beginning of the 19th century that the rights of Sweden in the Gulf of Bothnia, of the Turks to the Archipelago, of Holland to the Zuyder Zee, and of Denmark both to the Belts and Sound, were at that time uncontested.

FISHERY CONVENTIONS.

In fixing the limit within which the exclusive right of fishing is reserved to riparian States, it has become not uncommon to enter into

^a (Imp.) 14 and 15 Vict., c. 63; (Can.) 4 and 5 Vict., c. 36.

^b 47 Geo. III, c. 12, s. 15; 4 Geo. IV, c. 1, s. 25.

^c *Mowat v. McFee* (1880), 5 Sup. Ct. R. 66.

^d 39 Geo. III, c. 5.

^e 50 Geo. III, c. 5; 4 Geo. IV, c. 23; 9 and 10 Geo. IV, c. 3; 4 Wm. IV, c. 31.

^f 5th Ed., p. 150.

a special agreement providing for measurement from a line drawn across the mouth of all bays which do not exceed 10 miles in width.

FRANCE AND GREAT BRITAIN, 1839.

This was the rule adopted in the convention of the 2nd August, 1839, by the United Kingdom and France; and it was confirmed by the subsequent convention of 1867. (App., p. 32, 38.)

GREAT BRITAIN AND GERMANY, 1874.

In December 1874 an agreement was entered into between the United Kingdom and Germany under which—

those bays and incurvations of the coast which are 10 sea miles or less in breadth, reckoned from the extremest points of the land, and the flats must be considered as under the territorial sovereignty of the German Empire.

DENMARK, 1880.

In 1880, the German Government notified German fishermen that the Danish Government considered the Danish waters to include bays the entrances to which did not exceed 10 miles. (App., p. 795.)

NORTH SEA CONVENTION, 1882.

115 By the North Sea Fishery Convention of the 6th May, 1882, to which the United Kingdom, Germany, Belgium, Denmark, France, and the Netherlands were parties, it was provided that the fishermen of each country should enjoy the exclusive right of fishing within the distance of 3 miles from low-water mark along the whole extent of the coasts of their respective countries, and that, as regards bays, the distance of 3 miles should be measured from a straight line drawn across the bay in the part nearest the entrance at the first point where the width did not exceed 10 miles. (App., p. 41.)

In March 1888, France adopted the same rule in fixing the limits of the waters within which the vessels of other States could not fish.

EFFECT OF THESE CONVENTIONS.

These conventions fix by agreement a particular limit of 10 miles on the coasts to which they refer, but it is important to observe that such special conventions are inconsistent with the contention that any limitation as to the width of bays such as is now contended for, forms part of general international law.

SUMMARY.

His Majesty's Government submits that these facts establish beyond doubt that States do exercise exclusive jurisdiction over bodies

of water more than 6 marine miles in width, and that the usage of nations is entirely inconsistent with the existence of any general limitation of that kind or, indeed, of any precise limitation at all.

OPINIONS OF JURISTS.

Dealing next with the writings of jurists, it will be seen that the weight of authority negatives the existence of the limit contended for by the United States, or of any other precise limit.

AMERICAN WRITERS.

Turning first to American writers we find that Chancellor Kent, writing in 1832, not long after the treaty had been concluded, states the law as follows:—

KENT.

It is difficult to draw any precise or determinate conclusion, amidst the variety of opinions, as to the distance to which a State may lawfully extend its exclusive dominion over the sea adjoining its territories and beyond those portions of the sea which are embraced by harbours, gulfs, bays, and estuaries, and over which its jurisdiction unquestionably extends. All that can reasonably be asserted is, that

the dominion of the Sovereign of the shore over the contiguous
116 sea extends as far as is requisite for his safety and for some lawful end. A more extended dominion must rest entirely upon force and maritime supremacy. According to the current of modern authority, the general territorial jurisdiction extends into the sea as far as cannon-shot will reach, and no farther; and this is generally calculated to be a marine league; and the Congress of the United States have recognised this limitation, by authorising the district courts to take cognisance of all captures made within a marine league of the American shores. The executive authority (of this country) in 1793 considered the whole of Delaware Bay to be within our territorial jurisdiction; and it rested its claim upon those authorities which admit that gulfs, channels, and arms of the sea belong to the people with whose lands they are encompassed. It was intimated that the law of nations would justify the United States in attaching to their coasts an extent into the sea beyond the reach of cannon-shot.

Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume for domestic purposes connected with our safety and welfare the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the South Cape of Florida to the Mississippi. It is certain that our Government would be disposed to view with some uneasiness and sensibility in the case of war between other maritime Powers the use of the waters of our coast, far beyond the reach of cannon-

* Kent's Commentaries, 9th ed., vol. 1, pp. 31-33.

shot, as cruising ground for belligerent purposes. In 1793 our Government thought they were entitled in reason to as broad a margin of protected navigation as any nation whatever, though at that time they did not positively insist beyond the distance of a marine league from the sea-shores; and, in 1806, our Government thought it would not be unreasonable, considering the extent of the United States, the shoalness of their coast, and the natural indication furnished by the well-defined path of the Gulf Stream, to expect an immunity from belligerent warfare for the space between that limit and the American shore. It ought at least to be insisted that the extent of the neutral immunity should correspond with the claims maintained by Great Britain around her own territory, and that no belligerent right should be exercised within "the chambers formed by headlands, or anywhere at sea within the distance of four leagues, or from a right line from one headland to another."

Wheaton,^a in 1836, treats the matter in the same way:—

117 The maritime territory of every State extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same State. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the State. Within these limits its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation.

Halleck uses almost identical language in affirming a State's right of property to inlets enclosed between headlands.^b

A recent American writer, Hannis Taylor,^c sums up the position as follows:—

In the absence of any generally acknowledged standard as to their size and conformation, it is difficult to determine in any given case whether or no a bay, gulf, or recess in a coast-line can be justly regarded as territorial water Germany and France are inclined to limit their claims to such bays, gulfs, and recesses as are not more than 10 miles wide at their entrance, measured in a straight line from headland to headland. The latter claims, however, the whole of the oyster beds in the Bay of Cancale, the entrance to which is 17 miles wide,—the cultivation of such beds by local French fishermen making the case exceptional. At an earlier day the United States was inclined to claim dominion over a wide extent of the adjacent ocean. "Considering," says Chancellor Kent, "the great extent of the line of the American coasts, we have a right to claim for fiscal and defensive regulations a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume for domestic purposes connected with our safety and welfare the control of waters on our coasts, though included within lines stretching from quite distant headlands—as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the

^a Elements of Int. Law (4th ed.), 1904, sec. 177, pp. 275-6.

^b Ed. Baker, 1908, vol. i., p. 167.

^c International Public Law, s. 229, p. 278.

caples of the Delaware, and from the south Cape of Florida to the Mississippi." While Chesapeake and Delaware Bays and other inlets of a like character are still considered as territorial waters, the general policy of this Government, conforming itself to the opinion of the civilised world, clearly tends towards the curtailment of any unreasonable claim to jurisdiction outside of the marine league.

ENGLISH WRITERS.

The English authorities are in agreement with this view.

Phillimore^a says—

118 Maritime territorial rights extend as a general rule over arms of the sea, bays, gulfs, estuaries, which are enclosed but not entirely surrounded by lands belonging to one and the same State.

He disputes the proposition that the extent of sovereignty over bays is subject to any definite limitation, and cites in support of his view the argument of Mr. Dana, Counsel for the United States, delivered before the Halifax Fishery Commission in 1877.^b Mr. Dana contended that there was no agreement among jurists as to the bays which might be treated as territorial waters. He said (App., p. 266):—

The difficulties on that subject are inherent, and to my mind they are insuperable.

CONCEPTION BAY CASE.

In the case decided by the Privy Council,^c to which reference has already been made, Lord Blackburn, in giving the reasons of the Committee, deals with the opinions of jurists on this point in the following terms:—

Passing from the common law of England to the general law of nations, as indicated by the text writers on international jurisprudence, we find an universal agreement that harbours, estuaries, and bays landlocked belonged to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is "bay" for this purpose.

It seems generally agreed that where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay it is part of the territory; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting therefore a width of one cannon-shot from shore to shore, or 3 miles; some a cannon-shot from each shore, or 6 miles; some an arbitrary distance of 10 miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of New-

^a International Law (3rd ed), vol. 1, p. 284.

^b Halifax Commission, 1877, pp. 1663, 1664.

^c Direct U. S. Cable Co. and Anglo-Am. Tel. Co., 1877, L. R., 2 A. C., pp. 419, 420.

foundland, but also would have excluded from the territory of Great Britain that part of the Bristol Channel which in *Reg. v. Cunningham*^a was decided to be in the county of Glamorgan. On the other hand, the diplomatists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays, and Chancellor Kent, in his Commentaries, though by no means giving the weight of his authority to this claim, gives some reasons for not considering it altogether unreasonable.

119 It does not appear to their Lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the State possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination.

Hall^b treats bays as subject to very different considerations from those which apply to the open sea. He points out that nations have continually asserted claims to sovereignty over bays; and, after examining the principles on which occupation of these tracts of water may be justified, comes to the conclusion that a State may claim exclusive rights over waters which are supposed to be necessary to the safety of the State or which are within its powers to command.

EARLIER CONTINENTAL WRITERS.

These views are founded on the opinions of earlier continental writers. Thus Puffendorf^c says:—

Gulfs and channels or arms of the sea are, according to the regular course, supposed to belong to the people with whose lands they are encompassed.

Azuni, writing in 1796, says:—

It is already established among polished nations that, in places where the land, by its curve, forms a bay or a gulf, we must suppose a line to be drawn from one point of the enclosing land to the other, or along the small islands which extend beyond the headlands of the bay, and that the whole of this bay, or gulf, is to be considered as territorial sea, even though the centre may be, in some places, at a greater distance than 3 miles from either shore.^d

Bluntschli^e recognises that bays cannot be subject to the same limitations as the belt of sea along the coast, and admits that other considerations admit and justify a larger dominion.

Vattel^f says:—

Tout ce que nous avons dit des parties de la mer voisines des côtes se dit plus particulièrement et à plus forte raison des rades, des baies,

^a Bell's Cr. C., p. 72.

^b 5th Ed., p. 155.

^c Law of Nature and Nations, B. iv, c. v., s. 8, Kennet's ed., p. 382; and as quoted by Twiss (1884), p. 294.

^d Maritime Law of Europe, New York, 1806, vol. 1, p. 203.

^e S. 309.

^f 1830, s. 291, p. 272.

et des détroits, comme plus capables encore d'être occupés, et plus importants à la sûreté du pays. Mais je parle des baies et détroits de peu d'étendue, et non de ces grands espaces de mer
 120 auxquels on donne quelquefois ces noms, tels que la baie de Hudson, le Détroit de Magellan, sur lesquels l'empire ne saurait s'étendre, et moins encore la propriété. Une baie dont on peut défendre l'entrée peut être occupée et soumise aux lois du Souverain; il importe qu'elle le soit, puisque le pays pourrait être beaucoup plus aisément insulté en cet endroit que sur des côtes ouvertes aux vents et à l'impétuosité des flots.

Hautefeuille ^a says:—

Les côtes de la mer ne présentent pas une ligne droite et régulière; elles sont, au contraire, presque toujours coupées de baies, de caps, &c.; si le domaine maritime devait, toujours, être mesuré de chacun des points du rivage, il en résulterait de graves inconvénients. Aussi est-on convenu, dans l'usage, de tirer une ligne fictive d'un promontoire à l'autre, et de prendre cette ligne pour point de départ de la portée du canon. Ce mode, adopté par presque tous les peuples, ne s'applique qu'aux petites baies, et non aux golfes d'une grande étendue, comme le Golfe de Gascogne, comme celui de Lyon, qui sont en réalité de grandes parties de mer complètement ouvertes, et dont il est impossible de nier l'assimilation complète avec la haute mer.

PRESENT OPINIONS—INSTITUTE OF INTERNATIONAL LAW.

The opinions of present jurists may be best ascertained from the conclusions of the Institute of International Law.^b The subject was exhaustively discussed at the session at Paris in 1899, the exceptionally large number of thirty-nine members being present. They agreed to propose the following rule:—

Art. 3. Pour les baies, la mer territoriale suit les sinuosités de la côte, sauf qu'elle est mesurée à partir d'une ligne droite tirée en travers de la baie dans la partie la plus rapprochée de l'ouverture vers la mer, où l'écart entre les deux côtes de la baie est de 12 milles marins de largeur, à moins qu'un usage continu et séculaire n'ait consacré une largeur plus grande.

The object of the reservation at the end of this article is explained by the learned reporter, M. Barclay,^c in these words:—

Les baies ne servent pas, en général, à la navigation entre pays autres que le pays riverain. Elles sont placées par les promontoires en dehors des routes de la haute mer, séparées d'elle par une
 121 marque nettement déterminée. Or il y a beaucoup de baies qui ont bien plus de 10 milles et même 16 milles d'écart, et qui, par leur situation, sont nécessairement placées sous la souveraineté absolue de l'État riverain. Il en est ainsi pour les firths écossais. Pour la Baie de Cancale, la distance est de 17 milles; pour celle de

^a "Droits et Devoirs des Nations neutres," 1858, vol. 1, p. 92.

^b "Annuaire de l'Institut de Droit International," tome 13, 1894, 1895, p. 329.

^c P. 147.

Chaleur, au Canada, de 16 milles. Toutes ces baies sont considérées comme étant sous la domination exclusive de l'État riverain. Il y a lieu, enfin, de consacrer le principe que la baie est dans une situation différente de la mer territoriale proprement dite.

It is clear from the report of M. Barclay that in his opinion (1) there is no rule in international law as to the extent of bays of the nature now suggested by the United States, and (2) the considerations applicable to the belt of territorial sea do not apply to bays.

OTHER OPINIONS.

Attempts have been made, it is true, by some writers to suggest a general principle capable of application to all enclosed waters. But these suggestions have led to no practical result. The difference in the considerations which affect particular cases has made it difficult, if not impossible, to formulate any general rule; and the difference in the considerations which affect the open sea on the one hand, and enclosed waters on the other hand, has made it impossible to apply the same general rule to both.

SUMMARY.

It is submitted therefore that the opinions of jurists establish that there is not any definite limit, whether 6 miles or more, beyond which enclosed waters such as bays may not be claimed as territorial waters by the State within whose shores they are enclosed; and that *a fortiori* there was no such limit in 1818. It follows that the word "bay" as used in the treaty was used in its ordinary sense and included all those tracts of water known at the time as bays.

NEGOTIATIONS OF 1818.

In addition to these arguments, His Majesty's Government desire to point out to the Tribunal that the circumstances existing at the time of the negotiations of 1818 themselves negative the contention that the term "bays of His Britannic Majesty's dominions" as used in the treaty was not intended to include the whole of the bays on the British coasts.

At the beginning of the last century, Great Britain and the United States were putting forward wide claims to jurisdiction over territorial waters, as has already been shown. The case of Delaware Bay and the claims of the United States were fresh in the minds of the American negotiators; the rights of Great Britain over the waters surrounding the British coasts had been the subject of still more recent discussion. In view of these facts it is impossible to believe that the negotiations of 1818 were conducted on the footing that bays more than 6 miles wide were necessarily part of

the high seas. If it had been intended to limit the meaning of the word "bay" to bays of a certain size only, that limitation would certainly have been discussed and, if agreed to, would have been expressed on the face of the treaty.

The limit of sovereignty over enclosed waters contended for by the United States has never yet been recognized by the Law of Nations, and this Tribunal, as is respectfully submitted, can only act upon principles which have already become part of the law which it is administering.

CONCLUSION.

Great Britain, therefore, contends that the treaty applies to all bays on the coasts of British North America, and that the three marine miles specified in article one must be measured, in the case of unindented coasts, from the shore line at low tide; and, in the case of all bays, creeks, or harbours, from a line drawn across the mouths of such bays, creeks, or harbours.

QUESTION SIX.

"COASTS" AND "SHORES."

Have the inhabitants of the United States the liberty under the said article or otherwise to take fish in the bays, harbours, and creeks on that part of the southern coast of Newfoundland which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands, or on the Magdalen Islands?

THE QUESTION.

The question is whether United States fishermen are, under the treaty of 1818, entitled to take fish, not only on that portion of the "coast" of Newfoundland specified in article one of the treaty, and the "shores" of the Magdalen Islands, but also in the bays, harbours, and creeks thereof. While the treaty grants to American fishermen liberty to take fish—

on the coasts, bays, harbours, and creeks from Mount Joly, on the southern coast of Labrador, &c.—

it gives liberty on the "coast" merely of Newfoundland, and on the "shores" of the Magdalen Islands. And the question is, whether the more restricted liberty in these two localities is to be construed as meaning the same as the more ample liberty on the Labrador coast.

ANALYSIS OF THE TREATY.

For the present purpose the provisions of the treaty may be divided into three parts:—

1. American fishermen are to have liberty to take fish in the following places:—

(a.) Part of the southern, western, and northern "coast of Newfoundland."

(b.) "On the shores of the Magdalen Islands."

(c.) "On the coasts, bays, harbours, and creeks" of Labrador.

2. American fishermen are to have liberty to dry and cure fish—

in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland, hereabove described, and of the coast of Labrador.

124 3. The United States renounces any liberty theretofore enjoyed or claimed—

to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits.

DISTINCTION BETWEEN THE PHRASES.

The word "coast" is used throughout the treaty as something distinct from bays, harbours, and creeks; and it is submitted that—

(a.) The word "coast" alone is used in the first part, because coast alone was meant.

(b.) The word "coasts" was followed by "bays, harbours, and creeks" in the third part, because the intention was to include those indentations.

(c.) And when the indentations alone are intended (as in the second part of the provision), the word "coast" is omitted altogether.

Possibly, if the word "coast" had been used alone, without any such context as is to be found in this treaty, it might have been held to include the indentations of the coast. But the language under examination makes a clear distinction between "coasts," on the one hands, and "bays, harbours, and creeks," on the other, as the treaty of 1783 had already done, and as the treaties of 1854 and 1871 subsequently did.

NEGOTIATIONS, 1814-18.

Between the peace treaty of 1814 and the treaty of 1818, Great Britain was contending that the liberty of fishing granted by the treaty of 1783 had been terminated by the war of 1812, and the United States was contending that the war had not determined it. During the negotiations for a settlement, Lord Bathurst (the Secretary of State for Foreign Affairs for Great Britain), in writing (30th October, 1815) to Mr. Adams (the Minister of the United States in London), stated that His Majesty's Government felt (App., p. 69.)—

every disposition to afford to the citizens of those States all the liberties and privileges connected with the fisheries which can consist with the just rights and interests of Great Britain, and secure His Majesty's subjects from those undue molestations in their fisheries which they have formerly experienced from citizens of the United States. . . . It was not of fair competition that His Majesty's Government had reason to complain, but of the preoccupation of British harbours and creeks in North America by the fishing vessels of the United States and the forcible exclusion of British vessels from places where the fishery might be most advantageously conducted.

INSTRUCTIONS, 1815.

125 In the same year in the instructions with regard to fishing by the United States (which were communicated to the United

States Government) special stress was laid upon the exclusion of its fishermen from bays, harbours, rivers, creeks, and inlets of all His Majesty's possessions. It is obvious that, in those places, the fisheries were of special and peculiar value, and the treaty of 1818, it is contended, gave effect to this consideration. (App., p. 63.)

It is true that liberty was granted to take fish in the "bays, harbours, and creeks," as well as on the "coasts" of Labrador, but this concession emphasises the limitation of the liberty granted in respect of the rest of the treaty coast, and may have been due both to the necessity of making some concession (if an agreement was to be reached), and to the fact that it was less important to restrict the rights conferred in connection with Labrador than to limit the liberty granted in respect of the territorial waters of the more populous island of Newfoundland.

FRENCH CLAIMS.

Moreover, the existence of the French claim to a large portion of the coast, with regard to which these liberties were conceded, may have supplied an additional reason for not extending the grant to bays, harbours, and creeks, in which, for the reasons above indicated, there would be a greater probability of collision with the French fishermen.

OTHER TREATIES.

The treaties under discussion are by no means singular in their use of the word "coasts." In the treaty of 1854 (known as the Reciprocity Treaty) between Great Britain and the United States, for example, the word means, as in the 1818 treaty, something different from the indentations of the shore. By that treaty liberty was given to United States fishermen to take fish (App., p. 36.)—

on the sea-coasts and shores, and in the bays, harbours, and creeks of Canada, New Brunswick, Nova Scotia, Prince Edward Island, and of the several islands thereunto adjacent.

And liberty was given to British subjects to take fish—

on the eastern sea-coasts and shores of the United States north of the 36th parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbours, and creeks of the said sea-coasts and shores of the United States and of the said islands.

126 By the treaty of 1871 (articles 18 and 19) provision was made for reciprocal rights of fishing in similar terms. (App., p. 39).

THE SHORES OF THE MAGDALEN ISLANDS.

The word "shores" in article one of the treaty is used to express the same idea as "coasts" in other parts of the article. Messrs. Gal-

latin and Rush, the United States negotiators of the treaty, so understood, for in their report to their Secretary of State (the 20th October, 1818) they said (App., p. 37) :—

1. *Fisheries*.—We succeeded in securing, besides the rights of taking and curing fish, within the limits designated by our instructions as a *sine quâ non*, the liberty of fishing on the coasts of the Magdalen Islands, and of the western coast of Newfoundland, and the privilege of entering for shelter, wood, and water, in all the British harbours of North America.

The above argument with regard to the “coast” of Newfoundland, therefore, applies to the “shores” of the Magdalen Islands.

CONCLUSION.

His Majesty's Government therefore submits that the liberty to fish on the southern, western, and northern coasts of Newfoundland, and on the shores of the Magdalen Islands, does not include the liberty to fish in the bays, harbours, and creeks on such coasts or shores.

QUESTION SEVEN.

COMMERCIAL PRIVILEGES.

Are the inhabitants of the United States whose vessels resort to the treaty coasts for the purpose of exercising the liberties referred to in article 1 of the treaty of 1818 entitled to have for those vessels, when duly authorized by the United States in that behalf, the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading vessels generally?

THE QUESTION.

The treaty confers no rights upon American vessels. It concedes to inhabitants of the United States the right to fish in certain British waters; and the question is whether the vessels used by such American fishermen are entitled, as of right, to such commercial privileges on the treaty coasts as are from time to time accorded to trading vessels. If there is no such right, then it is within the power of Great Britain to open or close her ports to fishing vessels coming there for commercial purposes, at her pleasure.

BRITISH CONTENTION.

Great Britain contends that American fishermen cannot claim, as of right, to exercise any liberties in British territorial waters unless those liberties were granted by the treaty of 1818; that no commercial privileges were so granted; and that the exercise of commercial privileges by American fishing vessels would be contrary to the intention of that treaty.

UNITED STATES CONTENTION.

The United States contends that American fishing vessels resorting to British territorial waters under the terms of the treaty are entitled, as of right, to trade on the British shores, and to have the same commercial privileges as trading vessels, subject to their having the licence to touch and trade required by the law of the United States.

THE TREATY COASTS.

In terms, the question stated for the opinion of the Tribunal relates only to the treaty coasts. But the discussions which have taken place

with regard to the rights of American fishermen on the non-treaty coasts are important, and it may be of advantage to refer briefly to some of their leading features.

The facilities, which have been the subject of dispute hitherto, have related to such traffic as the purchase of bait, ice, seines, and other articles and supplies, the hiring of crews, the landing of fish, and the transfer of them to ships or railways for transportation to the United States or elsewhere—facilities which themselves amount to the establishment of a base of operations in British ports for the American fishing industry.

But the contention now put forward goes even further than this. It is a claim to all the commercial privileges accorded to vessels engaged solely in trade; in other words, it is a claim that vessels plying in British waters for the purpose of fishing under the treaty have the right to carry on trade as well.

HISTORY OF THE QUESTION.

1699.—From the earliest times the possession of the coasts of Newfoundland, for the purpose of procuring bait, has always been regarded as of very special value. In 1699 a British statute (10 and 11 Wm. III, c. 25) provided (App., p. 525) :—

that no alien or stranger whatsoever (not residing within the kingdom of *England*, dominion of *Wales*, or town of *Berwick upon Tweed*) shall at any time hereafter take any bait, or use any sort of trade or fishing whatsoever in *Newfoundland*, or in any of the said islands or places above mentioned.

The foregoing statute was in force at the date of the American revolution, and the ensuing treaty of 1783.

1786.—After the peace the British statute (26 Geo. III, c. 26) provided (App., p. 559) :—

That it shall not be lawful for any person or persons residing in, or carrying on fishery in the said island of Newfoundland, or on the banks thereof, there to sell, barter, or exchange any ship, vessel, or boat, of what kind or description soever, or any tackle, apparel, or furniture, used, or which may be used, by any ship, vessel, or boat; or any seines, nets, or other implements or utensils, used, or which may be used, in catching or curing fish, or any kind of bait whatsoever, used, or which may be used, in the catching of fish; or any kind of fish, oil, blubber, seal skins, peltry, fuel, wood, or timber, to or with any person or persons whatsoever, other than the subjects of His Majesty, his heirs and successors.

129 This statute (as well as that of 1699) was in force at the date of the 1818 treaty.

1818.—During the negotiations which preceded the treaty of this year, the United States Commissioners proposed that American fishermen should have liberty to enter the bays on the non-treaty coasts

for the purpose of purchasing bait. This was rejected by the British Commissioners, and the right of access to those coasts was limited to the four purposes specified in the treaty.

The British Commissioners, on their part, proposed clauses for the prevention of smuggling, but these were objected to by the Americans on the ground that they would expose fishermen to endless vexation, and were not pressed. At the time of these negotiations no American vessel had liberty to trade with the British colonies.

1819.—The Statute 59 Geo. III, cap. 38, was passed to give effect to the convention.

INSTRUCTIONS OF LORD BATHURST.

On the 21st June, Lord Bathurst addressed a despatch to Sir C. Hamilton (Governor of Newfoundland) in which he explained the effect of the treaty, and particularly instructed the Governor to see that no attempts were made to carry on trade under the pretence of exercising the rights conferred by it. He said (App., p. 99) :—

You will, in the first place, observe that the privilege granted to the citizens of the United States is one purely of fishery and of drying and curing fish within the limits severally specified in the convention. It is the pleasure of His Royal Highness that this privilege, as limited by the convention, should be fully and freely enjoyed by them without any hindrance or interference; but you will, at the same time, remark that all attempts to carry on trade, or to introduce articles for sale or barter into His Majesty's possessions under the pretence of exercising the rights conferred by the convention, is in every respect at variance with its stipulations.

ARRANGEMENTS OF 1830.

1830.—Reciprocal trading facilities were arranged. They were given effect to by an Order-in-Council of His Majesty and a proclamation of the President of the United States, but there was no treaty or agreement, and neither party acquired as against the other any right to a continuation of the facilities given. The Order-in-Council contained the following provision (App., p. 570) :

And His Majesty doth further, by the advice aforesaid and in pursuance of the powers aforesaid, declare that the ships of and
 130 belonging to the said United States of America may import from the United States, aforesaid, into the British possessions abroad, goods, the produce of those States; and may export goods from the British possessions abroad to be carried to any foreign country whatever.

Under this arrangement American trading vessels for the first time obtained access to Canadian ports. The terms of the Order-in-Council show that it applied only to vessels engaged in trade, and that it did not affect the position under the Fisheries Convention.

1839.—Lieutenant-Commanding Paine of the United States Navy was sent to the British fishing grounds to observe British enforcement of the limitations of the treaty. Upon returning, he reported that the British authorities claimed (App., p. 121) to draw a line from headland to headland, the Americans not to approach within 3 miles of the line; and added that if the American contentions were upheld, it would be difficult for the British to prevent American fishermen (App., p. 122) procuring articles of convenience, and particularly bait, from which they are precluded by the convention.

RECIPROCITY TREATY, 1854.

1855–1866.—During this period the reciprocity treaty of 1854 was in operation. Under that treaty, the fisheries on the British North American coasts and on the United States coasts north of the 36th parallel of north latitude were open to the fishermen of both countries, and the scheduled articles, which included fish of all kinds, were admitted into each country free of duty. During this period no restriction was placed on the purchase by fishermen of bait or other articles for the purpose of their fishing operations.

LICENSES, 1866–1870.

1866–1870.—The treaty of 1854 came to an end in 1866, but the fact that the United States fishermen had enjoyed the privilege of fishing on the non-treaty coasts for the preceding eleven years made its withdrawal a matter of some difficulty, and not the less because negotiations were on foot for renewal of the treaty. The British North American provinces therefore sanctioned the continuation of this privilege under a system of licenses, for which the fishermen were required to pay a small tonnage fee—fifty cents in 1866; a
 131 dollar in 1867; and two dollars in each of the two succeeding years. The same absence of restriction with regard to the purchase of bait and other articles which had prevailed during the continuation of the reciprocity treaty was continued to the holders of such licenses.

ENFORCEMENT, 1870–1871.

1870–1871.—Many of the United States fishermen having neglected to take out licenses, the system was ended, and the exclusion from all but the treaty rights recommended. The restrictions on the purchase of bait and other traffic revived. Seizures were made; and shortly prior to the making of a new treaty (1871) two decisions were given which are of some historical importance. In one of them, the “J. H. Nickerson,” Sir William Young, Judge in Vice-Admiralty

in Nova Scotia, held that purchasing bait in British waters was a breach of the existing statutes; and in the other, the "White Fawn," Judge Hazen, of New Brunswick, held that it was not. The statutes then in force were the British statute 59 Geo. III, cap. 38 (1819) (App., p. 565), and the Canadian statutes 31 Vict., cap. 61 (1868) (App., p. 628), and 33 Vict., cap. 15 (1870) (App., p. 630), which provided penalties against foreign vessels—

found fishing, or preparing to fish, or to have been fishing in British waters. One judge thought that purchasing bait was "preparing to fish," and the other judge thought it was not.

LORD KIMBERLEY, 1871.

1871.—In this year, in the course of prolonged negotiations for a renewal of reciprocal trade arrangements between Canada and the United States, as well as for the settlement of the Alabama claims, a despatch was written by Lord Kimberley (Colonial Secretary) to the Governor-General of Canada to which it seems right to refer. In the course of that despatch his Lordship dealt with the right to exclude American fishermen to a distance of 3 miles from the coasts and the question of the extent of bays and creeks, and then proceeded as follows (App., p. 246) :—

The exclusion of American fishermen from resorting to Canadian ports, "except for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water," might be warranted by the letter of the treaty of 1818, and by the terms of the Imperial Act 59 George III, cap. 38, but Her Majesty's Government feel bound to state that it seems to them an extreme measure, inconsistent with the general policy of the Empire, and they are disposed to concede this point to the United States' Government, under
 132 such restrictions as may be necessary to prevent smuggling, and to guard against any substantial invasion of the exclusive rights of fishing which may be reserved to British subjects.

It is obvious that the passage has no bearing on the question now under discussion. It deals not with the alleged rights of trading claimed for fishing-vessels on the treaty coasts, but with the proviso for entry by American fishermen for the purpose of shelter, of repairing damages and of obtaining wood and water, into the bays and harbours, with regard to which the United States renounced all liberties theretofore claimed in respect of the taking, drying or curing of fish by American fishermen. Lord Kimberley merely states that Her Majesty's Government are disposed to relax the enforcement of the terms of the proviso under such restrictions as are necessary to prevent smuggling and to obviate any invasion of the exclusive rights of British subjects to fish in these waters. No arrangement to this effect was ever arrived at, and so far from

waiving the rights of Great Britain in respect of the non-treaty coasts, this letter amounts to an assertion of these rights, which can be got rid of only by amicable arrangement. It is submitted that neither on the treaty, nor on the non-treaty coasts, have the American fishermen any right to purchase bait or otherwise to traffic on British territory.

At the time this letter was written the treaty of 1871 was under negotiation: it was signed three months later and ratified in the following June.

WASHINGTON TREATY, 1871.

1871-1885.—The treaty restored tranquillity, by again according to United States fishermen the larger liberties of fishing; certain trade privileges were given to the provinces, and they once more relaxed the restrictions against buying bait and other articles by the fishermen.

HALIFAX COMMISSION, 1877.

1877.—The same point that is now under discussion was raised before the Halifax Commission in 1877. The question before that Commission was what sum was payable by the United States Government to Great Britain in respect of the greater value of the concessions made by Great Britain as compared with those made by the United States. Great Britain argued that under the right to fish conceded by article 18 of the treaty of 1871 (which in this respect is substantially the same as the convention of 1818) American fishermen would be able to purchase bait and supplies and transship cargoes in British waters, and claimed compensation on that head. The United States Government, however, entirely disclaimed that construction of the treaty. They stated that no such right was intended to be implied from the mere grant of a right to fish. In the recapitulation of the argument at the end of the "Answer" filed by the United States Government is the following statement:—

Third. That the various incidental and reciprocal advantages of the treaty, such as the privileges of traffic, purchasing bait, and other supplies are not the subject of compensation; *because* the treaty of Washington confers no such rights on the inhabitants of the United States, who now enjoy them merely by sufferance, and who can at any time be deprived of them by the enforcement of existing laws, or the re-enactment of former oppressive Statutes."

The tribunal accepted this contention and held that it was not within their competence to award compensation on this head. Their decision was as follows (App., p. 263):—

^a United States Documents relating to the Fishery Controversy, vol. v, p. 136.

The commission, having considered the motion submitted by the agent of the United States at the conference held on the 1st instant, decided:—

That it is not within the competence of this tribunal to award compensation for commercial intercourse between the two countries, nor for the purchasing bait, ice, supplies, &c., &c., nor for the permission to transship cargoes in British waters.

Sir Alexander T. Galt (the Canadian commissioner), in giving the reasons for his decision, said (App., p. 265):—

But I am now met by the most authoritative statement as to what were the intentions of the parties to the treaty. There can be no stronger or better evidence of what the United States proposed to acquire under the Washington Treaty than the authoritative statement which has been made by their agent before us here and by their counsel. We are now distinctly told that it was not the intention of the United States in any way, by that treaty, to provide for the continuation of these incidental privileges, and that the United States are prepared to take the whole responsibility and to run all the risk of the re-enactment of the vexatious statutes, to which reference has been made.

1885.—Fourteen years after the making of the 1871 treaty, 134 its fishery clauses were terminated by the United States, but a *modus vivendi* was arranged for the season of 1885.

CANADIAN ACTION, 1886.

1886.—On the termination of the arrangements, the parties were thrown back on their rights under the treaty: British rights were strictly enforced, and American fishing vessels were seized for offences against the fisheries laws. Canada passed the statute 49 Vict., cap. 114 (1886) (App., p. 631); the Department of Marine issued a “warning” (5th March, 1886) (App., p. 296); and the Department of Customs issued a circular (7th March). A correspondence then ensued between Great Britain and the United States, to which attention will presently be invited.

The Canadian statute provided that (App., p. 632)—
if such ship, vessel, or boat is foreign, or not navigated according to the laws of the United Kingdom or of Canada, and (a) has been found fishing, or preparing to fish, or to have been fishing in the British waters within three marine miles of any of the coasts, bays, creeks, or harbours of Canada, not included within the above-mentioned limits, without a licence, or after the expiration of the term named in the last licence granted to such ship, vessel, or boat under the first section of this Act; or (b) has entered such waters for any purpose not permitted by treaty or convention, or by any law of the United Kingdom or of Canada for the time being in force, such ship, vessel or boat, and the tackle, rigging, apparel, furniture, stores, and cargo thereof shall be forfeited.

The clause (b) of this statute was new legislation. The judges, as has been stated, had disagreed as to whether purchasing bait could be stopped under statutes which forbade "preparing to fish." It was now included in the general prohibition. A despatch from the Governor-General of Canada to the Colonial Secretary (19th May, 1886) explains the situation:—

Your Lordship is no doubt aware that the decisions of the Canadian Courts leave it open to question whether the purchase of bait in Canadian water does or does not constitute a preparation to fish within the meaning of the Imperial Act of 1819, and the Canadian statute which it is now sought to amend. The decision of Chief Justice Sir W. Young in the Vice-Admiralty Court of Nova Scotia given in November 1871, in the case of the fishing-schooner "Nickerson," was to the effect that the purchase of bait constituted such a preparation to fish within Canadian waters. The same point had, however, previously arisen in February 1871, in the case of the American fishing-vessel "White Fawn," when Mr. Justice
135 Hazen decided that the purchase of bait within the 3-mile limit was not of itself a proof that the vessel was preparing to fish illegally within that limit.

There being therefore some doubt whether the intention of the convention of 1818 is effectually carried out either by the Imperial or the Canadian Acts referred to, it has been thought desirable by my Government to have recourse to legislation removing all doubt as to the liability to forfeiture of all foreign fishing-vessels resorting to Canadian waters for purposes not permitted by law or by treaty.^a

UNITED STATES STATUTES, 1887.

Thereupon the United States passed a statute which contained the following provision (App., p. 792):—

That whenever the President of the United States shall be satisfied that American fishing vessels or American fishermen, visiting or being in the waters or at any ports or places of the British dominions of North America, are or then lately have been denied or abridged in the enjoyment of any rights secured to them by treaty or law, or are or then lately have unjustly vexed or harassed in the enjoyment of such rights, or subjected to unreasonable restrictions, regulations, or requirements in respect of such rights; or otherwise unjustly vexed or harassed in said waters, ports or places; or whenever the President of the United States shall be satisfied that any such fishing vessels or fishermen, having a permit under the laws of the United States to touch and trade at any port or ports, place or places in the British dominions of North America, are or then lately have been denied the privilege of entering such port or ports, place or places in the same manner and under the same regulations as may exist therein applicable to trading vessels of the most favoured nation, or shall be unjustly vexed or harassed in respect thereof, or otherwise be unjustly vexed or harassed therein, or shall be pre-

^a Can. Sess. Pap. 1887, No. 16, p. 56.

vented from purchasing such supplies as may there be lawfully sold to trading vessels of the most favoured nation or whenever the President of the United States shall be satisfied that any other vessels of the United States, their masters or crews, so arriving at or being in such British waters or ports or places of the British dominions of North America, are or then lately have been denied any of the privileges therein accorded to the vessels, their masters or crews, of the most favoured nation, or unjustly vexed or harassed in respect of the same, or unjustly vexed or harassed therein by the authorities thereof, then, and in either or all of such cases, it shall be lawful, and it shall be the duty of the President of the United States, in his discretion, by proclamation to that effect, to deny vessels, their masters and crews, of the British dominions of North America, any entrance into the waters, ports, or places of, or within the United States (with
 136 such exceptions in regard to vessels in distress, stress of weather, or needing supplies as to the President shall seem proper), whether such vessels shall have come directly from said dominions on such destined voyage or by way of some port or place in such destined voyage elsewhere; and also to deny entry into any port or place of the United States of fresh fish or salt fish or any other product of said dominions, or other goods coming from said dominions to the United States.

1887.—Newfoundland passed a statute by which it was provided that no person (without a licence) should export or catch or sell, for the purpose of exportation, any herring, caplin, squid, or other bait fishes. (App., p. 711.)

1888.—A convention was negotiated known as the Chamberlain-Bayard convention. It provided for the settlement of the question as to bays; and, in exchange for the removal by the United States of customs duties upon fish and certain fish products, it was agreed that (App., pp. 42, 44)—

the privilege of entering the ports, bays, and harbours of the Atlantic coasts of Canada and Newfoundland shall be granted to United States fishing-vessels by annual licences, free of charge, for the following purposes, namely:—

1. The purchase of provisions, bait, ice, seines, lines, and all other supplies and outfits;
2. Transhipment of catch, for transport by any means of conveyance;
3. Shipping of crews.

The United States Senate declined to ratify this convention, and it therefore never became operative.

The negotiators however had provided for a *modus vivendi* pending legislative action with regard to the convention, as follows (App., p. 427):—

1. For a period not exceeding two years from the present date, the privilege of entering the bays and harbours of the Atlantic coasts of Canada and of Newfoundland shall be granted to United States

fishing-vessels by annual licences at a fee of \$1½ per ton, for the following purposes:—

The purchase of bait, ice, seines, lines, and all other supplies and Transhipment of catch and shipping of crews.

2. If, during the continuance of this arrangement, the United States should remove the duties on fish, fish-oil, whale, and seal oil (and their coverings, packages, &c.), the said licences shall be issued free of charge.

This arrangement is still in operation in Canada. Under it
137 American fishermen have taken out licences entitling them to the privileges mentioned on payment of annual licence fees. Between the years 1888 and 1907 American fishermen have thus paid over 165,000 dollars to Canada alone for the enjoyment of some of the commercial privileges to which they now assert a right. Similar privileges were conceded in Newfoundland until 1905 under various statutes of that colony, for which, since 1888, American fishermen have paid over 120,000 dollars.

1888.—Newfoundland passed a statute providing for the issue of licenses (App., p. 712.)—

to purchase herring, caplin, squid, or other bait fishes to be used by the purchasers *bonâ fide* for the purposes of bait in the prosecution of the fishery upon or adjacent to the coasts of this colony or its dependencies or of the bank fishery.

1889.—Newfoundland passed a statute (known as “The Bait Act,” 52 Vic., cap. 6) amending and consolidating the two previous statutes. It prohibited (without licence) the export of bait fishes, either for consumption or as bait. (App., p. 713.)

1890.—A convention known as the Bond-Blaine convention was arranged between the United States and Newfoundland. It never became effective. In return for entry into the United States of certain fish and fish products free of duty, Newfoundland agreed as follows (App., p. 45):—

United States fishing vessels entering the waters of Newfoundland shall have the privilege of purchasing herring, caplin, squid, and other bait fishes at all times on the same terms and conditions and subject to the same penalties in all respects as Newfoundland vessels. They shall also have the privilege of touching and trading, selling fish and oil, and procuring supplies in Newfoundland, conforming to the harbour regulations, but without other charge than the payment of such light, harbour, and custom dues as are or may be levied on Newfoundland fishing-vessels.

1893.—Newfoundland passed a statute having for its object the prohibition (without licence) of:—

1. The sale to foreigners of “herring, caplin, squid, or other bait fishes, ice, lines, seines, or other outfit or supplies for the fishery.” (App., p. 730.)

2. The engagement within British waters of persons to form part of the crew.

138 Although these Newfoundland statutes were declared not to "affect the rights and privileges granted by treaty to the subjects of any State in amity with Her Majesty," all American fishing vessels have conformed to their provisions, paid the licence fees, and taken out licences. No diplomatic complaint of these statutes was made until after 1905.

1902.—A convention, known as the Bond-Hay convention, was negotiated. It gave to the United States fishermen the right of purchasing bait, &c., in Newfoundland waters, on paying light, harbour, and customs dues, in return for other concessions. This convention has never been ratified by the United States. (App., p. 46.)

1905.—The licence system embodied in the Newfoundland statutes above referred to came to an end in this year when an Act, 5 Ed. VII, c. 4, was passed by the Legislature of that Colony prohibiting altogether the sale of bait, ice, lines, seines, or other outfits or supplies to foreign fishing-vessels, and the engagement by them of crews within Newfoundland waters. (App., p. 757.)

1906.—In 1906, the Act of 1905 was repealed and re-enacted with some amendments by the Foreign Fishing Vessels Act, 1906, but this latter statute has not been put into operation. Matters have gone on under a *modus vivendi* from year to year. Meantime correspondence has taken place which has led to the present reference to The Hague Tribunal. (App., p. 758.)

DISCUSSIONS, 1886–1888.

Reference has already been made to the correspondence which commenced between the two Governments in 1886 in regard to the position of American fishing vessels in Canadian ports. In that year the *modus vivendi* arranged on the termination of the treaty of Washington had itself come to an end, and the parties reverted to their rights under the treaty of 1818.

Canada proceeded to enforce her fishery laws, and American vessels were seized and proceeded against for infringement of those laws. The material portions of the correspondence which ensued are set out in the appendix, but it will be convenient to call attention to the more important documents. To a great extent they deal with the facts of particular cases which it is not necessary to examine before this Tribunal, but the general question is fully discussed in them.

139 On the 10th May, 1886, Mr. Bayard, writing to Sir L. S. S. West, the British Minister at Washington, contended that vessels engaged in deep sea fishing ought not to be prevented from buying bait in Canadian ports, and claimed for them the same cus-

tomary rights and privileges as were accorded to trading-vessels; but the claim was based on considerations of friendliness and courtesy rather than on legal right. (App., p. 298.)

On the 24th May, Mr. Phelps, the United States Minister in London, called on Lord Rosebery, then Her Majesty's Secretary of State for Foreign Affairs, and the conversation between them is recorded by Lord Rosebery in a letter of the same date to Sir L. S. S. West (App., p. 304):—

Mr. Phelps went on to argue the construction of the treaty of 1818, and said that though, at a first glance, its provisions might seem to justify the Canadian authorities in the course which they had taken, a general view of its whole scope contradicted that assumption, which, in any case, was inconsistent with the cordial relations existing between the two countries. In reply, I reminded Mr. Phelps that that treaty was concluded at a time when, after a war and a period of great bitterness, the relations between Great Britain and the United States were not so cordial as they are now.

As regarded the construction of the treaty, I could not presume to argue with so eminent a lawyer as himself; I could not, however, refrain from expressing the opinion that the plain English of the clause seemed to me entirely to support the Canadian view.

On the 29th May (1886) another interview took place between the same parties, and is recorded in a letter to Sir L. S. S. West (App., p. 310):—

The American Minister called on me to-day. . . .

He again discussed at some length the provisions of the treaty of 1818, and said that the newspapers which had reached him from America treated the matter as of little moment, because the British Government were sure not to support the action of the Canadian administration. He also alluded to a correspondence with Lord Kimberley in 1871, in which Lord Kimberley stated that the Imperial Government was the sole interpreter of the British view of Imperial treaties, and that they were not able to support the Canadian view of the bait clause. Mr. Phelps finally urged that the action of the Canadian Government should be suspended, which would then conduce to a friendly state of matters, which might enable negotiations to be resumed.

I replied to Mr. Phelps that, as regards the strict interpretation of the treaty of 1818, I was in the unfortunate position that there were not two opinions in this country on the matter, and that the

140 Canadian view was held by all authorities to be legally correct.

If we are now under the provisions of the treaty of 1818. it was by the action, not of Her Majesty's Government, or of the Canadian Government, but by the wish of the United States. I had offered to endeavour to procure the prolongation of the temporary arrangement of last year, in order to allow an opportunity for negotiating, and that had been refused. A joint commission had been refused, and, in fact, as any arrangement, either temporary or permanent, had been rejected by the United States, it was not a matter of option but a matter of course that we returned to the existing treaty. As to

Lord Kimberley's view I had had no explanation from him on that point, and of course I entirely concurred with his opinion that the British Government were the interpreters of the British view of Imperial treaties.

On the same day (29th May, 1886) Mr. Bayard wrote to protest against the Canadian statute of 1886. He described Canada's action as "arbitrary, unlawful, unwarranted, and unfriendly," and as "flagrantly violative of the reciprocal commercial privileges to which citizens of the United States are lawfully entitled under statutes of Great Britain, and the well-defined and publicly proclaimed authority of both countries, besides being in respect of the existing conventions between the two countries, an assumption of jurisdiction entirely unwarranted and which is wholly denied by the United States." (App., p. 311.)

On the 2nd June (1886) Mr. Phelps, in a letter to Lord Rosebery, discussed the treaty of 1818 at length. He said (App., p. 312):—

Recurring, then, to the only real question in the case, whether the vessel is to be forfeited for purchasing bait of an inhabitant of Nova Scotia to be used in lawful fishing, it may be readily admitted that, if the language of the treaty of 1818 is to be interpreted literally, rather than according to its spirit and plain intent, a vessel engaged in fishing would be prohibited from entering a Canadian port "for any purpose whatever," except to obtain wood or water, to repair damages, or to seek shelter. Whether it would be liable to the extreme penalty of confiscation for a breach of this prohibition, in a trifling and harmless instance, might be quite another question.

Such a literal construction is best refuted by considering its preposterous consequences. If a vessel enters a port to post a letter, or send a telegram, or buy a newspaper, to obtain a physician in case of illness, or a surgeon in case of accident, to land or bring off a passenger, or even to lend assistance to the inhabitants in fire, flood, or pestilence, it would, upon this construction, be held to violate the treaty stipulations maintained between two enlightened, mari-

141 time, and most friendly nations, whose ports are freely open to each other in all other places and under all other circumstances. If a vessel is not engaged in fishing, she may enter all ports. But if employed in fishing, not denied to be lawful, she is excluded, though on the most innocent errand. She may buy water, but not food or medicine; wood, but not coal. She may repair rigging, but not purchase a new rope, though the inhabitants are desirous to sell it. If she even entered the port (having no other business) to report herself to the custom-house, as the vessel in question is now seized for not doing, she would be equally within the interdiction of the treaty. If it be said these are extreme instances of violation of the treaty, not likely to be insisted on, I reply that no one of them is more extreme than the one relied upon in this case.

It will be observed that this argument did not take into consideration the fact that in 1818 United States vessels had not the right to enter British ports or territory.

CANADIAN DOCUMENTS.

Mr. Bayard's letter of the 10th May (*ante*) was dealt with in a report of the Canadian Minister of Justice (May 1886) and by a Canadian Order-in-Council (14th June, 1886). (App., p. 305.) Mr. Phelps' letter of the 2nd June (*ante*) (App., p. 319) was the subject of a further report by the Canadian Minister of Justice (22nd July). (App., p. 330.) The attention of the Tribunal is invited to these documents.

The correspondence was continued during the remainder of 1886 and during 1887, but the main contentions are sufficiently stated in the letters and documents to which reference has been made.

MR. MANNING'S REPORT, 1887.

In the report by Mr. Daniel Manning, United States Secretary of the Treasury, to the Speaker of the House of Representatives (10th January, 1887) is the following (App., p. 373) :—

American fishing-vessels duly authenticated by this department, and having a permit "to touch and trade," should be permitted to visit Canadian ports and buy supplies, and enjoy ordinary commercial privileges, unless such a right is withheld in our ports from Canadian vessels. That right is denied by the Privy Council and the Governor-General of the Canadian Dominion upon the ground that it would be in effect a *pro tanto* abrogation of the treaty of 1818. That contention is an error, in the opinion of this department, because the treaty of 1818 has no application to the subject-matter.

UNITED STATES HOUSE OF REPRESENTATIVES, 1887.

To the same effect was the report of a committee of the House of Representatives (18th January, 1887) :—

142 It is to be assumed that when this treaty of 1818 was signed, the British statutes of Charles II, in restraint of navigation, the rudiments of which are to be seen in 1650, and were aimed at Dutch trade with British sugar colonies, were, on the English side, rigorously enforced, so that no merchandise could be lawfully imported into Canadian ports excepting in English bottoms. The treaty of 1818 was concluded on the 20th October of that year, but ratifications were not exchanged till the 30th January, 1819. Certainly on our side there was then in force legislative restriction on navigation almost as severe as was the English enactment after the restoration of Charles II. America had not then emerged from the era of the embargo, Berlin and Milan decrees, and the influences of the war of 1812. On 18th April, 1818, the President approved a law closing our ports after the 30th September, 1818, against British vessels coming from a colony which, by the ordinary laws, is closed against American vessels. Touching at a port open to American vessels could not modify the restriction. Vessels and cargoes entering,

or attempting to enter, in violation of the law were forfeitable. And any English vessel that could lawfully enter our ports was compelled to give a bond, if laden outward with American products, not to land them in a British colony or territory from which American vessels were excluded. The presumption is, that quite independently of fishing rights and liberties, no American vessel was for long before, and after, 1818 permitted by English law to touch and trade in Canadian ports. (App., p. 378.)

* * * * *

It may be conceded that, apart from the right of American fishermen to take fish of all kinds within certain clearly defined British waters, American deep-sea fishermen have no greater rights, by treaty or public law, in British ports, than British fishermen have in American ports, so far as concerns revenue police, maritime tolls or taxes, pilotage, light-houses, quarantine, and all matters of ceremonial. (App., p. 382.)

* * * * *

The treaty of 1818 gave rights of fishing independent of general commercial rights, although it may be said that as to shelter, repairs, wood, and water, the treaty did give to fishermen certain commercial rights, or rather a few rights of humanity. The treaty did not restrain the granting or the exercising of commercial rights. The right, if it be a right, of an American to buy anything in Canada does not come of the inshore fishing treaty of 1818. (App., p. 382.)

UNITED STATES SENATE, 1887.

In a report dated the 19th January, 1887, the committee for foreign relations of the Senate, after referring to the article of the treaty of 1783, said (App., p. 387):—

143 This article, it will be observed, recognised an existing right and practice in respect of American fishermen exercising their calling not only at sea on the banks of Newfoundland, but in all places in the sea within what would be strictly British waters. And it will be observed also that this treaty said nothing on the subject of commercial intercourse between the people of the United States and those of the British provinces. (App., p. 397.)

* * * * *

The treaties between the United States and Great Britain on the subject of intercommunication, and the rights of the citizens and subjects of the one in the ports and territories of the other have not included the British dominions of North America (with possibly certain exceptions as to intercourse by land), and such intercourse, strangely enough, still remains the subject of legislation merely in the two countries.

In the debate in the United States Senate of 24th January 1887 Senator Evarts said that—

the settled opinion of the Government now is that the treaty of 1818 is nothing but a fishing treaty and not a commercial treaty at all. It is regulative of the fishing interest as there described as the subject-

matter, and the basis of all the provisions that have entered into that treaty. It is not a restriction of commerce at all; it is an enlargement of mere fishing rights under the very limited allowance of shelter and repairs and procuring wood.^a

UNITED STATES SENATE, 1888.

A second report was issued by the Senate Committee on the 7th May, 1888. A large part of it was devoted to proving (App., p. 435)—

1. That at the date of the treaty (1818) no American vessels of any kind (with certain unimportant exceptions) had any right of admission for any purposes into British waters or ports.

2. That the renunciation in the treaty, therefore, applied to fishing-vessels—the only vessels that could have had any pretence of a claim of entry.

3. That the treaty “had no relation, one way or the other, to the exercise of what may be called commercial rights.”

4. That “the right of the British to exclude” all American vessels “from ~~her~~ ports in British North America, as the matter stood until 1830, is fully conceded.”

Some extracts from the report may be useful (App., p. 436) :—

The commercial treaty concluded on the 3rd July, 1815, between the two countries provided for reciprocal liberty of commerce between all the territories of Great Britain in Europe and the territories of the United States, but left without any new treaty, stipulation or obligation, commercial intercourse between British dominions in North America and the United States remaining under the exclusive control of each.

* * * * *

It will be observed that the ancient right continued in all its force in every bay, harbour, and creek of a described territory, and that the renunciation of the right to fish on other coasts, bays, harbours, and creeks is in the same language, and is perfectly correlative to the first, and that the line of British Municipal Dominion was recognised and stated to be a line 3 marine miles from these British coasts, bays, creeks, and harbours, and that this renunciation was, both in substance and form, a renunciation only of a right to *fish* and to exercise the incidents of the fishing, as drying, &c., and that the proviso to that renunciation admitted the American fishermen to enter such waters, bays, and harbours for the specific purposes necessary to them in their character as fishermen only, and not having the slightest reference, either expressly or by implication, to any *fishing* or *other* vessel of the United States, and sailing under their flag, entering any port of His Majesty's Dominions anywhere for any commercial or trading purpose. (App., p. 436.)

* * * * *

^a Congressional Record, vol. xviii, p. 941.

It is to be kept clearly in view that at the time of the conclusion of this treaty of 1818, and for twelve years afterward, no American vessel had any right to enter any port of British North America with the few exceptions named in the mutual arrangements of 1820 and 1823 hereinafter stated. The treaty of 1815, and the British laws and policy, reserved the whole trade and intercourse with the ports of these colonies to her own vessels, and reciprocally there was no law or treaty of the United States which authorised the entry into ports (with the exceptions stated) of the United States of British vessels from British North American ports.

Thus it was that the treaty of 1818 omitted to make any mention of the ports in the British provinces in connection with the arrival or departure of American vessels, either fishing or other, and so it was a clear and necessary construction of the treaty of 1818 that the arrangements, conditions, and renunciations therein provided had no relation, one way or the other, to the exercise of what may be called commercial rights by the American fishing or other vessels in the waters or ports of British North America, for the *status* of things was such that it could not be done in the case of *any* American vessel without regard to her character as a vessel engaged in fishing upon the high seas or in the British territorial waters, wherein, as was provided, she might continue to fish, or to her commercial character. (App., p. 437.)

The right (except in the cases before stated) of the British to exclude such vessels and all others of the United States from her ports in British North America, as the matter stood until 1830, 145 is fully conceded; and it is also conceded that during that time the only right of any vessel of the United States to enter the waters of British North America depended upon the treaty of 1818 alone, and, in order to obtain the benefit of that treaty for such purposes, the American vessel *must* have been a fishing-vessel, and must have resorted to those particular waters for some one of the purposes mentioned in the treaty and no others.

* * * * *

In 1818, then, no American fishing-vessel or any other American vessel could enter a port on any of the coasts of British North America, even where the full right of fishing inshore existed. And the treaty of 1818, formed on that basis, was not intended to, and it did not in any way touch the question of any trade or commercial right whatever, and of course made no distinction in these respects between fishing and other American vessels. (App., p. 444.)

A minority of the Senate Committee presented a separate report which deserves consideration. They, too, agreed that, upon the treaty of 1818, no right to commercial privileges could be based, and said:—

Can we ever hope to engraft on the treaty of 1818 any new agreement for commercial privileges to our fishermen, without giving an equivalent in some liberty or privilege that Great Britain will claim for her fishermen? This question is answered by the fact that we renounced in 1818 the best part of the fisheries that were of the fruits of the war for independence in order to make the residue a permanent right; and in 1854 and 1871 we agreed to pay heavily for a temporary suspension of the restrictions and limitations of the

treaty of 1818. We have made four fisheries treaties with Great Britain, in 1783, 1818, 1854, and 1871, and in none of them has any commercial privilege been secured to our fishermen. No serious effort has been made to secure such privileges prior to the negotiation now before the Senate. (App., p. 467.)

UNITED STATES CONTENTIONS.

The contentions of the United States are set out at length in these discussions, but His Majesty's Government find some difficulty in appreciating the exact ground on which the right to commercial facilities for American fishing-vessels is to be supported before this Tribunal. The treaty gives no right to those facilities. His Majesty's Government contend that the treaty was framed on the assumption that no such right existed, and that to grant such facilities would be to alter the character of the liberties granted by it; but, be that as it may, it is certain that the treaty itself confers no commercial rights. Yet, apart from the treaty, there is no agreement between the two Governments under which this right can be claimed. The Order-in-Council of 1830 manifestly applies to trading-vessels only, and no suggestion was ever made that it applied to fishing-vessels until the controversy of 1886. The position taken by the United States Government before the Halifax Commission is proof, if proof be needed, that no agreement as to fishing-vessels existed at that time. And the fact that American fishermen have paid licence fees for the last twenty years in order to obtain certain limited trade privileges is consistent only with the same conclusion. His Majesty's Government content themselves, therefore, on the present occasion with stating the argument in support of their own view, reserving to themselves the liberty to deal with the contention of the United States when that contention has been more exactly stated in the Case presented to the Tribunal.

ARGUMENT OF GREAT BRITAIN.

TREATY OF 1818.

1. The treaty of 1818 does not confer any liberty to trade. On the contrary, it specifies certain limited purposes for which the use of the British shores is permitted, and the clear intention is that American fishermen should have no other liberties on those shores. At the date of the treaty no American vessel had a right to enter any port in British North America for commercial purposes. Those ports were absolutely closed to American traders, just as the ports of the United States were closed to British traders. The treaty made an exception to this general prohibition, and permitted vessels of a particular kind, to wit, fishing-vessels, to have access to the British

shores for certain limited purposes, but it did not do away with the general prohibition against entry for other purposes; it did not confer on fishing-vessels those commercial privileges which were denied at that time, and for years afterwards, to vessels of all other kinds.

COMMERCIAL FACILITIES WOULD ALTER CHARACTER OF TREATY LIBERTIES.

2. A liberty to exercise commercial privileges is not in accordance with the tenour of the treaty. It would enable American
147 fishermen to establish the head-quarters of their industry on British soil. Liberty for fishermen of another country to participate in shore fisheries is one thing: liberty to make those shores the bases of their fishing business is a distinct and much more extensive concession. No such grant as this was contemplated in 1818. The right to use the shores was given for specified purposes only, and subject to special limitations. The claim to trading privileges is a claim to have the use of the shores for purposes other than those specified, and subject to no limitations.

NO RIGHT APART FROM TREATY.

3. Apart from the treaty of 1818, there is no treaty or agreement under which American fishermen can claim to exercise any rights in British territorial waters. There has been a succession of temporary arrangements relating to fisheries extending over a long course of years, and liberty to trade for purposes connected with fishing operations has been generally conceded during the continuance of these arrangements. But these concessions were merely voluntary and terminable at will, and there can not be any obligation on Great Britain to give to fishing-vessels the same commercial privileges as are accorded as a matter of comity to trading-vessels.

U. S. CONTENTION IN HALIFAX ARBITRATION.

4. The Government of the United States have themselves urged before the Halifax Commission that the privileges of traffic, purchasing bait and other supplies have been enjoyed by the inhabitants of the United States on sufferance, and that they could at any time be deprived of them by British legislation, and this contention was accepted and acted on by the Commissioners. They further asserted that a liberty to fish does not carry with it any right to buy bait, ice, or supplies, or to transship cargoes. (App., p. 254.)

COMMERCIAL PRIVILEGES CANNOT BE CLAIMED AS OF RIGHT UNDER INTERNATIONAL LAW.

5. There is no principle of the law of nations under which commercial privileges can be claimed as of right. It is within the power of a State to close its ports to foreign trade, or to any particular class of foreign trade, as it may please; it is equally within its power

to permit that trade, subject to such restrictions and conditions as it may think proper to prescribe. The question before this Tribunal is one not of policy but of law, and Great Britain cannot assent to the proposition that she is compelled to grant commercial facilities as a matter of law.

COMITY.

148 6. It has been urged in the course of the discussions which have taken place on this question that commercial facilities ought to be granted on the ground of "comity," or, as it has been otherwise put, of "good neighbourhood." Such considerations cannot be appealed to in support of a claim of right such as is now advanced before this Tribunal. But it may be observed that such general considerations cannot apply in the case of vessels coming into British waters to fish on terms and subject to conditions specifically defined by agreement, and that the concession to American fishermen of the same commercial facilities as are accorded to trading-vessels would have the effect of altering the whole character of the liberties granted by the treaty of 1818, and of removing limitations expressly imposed by the treaty.

DISTINCTION BETWEEN FISHING AND TRADING VESSELS.

7. If the liberty to trade be not claimed as incidental to the liberty to fish given by the treaty (and it has been pointed out that the United States have expressly disclaimed this view), then it must be claimed on some ground common to all trading vessels, and can no longer be limited to trading for the purpose of fishing operations; it is a claim to carry on trade of every kind that is permitted in the case of other vessels. The point is of importance, because the distinction between vessels engaged in trade and vessels engaged in fishing, is one that it is necessary to maintain for revenue, if for no other purposes. Trading vessels proceed on definite voyages; they clear for particular ports, their movements are known, and can be watched. Fishing vessels do not comply with any of these conditions. They proceed on no definite voyages, they clear for no particular ports—on the contrary, they enter one harbour after another according to the needs of the moment, their movements are not known and cannot be watched. It would be impossible to take effective measures for the prevention of smuggling if the same foreign vessels were allowed to trade as well as to fish in British waters. This observation is forcibly illustrated by the claim which is put forward on behalf of the United States that fishing-vessels are exempt from any duty to report at custom-houses.

OPINION OF MR. POMEROY.

8. Mr. Pomeroy, an American jurist of repute, deals with this aspect of the case in a passage which deserves consideration.

149 He first discusses the negotiations of 1818, and gives his opinion that Great Britain is not estopped from opposing the present claim by anything that occurred preliminary to the treaty. He continues as follows:—

We must fall back, then, upon the accepted doctrines of international law. Every nation has the undoubted right to prescribe such regulations of commerce carried on in its waters, and with its citizens, as it deems expedient, even to the extent of excluding entirely some or all foreign vessels and merchandise. Such measures may be harsh, and under some circumstances a violation of inter-state comity, but they are not illegal. At all events, it does not become a Government to complain which now maintains a tariff prohibitory as to many articles, and which at one time passed a general embargo and non-intercourse Act. There seem to be special reasons why the Dominion authorities may inhibit general commerce by Americans engaged in fishing. Their vessels clear for no particular port; they are accustomed to enter one bay or harbour after another as their needs demand; they might thus carry on a coasting trade; they would certainly have every opportunity for successful smuggling. Indeed, this whole subject legitimately belongs to the local customs and revenue system, and not to the fisheries. We are thus forced to the conclusion that American fishermen have no right to enter the bays and harbours in question and sell goods or purchase supplies other than wood and water.^a

In a foot-note the author adds:—

The remarks in the text are based solely upon the fishery article of the treaty of 1818, without reference to any existing commercial conventions between the United States and Great Britain. It is possible that some provisions in the latter might require a modification of our conclusions.

MUNICIPAL LAW.

9. Reference has been made in the course of the discussions on this point to the statutes of Great Britain and of the colonies. But it is not material to discuss these enactments. Even if fishing vessels were entitled to trade under the provisions of the law as it stands, and that is a matter for the courts of the country to determine, there would be nothing, apart from treaty or agreement, to prevent the withdrawal of that right by subsequent legislation. The question before this Tribunal is one of international and not of municipal law.

CONCLUSIONS.

His Majesty's Government submit that Question No. 7 must be answered in the negative, because—

1. The treaty of 1818 did not confer any commercial privileges.
2. Apart from the treaty, American fishing-vessels are not, as a matter of right, entitled to the same commercial privileges as trading-vessels.

^a "Am. Law Rev.," vol. 5, pp. 414-5.

NORTH ATLANTIC COAST FISHERIES

APPENDIX TO THE CASE

PRESENTED ON THE PART OF

THE GOVERNMENT OF HIS
BRITANNIC MAJESTY

TO THE

TRIBUNAL CONSTITUTED UNDER AN AGREEMENT SIGNED
AT WASHINGTON ON THE 27TH DAY OF JANUARY,
1909, BETWEEN HIS BRITANNIC MAJESTY AND
THE UNITED STATES OF AMERICA

(IN THREE PARTS)

PART 1

REPORT OF THE

THE GOVERNMENT OF THE
DISTRICT OF COLUMBIA

OF THE
DEPARTMENT OF THE DISTRICT OF COLUMBIA
AND
THE DISTRICT OF COLUMBIA

1898

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Statement of Assets

As of the close of business on the 31st day of December, 1900

of the year ending December 31, 1900

Assets		Liabilities	
Cash	100.00	Accounts Payable	100.00
Accounts Receivable	100.00	Notes Payable	100.00
Inventory	100.00	Capital	100.00
Fixed Assets	100.00		
Land	100.00		
Buildings	100.00		
Equipment	100.00		
Other Assets	100.00		
Total	400.00	Total	400.00

PART I.

TREATIES AND CONVENTIONS.

No. 1.—Special agreement for the submission of questions relating to fisheries on the North Atlantic coast under the general convention of arbitration concluded between Great Britain and the United States on April 4, 1908.

ARTICLE 1.

Whereas by article 1 of the convention signed at London on the 20th day of October, 1818, between Great Britain and the United States, it was agreed as follows:—

Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry and cure fish on certain coasts, bays, harbours and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties, that the inhabitants of the said United States shall have for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coasts of Newfoundland, from the said Cape Ray to the Quirpon Islands on the shores of the Magdalen Islands, and also on the coasts, bays, harbours and creeks from Mount Joly on the southern coast of Labrador, to and through the Straits of Belleisle and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson Bay Company; and that the American fishermen shall also have liberty for ever, to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce for ever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on, or within 3 marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits; provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any

other manner whatever abusing the privileges hereby reserved to them.

And, whereas, differences have arisen as to the scope and meaning of the said article, and of the liberties therein referred to, and otherwise in respect of the rights and liberties which the inhabitants of the United States have or claim to have in the waters or on the shores therein referred to:

It is agreed that the following questions shall be submitted for decision to a tribunal of arbitration constituted as hereinafter provided:—

Question 1. To what extent are the following contentions or either of them justified?

It is contended on the part of Great Britain that the exercise of the liberty to take fish referred to in the said article, which the inhabitants of the United States have ever in common with the subjects of His Britannic Majesty, is subject, without the consent of the United States, to reasonable regulation by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or rules, as, for example, to regulations in respect of (1) the hours, days, or seasons when fish may be taken on the treaty coasts; (2) the method, means, and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts; (3) any other matters of a similar character relating to fishing; such regulations being reasonable, as being, for instance—

(a.) Appropriate or necessary for the protection and preservation of such fisheries and the exercise of the rights of British subjects therein and of the liberty which by the said article 1 the inhabitants of the United States have therein in common with British subjects;

2 (b.) Desirable on grounds of public order and morals.

(c.) Equitable and fair as between local fishermen and the inhabitants of the United States exercising the said treaty liberty and not so framed as to give unfairly an advantage to the former over the latter class.

It is contended on the part of the United States that the exercise of such liberty is not subject to limitations or restraints by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or regulations in respect of (1) the hours, days, or seasons when the inhabitants of the United States may take fish on the treaty coasts, or (2) the method, means, and implements used by them in taking fish or in carrying on fishing operations on such coasts, or (3) any other limitations or restraints of similar character—

(a.) Unless they are appropriate and necessary for the protection and preservation of the common rights in such fisheries and the exercise thereof; and

(b.) Unless they are reasonable in themselves and fair as between local fishermen and fishermen coming from the United States, and not so framed as to give an advantage to the former over the latter class; and

(c.) Unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement.

Question 2. Have the inhabitants of the United States, while exercising the liberties referred to in said article, a right to employ as

members of the fishing crews of their vessels persons not inhabitants of the United States?

Question 3. Can the exercise by the inhabitants of the United States of the liberties referred to in the said article be subjected, without the consent of the United States, to the requirements of entry or report at custom-houses or the payment of light or harbour or other dues, or to any other similar requirement or condition of exaction?

Question 4. Under the provision of the said article that the American fishermen shall be admitted to enter certain bays or harbours for shelter, repairs, wood, or water, and for no other purpose whatever, but that they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein or in any other manner whatever abusing the privileges thereby reserved to them, is it permissible to impose restrictions making the exercise of such privileges conditional upon the payment of light or harbour or other dues, or entering or reporting at custom-houses or any similar conditions?

Question 5. From where must be measured the "3 marine miles of any of the coasts, bays, creeks, or harbours" referred to in the said article?

Question 6. Have the inhabitants of the United States the liberty under the said article or otherwise to take fish in the bays, harbours, and creeks on that part of the southern coast of Newfoundland which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands, or on the Magdalen Islands.

Question 7. Are the inhabitants of the United States whose vessels resort to the treaty coasts for the purpose of exercising the liberties referred to in article 1 of the treaty of 1818 entitled to have for those vessels, when duly authorised by the United States in that behalf, the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading vessels generally?

ARTICLE 2.

Either party may call the attention of the tribunal to any legislative or executive act of the other party, specified within three months of the exchange of notes enforcing this agreement, and which is claimed to be inconsistent with the true interpretation of the treaty of 1818; and may call upon the tribunal to express in its award its opinion upon such acts, and to point out in what respects, if any, they are inconsistent with the principles laid down in the award in reply to the preceding questions; and each party agrees to conform to such opinion.

ARTICLE 3.

If any question arises in the arbitration regarding the reasonableness of any regulation or otherwise which requires an examination of the practical effect of any provisions in relation to the conditions surrounding the exercise of the liberty of fishery enjoyed by the inhabitants of the United States, or which requires expert information about the fisheries themselves, the tribunal may, in that case, refer such question to a commission of three expert specialists in such mat-

ters; one to be designated by each of the parties hereto, and the third, who shall not be a national of either party, to be designated by the tribunal. This commission shall examine into and report their conclusions on any question or questions so referred to it by the tribunal and such report shall be considered by the tribunal and shall, if incorporated by them in the award, be accepted as a part thereof.

Pending the report of the commission upon the question or questions so referred and without awaiting such report, the tribunal may make a separate award upon all or any other questions before it, and such separate award, if made, shall become immediately effective, provided that the report aforesaid shall not be incorporated in the award until it has been considered by the tribunal. The expenses of such commission shall be borne in equal moieties by the parties hereto.

3

ARTICLE 4.

The tribunal shall recommend for the consideration of the high contracting parties rules and a method of procedure under which all questions which may arise in the future regarding the exercise of the liberties above referred to may be determined in accordance with the principles laid down in the award. If the high contracting parties shall not adopt the rules and method of procedure so recommended, or if they shall not, subsequently to the delivery of the award, agree upon such rules and methods, then any differences which may arise in the future between the high contracting parties relating to the interpretation of the treaty of 1818 or to the effect and application of the award of the tribunal shall be referred informally to the Permanent Court at The Hague for decision by the summary procedure provided in Chapter IV of The Hague Convention of the 18th October, 1907.

ARTICLE 5.

The Tribunal of Arbitration provided for herein shall be chosen from the general list of members of the Permanent Court at The Hague, in accordance with the provisions of article 45 of the Convention for the Settlement of International Disputes, concluded at the Second Peace Conference at The Hague on the 18th October, 1907. The provisions of said convention, so far as applicable and not inconsistent herewith, and excepting articles 53 and 54, shall govern the proceedings under the submission herein provided for.

The time allowed for the direct agreement of His Britannic Majesty and the President of the United States on the composition of such tribunal shall be three months.

ARTICLE 6.

The pleadings shall be communicated in the order and within the time following:—

As soon as may be, and within a period not exceeding seven months from the date of the exchange of notes making this agreement binding, the printed Case of each of the parties hereto, accompanied by printed copies of the documents, the official correspondence, and all other evidence on which each party relies, shall be delivered in duplicate (with such additional copies as may be agreed upon) to the agent

of the other party. It shall be sufficient for this purpose if such Case is delivered at the British Embassy at Washington or at the American Embassy at London, as the case may be, for transmission to the agent for its Government.

Within fifteen days thereafter such printed Case and accompanying evidence of each of the parties shall be delivered in duplicate to each member of the tribunal, and such delivery may be made by depositing within the stated period the necessary number of copies with the International Bureau at The Hague for transmission to the arbitrators.

After the delivery on both sides of such printed Case, either party may, in like manner, and within four months after the expiration of the period above fixed for the delivery to the agents of the Case, deliver to the agent of the other party (with such additional copies as may be agreed upon), a printed Counter-Case accompanied by printed copies of additional documents, correspondence, and other evidence in reply to the Case, documents, correspondence, and other evidence so presented by the other party, and within fifteen days thereafter such party shall, in like manner as above provided, deliver in duplicate such Counter-Case and accompanying evidence to each of the arbitrators.

The foregoing provisions shall not prevent the tribunal from permitting either party to rely at the hearing upon documentary or other evidence which is shown to have become open to its investigation or examination or available for use too late to be submitted within the period hereinabove fixed for the delivery of copies of evidence, but in case any such evidence is to be presented, printed copies of it, as soon as possible after it is secured, must be delivered, in like manner as provided for the delivery of copies of other evidence, to each of the arbitrators and to the agent of the other party. The admission of any such additional evidence, however, shall be subject to such conditions as the tribunal may impose, and the other party shall have a reasonable opportunity to offer additional evidence in rebuttal.

The tribunal shall take into consideration all evidence which is offered by either party.

ARTICLE 7.

If in the Case or Counter-Case (exclusive of the accompanying evidence) either party shall have specified or referred to any documents, correspondence, or other evidence in its own exclusive possession without annexing a copy, such party shall be bound, if the other party shall demand it within thirty days after the delivery of the Case or Counter-Case respectively, to furnish to the party applying for it a copy thereof; and either party may, within the like time, demand that the other shall furnish certified copies or produce for inspection the originals of any documentary evidence adduced by the party upon whom the demand is made. It shall be the duty of the party upon whom any such demand is made to comply with it as soon as may be, and within a period not exceeding fifteen days after the demand has been received. The production for inspection or the furnishing to the other party of official governmental publications, publishing, as authentic, copies of the documentary evidence referred to, shall be a sufficient compliance with such demand, if such governmental publi-

cations shall have been published prior to the 1st day of January, 1908. If the demand is not complied with, the reasons for the failure to comply must be stated to the tribunal.

ARTICLE 8.

4 The tribunal shall meet within six months after the expiration of the period above fixed for the delivery to the agents of the Case, and upon the assembling of the tribunal at its first session each party, through its agent or counsel, shall deliver in duplicate to each of the arbitrators and to the agent and counsel of the other party (with such additional copies as may be agreed upon) a printed Argument showing the points and referring to the evidence upon which it relies.

The time fixed by this agreement for the delivery of the Case, Counter-Case, or Argument, and for the meeting of the tribunal, may be extended by mutual consent of the parties.

ARTICLE 9.

The decision of the tribunal shall, if possible, be made within two months from the close of the arguments on both sides, unless on the request of the tribunal the parties shall agree to extend the period.

It shall be made in writing, and dated and signed by each member of the tribunal, and shall be accompanied by a statement of reasons.

A member who may dissent from the decision may record his dissent when signing.

The language to be used throughout the proceedings shall be English.

ARTICLE 10.

Each party reserves to itself the right to demand a revision of the award. Such demand shall contain a statement of the grounds on which it is made and shall be made within five days of the promulgation of the award, and shall be heard by the tribunal within ten days thereafter. The party making the demand shall serve a copy of the same on the opposite party, and both parties shall be heard in argument by the tribunal on said demand. The demand can only be made on the discovery of some new fact or circumstance calculated to exercise a decisive influence upon the award and which was unknown to the tribunal and to the party demanding the revision at the time the discussion was closed, or upon the ground that the said award does not fully and sufficiently, within the meaning of this agreement, determine any question or questions submitted. If the tribunal shall allow the demand for a revision, it shall afford such opportunity for further hearings and arguments as it shall deem necessary.

ARTICLE 11.

The present agreement shall be deemed to be binding only when confirmed by the two Governments by an exchange of notes.

In witness whereof this agreement has been signed and sealed by His Britannic Majesty's Ambassador at Washington, the Right Hon-

ourable James Bryce, O.M., on behalf of Great Britain, and by the Secretary of State of the United States, Elihu Root, on behalf of the United States.

Done at Washington on the 27th day of January, 1909.

(L.S.)	JAMES BRYCE.
(L.S.)	ELIHU ROOT.

No. 2.—1909, June 2: *Letter from the Hon. P. C. Knox to the Right Hon. James Bryce, enclosing a list of Legislative and Executive Acts of Canada and Newfoundland objected to by United States.*

DEPARTMENT OF STATE, Washington, June 2nd, 1909.

EXCELLENCY, By Article II of the Special Agreement of January 27th last between Great Britain and the United States for the submission to arbitration of questions relating to the North Atlantic Coast Fisheries, it is provided:

"Either Party may call the attention of the Tribunal to any legislative or executive act of the other Party, specified within three months of the exchange of notes enforcing this agreement, and which is claimed to be inconsistent with the true interpretation of the Treaty of 1818; and may call upon the Tribunal to express in its award its opinion upon such acts, and to point out in what respects, if any, they are inconsistent with the principles laid down in the award in reply to the proceeding questions; and each party agrees to conform to such opinion."

At the request of Mr. Chandler P. Anderson, the Agent of the United States in this proceeding, I have the honour to present to you the accompanying list, prepared by him of the legislative and executive Acts of Canada and Newfoundland, which are specified on the part of the United States in compliance with the requirement of the above Article that the legislative and executive Acts referred to therein must be specified within Special Agreement, which period will not expire until the 4th of this month, the notes referred to having been exchanged on March 4th last.

I have, &c.

(Sgd.) P. C. KNOX.

NORTH ATLANTIC COAST FISHERIES: ARBITRATION AT THE HAGUE.

List of Legislative and Executive Acts of Canada and Newfoundland specified on the part of the United States under the provisions of Article II of the Special Agreement of January 27, 1909, between the United States and Great Britain.

Revised Statutes of Canada, 1906.

Chapter 45—The Fisheries Act;

Chapter 47—The Customs and Fisheries Protection Act;

Chapter 48—The Customs Act;

Chapter 113—The Canada Shipping Act, Part VI, so far as relates to the compulsory employment of Pilots and Payments of dues and Part XII relating to Public Harbours and Harbour Masters, and rules and regulations established thereunder.

Canadian Order in Council of September 12, 1907, promulgating Fishery Regulations, (including Regulations).

Canadian Order in Council of September 9, 1908, amending Fishery Regulations. Consolidated Statutes of Newfoundland, 1892:

Chapter 119—of Pilots and Pilotage for the Port of Saint Johns;

Chapter 120—of Harbour Master and Harbour Regulations for the Port of Saint Johns;

Chapter 124—of the Coast Fisheries;

Chapter 129—of the exportation, sale, etc., of Bait Fishes.

Newfoundland Act of March 3, 1896 (61 Vict. Cap. 3)—An Act respecting the Department of Fisheries.

Newfoundland Act of March 30, 1898 (61 Vict. Cap. 13)—An Act respecting the Customs.

Newfoundland Act of July 19, 1899 (62 and 63 Vict. Cap. 19)—An Act relating to Light Dues.

Newfoundland Act of June 15, 1905 (5 Edw. VII, Cap. 4)—An Act respecting Foreign Fishing Vessels.

Newfoundland Fishing Regulations, 1908.

No. 3.—1909, June 4: *Letter from the Right Hon. James Bryce to the Hon. P. C. Knox containing Notice given under Article II of the Special Agreement of January 27, 1909.*

BRITISH EMBASSY, Washington, 4th June, 1909.

SIR: By Article II of the Special Agreement of January 27 last, between Great Britain and the United States for the submission to arbitration of questions relating to the North Atlantic Coast Fisheries, it is provided:—

“Either party may call attention of the Tribunal to any legislative or executive act of the other Party, specified within three months of the exchange of the notes enforcing this agreement, and which is claimed to be inconsistent with the true interpretation of the Treaty of 1818; and may call upon the Tribunal to express in its award its opinion upon such Acts, and to point out in what respects, if any, they are inconsistent with the principles laid down in the award in reply to the preceding questions; and each party agrees to conform to such opinion.”

On the part of His Majesty's Government I have the honour to inform you that His Majesty's Government proposes to call the attention of the Hague Tribunal in pursuance of the provisions of the said Article II, to certain acts of the United States being such as would fall within the provisions of that Article and which are claimed to be inconsistent with the true interpretation of the Treaty of 1818, and to call upon the Tribunal to express in its award its opinion upon such acts and to point out in what respect, if any, they are inconsistent with the principles laid down in the award in reply to the questions submitted for decision to the Tribunal.

The acts in question are the acts of the United States Government directed towards or amounting to an attempt at the policing by the national vessels of the United States of the so called Treaty Coast, that is to say those parts of the Coast of Newfoundland, Labrador, and the Magdalen Islands, on which the inhabitants of the United States have under the said Treaty a liberty to take fish in common with the subjects of His Britannic Majesty.

This notice is given in compliance with the requirements of the above article that notice of the acts intended to be called into

of notes enforcing this agreement, which period will expire upon this day, the notes referred to having been exchanged on the fourth of March last.

I have, &c.

(Sgd.) JAMES BRYCE.

The Honourable P. C. KNOX,
Secretary of State.

No. 4.—1686, November 6–16: *Extract from translation of Treaty between His Britannic Majesty and France.*

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Article V. The subjects, inhabitants, merchants, commanders of ships, masters and mariners, of the kingdoms, provinces and dominions of each King respectively, shall abstain and forbear to trade and fish in all the places possessed or which shall be possessed by one or the other party in America, viz., the King of Great Britain's subjects shall not drive their commerce and trade, nor fish in the havens, bays, creeks, roads, shoals or places, which the most Christian King holds or shall hereafter hold in America; and in like manner, the most Christian King's subjects shall not drive their commerce and trade, nor fish in the havens, bays, creeks, roads, shoals or places, which the King of Great Britain possesses or shall hereafter possess in America. And if any ship or vessel shall be found trading or fishing contrary to the tenor of this treaty, the said ship or vessel, with its lading, proof being made thereof, shall be confiscated; nevertheless, the party who shall find himself aggrieved by such sentence or confiscation, shall have liberty to apply himself to the Privy Council of that King, by whose governors or judges the sentence has been given against him: but it is always to be understood, that the liberty of navigation ought in no manner to be disturbed, where nothing is committed against the genuine sense of this treaty.

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No. 5.—1713, March 31–April 11: *Extract from Treaty between Her Britannic Majesty and France (the Treaty of Utrecht).*

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X. The said Most Christian King shall restore to the kingdom and Queen of Great Britain, to be possessed in full right for ever, the Bay and Straits, of Hudson, together with all lands, seas, sea coasts, rivers, and places situate in the said bay and straits, and which belong thereunto, no tracts of land or of sea being excepted, which are at present possessed by the subjects of France. All which, as well as any buildings there made, in the condition they now are, and likewise all fortresses there erected, either before or since the French seized the same, shall, within 6 months from the ratification of the present treaty, or sooner, if possible, be well and truly delivered to the British subjects having commission from the Queen of Great Britain to demand and receive the same, entire and undemolished,

together with all the cannon and cannon-ball which are therein, as also with a quantity of powder, if it be there found, in proportion to the cannon-ball, and with the other provision of war usually belonging to canon. It is however provided that it may be entirely free for the company of Quebec, and all other the subjects of the most Christian King whatsoever, to go by land, or by sea, whither-soever they please out of the lands of the said bay, together with all their goods, merchandises, arms, and effects, of what nature or condition soever, except such things as are above reserved in this article. But it is agreed on both sides, to determine within a year, by commissaries to be forthwith named by each party, the limits which are to be fixed between the said bay of Hudson, and the places appertaining to the French; which limits both the British and French subjects shall be wholly forbid to pass over, or thereby to go to each other by sea or by land. The same commissaries shall also have orders to describe and settle in like manner the boundaries between the other British and French colonies in those parts.

XI. The above-mentioned Most Christian King shall take care that satisfaction be given, according to the rule of justice and equity, to the English company trading to the bay of Hudson, for all damages and spoil done to their colonies, ships, persons, and goods, by the hostile incursions and depredations of the French, in time of peace, an estimate being made thereof by commissaries to be named at the requisition of each party. The same commissaries shall moreover enquire as well into the complaints of the British subjects concerning ships taken by the French in time of peace, as also concerning the damages sustained last year in the island called Montserat, and others, as into those things of which the French subjects complain, relating to the capitulation in the Island of Nevis, and castle of Gambia, also to French ships, if perchance any such have been taken by British subjects in time of peace. And in like manner into all disputes of this kind which shall be found to have arisen between both nations, and which are not yet ended; and due justice shall be done on both sides without delay.

7 XII. The Most Christian King shall take care to have delivered to the Queen of Great Britain, on the same day that the ratifications of this treaty shall be exchanged, solemn and authentic letter, or instruments, by virtue whereof it shall appear that the Island of St. Christophers is to be possessed alone hereafter by British subjects, likewise all Nova Scotia or Accadie, with its ancient boundaries, as also the city of Port Royal, now called Annapolis Royal, and all other things in those parts, which depend on the said lands and islands, together with the dominion, propriety, and possession of the said islands, lands, and places, and all rights whatsoever, by treaties, or by any other way obtained, which the Most Christian King, the crown of France, or any the subjects thereof, have hitherto had to the said islands, lands, and places, and the inhabitants of the same, are yielded and made over to the Queen of Great Britain, and to her crown for ever, as the Most Christian King doth at present yield and make over all the particulars abovesaid; and that in such ample manner and form, that the subjects of the Most Christian King shall hereafter be excluded from all kind of fishing in the said seas, bays, and other places, on the coasts of Nova Scotia, that is to say,

on those which lie towards the east, within 30 leagues, beginning from the island commonly called Sable, inclusively, and thence stretching along towards the south-west.

XIII. The island called Newfoundland, with the adjacent islands, shall from this time forward belong of right wholly to Britain; and to that end the town and fortress of Placentia and whatever other places in the said island are in the possession of the French, shall be yielded and given up, within 7 months from the exchange of the ratifications of this treaty, or sooner if possible, by the Most Christian King, to those who have a commission from the Queen of Great Britain for that purpose. Nor shall the Most Christian King, his heirs and successors, or any of their subjects, at any time hereafter lay claim to any right to the said island and islands, or to any part of it or them. Moreover it shall not be lawful for the subjects of France to fortify any place in the said Island of Newfoundland, or to erect any buildings there, besides stages made of boards and huts necessary and usual for drying of fish; or to resort to the said island, beyond the time necessary for fishing and drying of fish. But it shall be allowed to the subjects of France to catch fish, and to dry them on land, in that part only, and in no other besides that of the said Island of Newfoundland, which stretches from the place called Cape Bonavista to the northern point of the said island, and from thence running down by the western side, reaches as far as the place called Point Riche. But the island called Cape Breton, as also all others, both in the mouth of the River St. Lawrence and in the gulf of the same name, shall hereafter belong of right to the French; and the Most Christian King shall have all manner of liberty to fortify any place or places there.

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No. 6.—1763, February 10: *Extract from Translation of Treaty between His Britannic Majesty, France, and Spain (the Treaty of Paris).*

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Article I. There shall be a Christian, universal, and perpetual peace, as well by sea as by land, and a sincere and constant friendship shall be reestablished between their Britannic, Most Christian, Catholic, and Most Faithful Majesties, and between their heirs and successors, kingdoms, dominions, provinces, countries, subjects, and vassals, of what quality or condition soever they be, without exception of places or of persons: so that the high contracting parties shall give the greatest attention to maintain between themselves and their said dominions and subjects this reciprocal friendship and correspondence, without permitting, on either side, any kind of hostilities, by sea or by land, to be committed from henceforth, for any cause, or under any pretence whatsoever, and everything shall be carefully avoided which might hereafter prejudice the union happily re-established, applying themselves, on the contrary, on every occasion, to procure for each other whatever may contribute to their mutual glory, interests, and advantages, without giving any assistance or protection, directly or indirectly, to those who would cause any preju-

dice to either of the high contracting parties: there shall be a general oblivion of everything that may have been done or committed before or since the commencement of the war which is just ended.

II. The treaties of Westphalia of 1648; those of Madrid between the crowns of Great Britain and Spain of 1667, and 1670; the treaties of peace of Nimeguen of 1678, and 1679; of Ryswick of 1697; those of peace and of commerce of Utrecht of 1713; that of Baden of 1714; the treaty of the triple alliance of The Hague of 1771: that of the quadruple alliance of London of 1718; the treaty of peace of Vienna of 1738; the definitive treaty of Aix la Chapelle of 1748; and that of Madrid, between the crowns of Great Britain and Spain of 1750: as well as the treaties between the crowns of Spain and Portugal of the 13th of February, 1668; of the 6th of February, 1715; and of the 12th of February, 1761; and that of the 11th of April, 1713, between France and Portugal with the guarantees of Great Britain, serve as a basis and foundation to the peace, and to the present treaty: and for this purpose they are all renewed and confirmed in the best form, as well as all the general, which subsisted between the high contracting parties before the war, as if they were inserted here word for word, so that they are to be exactly observed, for the future, in their whole tenor, and religiously executed on all sides, in all their points, which shall not be derogated from by the present treaty, notwithstanding all that may have been stipulated to the contrary by any of the high contracting parties: and all the said parties declare, that they will not suffer any privilege, favour, or indulgence to subsist, contrary to the treaties above confirmed, except what shall have been agreed and stipulated by the present treaty.

III. All the prisoners made, on all sides, as well by land as by sea, and the hostages carried away or given during the war, and to this day, shall be restored, without ransom, six weeks, at least, to be computed from the day of the exchange of the ratification of the present treaty, each crown respectively paying the advances which shall have been made for the subsistence and maintenance of their prisoners by the sovereign of the country where they shall have been detained, according to the attested receipts and estimates and other authentic vouchers which shall be furnished on one side and the other. And securities shall be reciprocally given for the payment of the debts which the prisoners shall have contracted in the countries where they have been detained until their entire liberty. And all the ships of war and merchant vessels which shall have been taken since the expiration of the terms agreed upon for the cessation of hostilities by sea shall likewise be restored, *bonâ fide*, with all their crews and cargoes: and the execution of this article shall be proceeded upon immediately after the exchange of the ratifications of this treaty.

IV. His Most Christian Majesty renounces all pretensions which he has heretofore formed or might have formed to Nova Scotia or Acadia in all its parts, and guarantees the whole of it, and with all its dependencies, to the King of Great Britain: Moreover, his Most Christian Majesty cedes and guarantees to his said Britannic Majesty, in full right, Canada, with all its dependencies, as well as the Island of Cape Breton, and all the other islands and coasts in the Gulf and River of St. Lawrence, and in general, everything that depends on the said countries, lands, islands, and coasts, with the sovereignty,

property, possession, and all rights acquired by treaty, or otherwise, which the Most Christian King and the Crown of France have had till now over the said countries, lands, islands, places, coasts, and their inhabitants, so that the Most Christian King cedes and makes over the whole to the said King, and to the Crown of Great Britain, and that in the most ample manner and form, without restriction, and without any liberty to depart from the said cession and guarantee under any pretence, or to disturb Great Britain in the possessions above mentioned. His Britannic Majesty, on his side, agrees to grant the liberty of the Catholic religion to the inhabitants of Canada: he will, in consequence, give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish Church, as far as the laws of Great Britain permit. His Britannic Majesty farther agrees, that the French inhabitants, or others who had been subjects of the Most Christian King in Canada, may retire with all safety and freedom wherever they shall think proper, and may sell their estates, provided it be to the subjects of His Britannic Majesty, and bring away their effects as well as their persons, without being restrained in their emigration, under any pretence whatsoever, except that of debts or of criminal prosecutions: The term limited for this emigration shall be fixed to the space of eighteen months, to be computed from the day of the exchange of the ratification of the present treaty.

V. The subjects of France shall have the liberty of fishing and drying on a part of the coasts of the Island of Newfoundland, such as it is specified in the XIIIth article of the treaty of Utrecht; which article is renewed and confirmed by the present treaty, (except what relates to the Island of Cape Breton, as well as to the other islands and coasts in the mouth and in the Gulf of St. Lawrence): And His Britannic Majesty consents to leave to the subjects of the Most Christian King the liberty of fishing in the Gulf of St. Lawrence, on condition that the subjects of France do not exercise the said fishery but at the distance of three leagues from all the coasts belonging to Great Britain, as well those of the continent as those of the islands situated in the said Gulf of St. Lawrence. And as to what relates to the fishery on the coasts of the Island of Cape Breton, out of the said gulf, the subjects of the Most Christian King shall not be permitted to exercise the said fishery but at the distance of 15 leagues from the coasts of the Island of Cape Breton; and the fishery on the coasts of Nova Scotia or Acadia, and everywhere else out of the said gulf, shall remain on the foot of former treaties.

VI. The King of Great Britain cedes the Islands of St. Pierre and Macquelon, in full right, to His Most Christian Majesty, to serve as a shelter to the French fishermen; and his said Most Christian Majesty engages not to fortify the said islands; to erect no buildings upon them but merely for the convenience of the fishery; and to keep upon them a guard of fifty men only for the police.

VII. In order to re-establish peace on solid and durable foundations, and to remove for ever all subject of dispute with regard to the limits of the British and French territories on the continent of America; it is agreed, that, for the future, the confines between the dominions of His Britannic Majesty and those of His Most Christian Majesty, in that part of the world, shall be fixed irrevocably by a

line drawn along the middle of the River Mississippi, from its source to the River Iberville, and from thence, by a line drawn along the middle of this river, and the Lakes Maurepas and Potchartrain to the sea; and for this purpose, the Most Christian King cedes in full right, and guarantees to His Britannic Majesty the river and port of the Mobile, and every thing which he possesses, or ought to possess, on the left side of the River Mississippi, except the town of New Orleans and the island in which it is situated, which shall remain to France, provided that the navigation of the River Mississippi shall be equally free, as well to the subjects of Great Britain as to those of France, in its whole breadth and length, from its source to the sea, and expressly that part which is between the said Island of New Orleans and the right bank of that river, as well as the passage both in and out of its mouth: it is farther stipulated, that the vessels belonging to the subjects of either nation shall not be stopped, visited, or subjected to the payment of any duty whatsoever. The stipulations inserted in the IVth article, in favour of the inhabitants of Canada shall also take place with regard to the inhabitants of the countries ceded by this article.

VIII. The King of Great Britain shall restore to France the Islands of Guadaloupe, of Mariegalante, of Desirade, of Martinico, and of Belleisle; and the fortresses of these islands shall be restored in the same condition they were in when they were conquered by the British arms, provided that His Britannic Majesty's subjects, who shall have settled in the said islands, or those who shall have any commercial affairs to settle there or in other places restored to France by the present treaty, shall have liberty to sell their lands and their estates, to settle their affairs, to recover their debts, and to bring away their effects as well as their persons, on board vessels, which they shall be permitted to send to the said islands and other places restored as above, and which shall serve for this use only, without being restrained on account of their religion, or under any other pretence whatsoever, except that of debts or of criminal prosecutions: and for this purpose, the term of eighteen months is allowed to His Britannic Majesty's subjects, to be computed from the day of the exchange of the ratifications of the present treaty; but, as the liberty granted to His Britannic Majesty's subjects, to bring away their persons and their effects, in vessels of their nation, may be liable to abuses if precautions were not taken to prevent them; it has been expressly agreed between His Britannic Majesty and His Most Christian Majesty, that the number of English vessels which have leave to go to the said islands and places restored to France, shall be limited, as well as the number of tons of each one; that they shall go in ballast; shall set sail at a fixed time; and shall make one voyage only; all the effects belonging to the English being to be embarked at the same time. It has been farther agreed, that His Most Christian Majesty shall cause the necessary passports to be given to the said vessels; that, for the greater security, it shall be allowed to place two French clerks or guards in each of the said vessels, which shall be visited in the landing places and ports of the said islands and places restored to France, and that the merchandise which shall be found therein shall be confiscated.

IX. The Most Christian King cedes and guarantees to His Britannic Majesty, in full right, the Islands of Grenada, and the Grena-

dines, with the same stipulations in favour of the inhabitants of this colony, inserted in the IVth article for those of Canada: and the partition of the islands called neutral, is agreed and fixed, so that those of St. Vincent, Dominico, and Tobago, shall remain in full right to Great Britain, and that of St. Lucia shall be delivered to France, to enjoy the same likewise in full right, and the high contracting parties guarantee the partition so stipulated.

X. His Britannic Majesty shall restore to France the Island of Goree in the condition it was in when conquered: and His Most Christian Majesty cedes, in full right, and guarantees to the King of Great Britain the River Senegal, with the forts and factories of St. Lewis, Podor, and Galam, and with all the rights and dependencies of the said River Senegal.

XI. In the East Indies Great Britain shall restore to France, in the condition they are now in, the different factories which that Crown possessed, as well as on the coast of Coromandel and Orixá as on that of Malabar, as also in Bengal, at the beginning of the year 1749. And His Most Christian Majesty renounces all pretension to the acquisitions which he has made on the coast of Coromandel and Orixá since the said beginning of the year 1749. His Most Christian Majesty shall restore, on his side, all that he may have conquered from Great Britain in the East Indies during the present war; and will expressly cause Nattal and Tapanouilly, in the Island of Sumatra, to be restored. He engages farther, not to erect fortifications, or to keep troops in any part of the dominions of the Subah of Bengal. And in order to preserve future peace on the coast of Coromandel and Orixá, the English and French shall acknowledge Mahomet Ally Khan for lawful Nabob of the Carnatick, and Salabat Jíng for lawful Subah of the Decan; and both parties shall renounce all demands and pretensions of satisfaction with which they might charge each other, or their Indian allies, for the depredations or pillage committed on the one side or on the other during the war.

XII. The Island of Minorca shall be restored to His Britannic Majesty, as well as Fort St. Philip, in the same condition they were in when conquered by the arms of the Most Christian King; and with the artillery which was there when the said island and the said fort were taken.

XIII. The town and port of Dunkirk shall be put into the state fixed by the last treaty of Aix la Chapelle, and by former treaties. The cunette shall be destroyed immediately after the exchange of the ratifications of the present treaty, as well as the forts and batteries which defend the entrance on the side of the sea; and provision shall be made at the same time for the wholesomeness of the air, and for the health of the inhabitants, by some other means, to the satisfaction of the King of Great Britain.

XIV. France shall restore all the countries belonging to the Electorate of Hanover, to the Landgrave of Hesse, to the Duke of Brunswick, and to the Count of La Lippe Buckebourg, which are or shall be occupied by His Most Christian Majesty's arms: the fortresses of these different countries shall be restored in the same condition they were in when conquered by the French arms; and the pieces of artillery, which shall have been carried elsewhere, shall be replaced by the same number, of the same bore, weight and metal.

XV. In case the stipulations contained in the XIIIth article of the preliminaries should not be completed at the time of the signature of the present treaty, as well with regard to the evacuations to be made by the armies of France of the fortresses of Cleves, Wezel, Guelders, and of all the countries belonging to the King of Prussia, as with regard to the evacuations to be made by the British and French armies of the countries which they occupy in Westphalia, Lower Saxony, on the Lower Rhine, the Upper Rhine, and in all the Empire; and to the retreat of the troops into the dominions of their respective Sovereigns: their Britannic and Most Christian Majesties promise to proceed, *bonâ fide*, will all the dispatch
10 the case will permit of to the said evacuations, the entire completion whereof they stipulate before the 15th of March next, or sooner if it can be done; and their Britannic and Most Christian Majesties farther engage and promise to each other, not to furnish any succours of any kind to their respective allies who shall continue engaged in the war in Germany.

XVI. The decision of the prizes made in time of peace by the subjects of Great Britain, on the Spaniards, shall be referred to the courts of justice of the Admiralty of Great Britain, conformably to the rules established among all nations, so that the validity of the said prizes, between the British and Spanish nations, shall be decided and judged, according to the law of nations, and according to treaties, in the courts of justice of the nation who shall have made the capture.

XVII. His Britannic Majesty shall cause to be demolished all the fortifications which his subjects shall have erected in the Bay of Honduras, and other places of the territory of Spain in that part of the world, four months after the ratification of the present treaty: and His Catholic Majesty shall not permit His Britannic Majesty's subjects, or their workmen, to be disturbed or molested under any pretence whatsoever in the said places, in their occupation of cutting, loading, and carrying away log-wood; and for this purpose, they may build, without hindrance, and occupy, without interruption, the houses and magazines necessary for them, for their families, and for their effects: and His Catholic Majesty assures them, by this article, the full enjoyment of those advantages and powers on the Spanish coasts and territories, as above stipulated, immediately after the ratification of the present treaty.

XVIII. His Catholic Majesty desists, as well for himself as for his successors, from all pretension which he may have formed in favour of the Guipuscoans, and other his subjects, to the right of fishing in the neighbourhood of the island of Newfoundland.

XIX. The King of Great Britain shall restore to Spain all the territory which he has conquered in the Island of Cuba, with the fortress of the Havannah; and this fortress, as well as all the other fortresses of the said island, shall be restored in the same condition they were in when conquered by His Britannic Majesty's arms, provided that His Britannic Majesty's subjects who shall have settled in the said island, restored to Spain [Spain] by the present treaty, or those who shall have any commercial affairs to settle there, shall have liberty to sell their lands and their estates, to settle their affairs, recover their debts, and to bring away their effects, as well as their persons, on

board vessels which they shall be permitted to send to the said island restored as above, and which shall serve for that use only, without being restrained on account of their religion or under any other pretence whatsoever, except that of debts or of criminal prosecutions: And for this purpose, the term of eighteen months is allowed to His Britannic Majesty's subjects, to be computed from the day of the exchange of the ratifications of the present treaty: but as the liberty granted to His Britannic Majesty's subjects, to bring away their persons and their effects, in vessels of their nation, may be liable to abuses if precautions were not taken to prevent them; it has been expressly agreed between His Britannic Majesty and His Catholic Majesty, that the number of English vessels which shall have leave to go to the said island restored to Spain shall be limited, as well as the number of tons of each one; that they shall go in ballast; shall set sail at a fixed time; and shall make one voyage only; all the effects belonging to the English being to be embarked at the same time: it has been farther agreed, that His Catholic Majesty shall cause the necessary passports to be given to the said vessels; that for the greater security, it shall be allowed to place two Spanish clerks or guards in each of the said vessels, which shall be visited in the landing places and ports of the said island restored to Spain, and that the merchandise which shall be found therein shall be confiscated.

XX. In consequence of the restitution stipulated in the preceding article, His Catholic Majesty cedes and guarantees, in full right, to His Britannic Majesty, Florida, with Fort St. Augustin, and the Bay of Pensacola, as well as all that Spain possesses on the continent of North America, to the east or to the south east of the river Mississippi. And, in general, everything that depends on the said countries and lands, with the sovereignty, property, possession, and all rights, acquired by treaties or otherwise, which the Catholic King and the Crown of Spain have had till now over the said countries, lands, places, and their inhabitants; so that the Catholic King cedes and makes over the whole to the said King and to the Crown of Great Britain, and that in the most ample manner and form. His Britannic Majesty agrees, on his side, to grant to the inhabitants of the countries above ceded, the liberty of the Catholic religion: he will, consequently, give the most express and the most effectual orders that his new Roman Catholic subjects may profess the worship of their religion according to the rights of the Romish Church, as far as the laws of Great Britain permit. His Britannic Majesty farther agrees, that the Spanish inhabitants, or others who had been subjects of the Catholic King in the said countries, may retire, with all safety and freedom wherever they think proper; and may sell their estates, provided it be to His Britannic Majesty's subjects, and bring away their effects, as well as their persons, without being restrained in their emigration, under any pretence whatsoever, except that of debts or of criminal prosecutions: the term limited for this emigration being fixed to the space of eighteen months, to be computed from the day of the exchange of the ratifications of the present treaty. It is moreover stipulated, that His Catholic Majesty shall have power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things.

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- 11 No. 7.—1783, September 3: *Extract from Treaty between His Britannic Majesty and France (Versailles).*

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ARTICLE II.

The treaties of Westphalia of 1648; the treaties of peace of Nimeguen of 1678, and 1679; of Ryswick of 1697; those of peace and of commerce of Utrecht of 1713; that of Baden of 1714; that of the triple alliance of the Hague of 1717; that of the quadruple alliance of London of 1718; the treaty of peace of Vienna of 1738; the definitive treaty of Aix-la-Chapelle of 1748; and that of Paris of 1763, serve as a basis and foundation to the peace and to the present treaty; and for this purpose they are all renewed and confirmed in the best form, as well as all the treaties in general which subsisted between the high contracting parties before the war, as if they were herein inserted word for word; so that they are to be exactly observed for the future in their full tenor, and religiously executed by both parties, in all the points which shall not be derogated from by the present treaty of peace.

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ARTICLE IV.

His Majesty the King of Great Britain is maintained in his right to the Island of Newfoundland, and to the adjacent islands, as the whole were assured to him by the thirteenth article of the treaty of Utrecht; excepting the Islands of St. Pierre and Miquelon, which are ceded in full right, by the present treaty, to His Most Christian Majesty.

ARTICLE V.

His Majesty the Most Christian King, in order to prevent the quarrels which have hitherto arisen between the two nations of England and France, consents to renounce the right of fishing, which belongs to him in virtue of the aforesaid article of the treaty of Utrecht from Cape Bonavista to Cape St. John, situated on the eastern coast of Newfoundland, in fifty degrees north latitude; and His Majesty the King of Great Britain consents on his part, that the fishery assigned to the subjects of His Most Christian Majesty, beginning at the said Cape St. John, passing to the north, and descending by the western coast of the Island of Newfoundland, shall extend to the place called Cape Raye, situated in forty-seven degrees, fifty minutes latitude. The French fishermen shall enjoy the fishery which is assigned to them by the present article, as they had the right to enjoy that which was assigned to them by the treaty of Utrecht.

ARTICLE VI.

With regard to the fishery in the Gulf of St. Laurence, the French shall continue to exercise it conformably to the fifth article of the Treaty of Paris.

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No. 8.—*Extracts from Declarations of British and French Kings accompanying above Treaty.*

DECLARATION.

The King having entirely agreed with His Most Christian Majesty upon the articles of the definitive treaty, will seek every means which shall not only insure the execution thereof, with his accustomed good faith and punctuality, but will besides give, on his part, all possible efficacy to the principles which shall prevent even the least foundation of dispute for the future.

To this end, and in order that the fishermen of the two nations may not give cause for daily quarrels, His Britannic Majesty will take the most positive measures for preventing his subjects from interrupting, in any manner, by their competition, the fishery of the French, during the temporary exercise of it which is granted to them upon the coasts of the Island of Newfoundland; and he will, for this purpose, cause the fixed settlements, which shall be formed there, to be removed. His Britannic Majesty will give orders, that the French fishermen be not incommoded, in cutting the wood necessary for the repair of their scaffolds, huts, and fishing vessels.

The thirteenth article of the treaty of Utrecht, and the method of carrying on the fishery which has at all times been acknowledged, shall be the plan upon which the fishery shall be carried on there; it shall not be deviated from by either party; the French fishermen building only their scaffolds, confining themselves to the repair of their fishing vessels, and not wintering there; the subjects of His Britannic Majesty, on their part, not molesting, in any manner, the French fishermen, during their fishing, nor injuring their scaffolds during their absence.

The King of Great Britain, in ceding the Islands of St. Pierre and Miquelon to France, regards them as ceded for the purpose of serving as a real shelter to the French fishermen, and in full confidence that these possessions will not become an object of jealousy between the two nations; and that the fishery between the said islands, and that of Newfoundland, shall be limited to the middle of the channel.

COUNTER-DECLARATION.

The principles which have guided the King, in the whole course of the negotiations which preceded the re-establishment of peace, must have convinced the King of Great Britain, that His Majesty has had no other design than to render it solid and lasting, by preventing, as much as possible, in the four quarters of the world, every subject of discussion and quarrel. The King of Great Britain undoubtedly places too much confidence in the uprightness of His Majesty's intentions, not to rely upon his constant attention to prevent the Islands of St. Pierre and Miquelon from becoming an object of jealousy between the two nations.

As to the fishery on the coasts of Newfoundland, which has been the object of the new arrangements settled by the two sovereigns upon this matter, it is sufficiently ascertained by the fifth article of

the treaty of peace signed this day, and by the declaration likewise delivered to-day, by His Britannic Majesty's Ambassador Extraordinary and Plenipotentiary; and His Majesty declares, that he is fully satisfied on this head.

In regard to the fishery between the Island of Newfoundland and those of St. Pierre and Miquelon, it is not to be carried on, by either party, but to the middle of the channel; and His Majesty will give the most positive orders, that the French fishermen shall not go beyond this line. His Majesty is firmly persuaded that the King of Great Britain will give like orders to the English fishermen.

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No. 9.—1783, September 3: *Treaty between His Britannic Majesty and the United States.*

Definitive Treaty of Peace and Friendship between His Britannic Majesty and the United States of America.—Signed at Paris, the 3rd of September, 1783.

In the Name of the Most Holy and Undivided Trinity.

It having pleased the Divine Providence to dispose the hearts of the Most Serene and Most Potent Prince, George the Third, by the grace of God, King of Great Britain, France and Ireland, Defender of the Faith, Duke of Brunswick and Lunenburg, Arch-Treasurer and Prince Elector of the Holy Roman Empire, &c., and of the United States of America, to forget all past misunderstandings and differences that have unhappily interrupted the good correspondence and friendship which they mutually wish to restore: and to establish such a beneficial and satisfactory intercourse between the 2 Countries, upon the ground of reciprocal advantages and mutual convenience, as may promote and secure to both perpetual Peace and Harmony; and having for this desirable end already laid the foundation of Peace and reconciliation, by the Provisional Articles signed at Paris, on the 30th of November, 1782, by the Commissioners empowered on each part; which Articles were agreed to be inserted in, and to constitute, the Treaty of Peace proposed to be concluded between the Crown of Great Britain and the said United States, but which Treaty was not to be concluded until terms of Peace should be agreed upon between Great Britain and France, and His Britannic Majesty should be ready to conclude such Treaty accordingly; and the Treaty between Great Britain and France having since been concluded, His Britannic Majesty and the United States of America, in order to carry into full effect the Provisional Articles above-mentioned, according to the tenor thereof, have constituted and appointed, that is to say:

His Britannic Majesty, on his part, David Hartley, Esq., Member of the Parliament of Great Britain; and the said United States, on their part, John Adams, Esq., late a Commissioner of the United States of America at the Court of Versailles, late Delegate in Congress from the State of Massachusetts, and Chief Justice of the said State, and Minister Plenipotentiary of the said United States to Their High Mightinesses the States General of the United Netherlands; Benjamin Franklin, Esq., late Delegate in Congress from the State of Pennsylvania, President of the Convention of the said State,

and Minister Plenipotentiary from the United States of America at the Court of Versailles; John Jay, Esq., late President of Congress and Chief Justice of the State of New York, and Minister Plenipotentiary from the said United States at the Court of Madrid; to be the Plenipotentiaries for the concluding and signing the present Definitive Treaty: who, after having reciprocally communicated their respective Full Powers, have agreed upon and confirmed the following Articles:^a

Art. I. His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be Free, Sovereign and Independent States; 13 that he treats with them as such; and for himself, his Heirs and Successors, relinquishes all claims to the government, propriety and territorial rights of the same, and every part thereof.

II. And that all disputes which might arise in future on the subject of the Boundaries of the said United States may be prevented, it is hereby agreed and declared, that the following are and shall be their Boundaries, viz., from the North-west Angle of Nova Scotia, viz., that Angle which is formed by a line drawn due north, from the source of St. Croix River to the Highlands, along the said Highlands which divide those Rivers that empty themselves into the River St. Lawrence from those which fall into the Atlantic Ocean, to the North-westernmost head of Connecticut River; thence down along the middle of that River to the 45th degree of North latitude; from thence by a line due West on said latitude until it strikes the River Iroquois or Cataraquy; thence along the middle of the said River into Lake Ontario; through the middle of said Lake until it strikes the communication by water between that Lake and Lake Erie; thence along the middle of said communication into Lake Erie; through the middle of said Lake until it arrives at the water-communication between that Lake and Lake Huron; thence along the middle of said water-communication into the Lake Huron; thence through the middle of said Lake to the water-communication between that Lake and Lake Superior; thence through Lake Superior, Northward of the Isles Royal and Phelipeaux, to the Long Lake; thence through the middle of said Long Lake, and the water-communication between it and the Lake of the Woods, to the said Lake of the Woods; thence through the said Lake to the most North-western point thereof, and from thence on a due West course to the River Mississippi; thence by a line to be drawn along the middle of the said River Mississippi, until it shall intersect the Northernmost part of the 31st degree of North latitude: South by a line to be drawn due East from the determination of the line last mentioned, in the latitude of 31 degrees North of the Equator, to the middle of the River Apalachicola or Catahouche; thence along the middle thereof to its junction with the Flint River; thence straight to the head of St. Mary's River, and thence down along the middle of St. Mary's River to the Atlantic Ocean: East by a line to be drawn along the middle

^a These Articles are practically identical with the Provisional Articles of 30 November, 1782, agreed upon by Richard Oswald, commissioner for His Britannic Majesty, and John Adams, Benjamin Franklin, John Jay, and Henry Laurens, commissioners for United States.

of the River St. Croix, from its mouth in the Bay of Fundy to its source; and from its source directly North to the aforesaid Highlands, which divide the Rivers that fall into the Atlantic Ocean from those which fall into the River St. Lawrence: comprehending all Islands within 20 leagues of any part of the shores of The United States, and lying between lines to be drawn due East from the points where the aforesaid Boundaries between Nova Scotia on the one part, and East Florida on the other, shall respectively touch the Bay of Fundy, and the Atlantic Ocean; excepting such Islands as now are, or heretofore have been, within the limits of the said Province of Nova Scotia.

III. It is agreed, that the People of The United States shall continue to enjoy unmolested the right to take Fish of every kind on the Grand Bank and on all the other Banks of Newfoundland; also in the Gulph of St. Lawrence, and at all other places in the Sea, where the Inhabitants of both Countries used at any time heretofore to fish. And also that the Inhabitants of The United States shall have liberty to take fish of every kind on such part of the Coast of Newfoundland as British Fishermen shall use, (but not to dry or cure the same on that Island), and also on the Coasts, Bays, and Creeks of all other of His Britannic Majesty's Dominions in America; and that the American Fishermen shall have liberty to dry and cure fish in any of the unsettled Bays, Harbors, and Creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same, or either of them, shall be settled, it shall not be lawful for the said Fishermen to dry or cure fish at such Settlement, without a previous agreement for that purpose with the Inhabitants, Proprietors, or Possessors of the ground.

IV. It is agreed that Creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all *bonâ fide* debts heretofore contracted.

V. It is agreed that the Congress shall earnestly recommend it to the Legislatures of the respective States, to provide for the restitution of all estates, rights, and properties which have been confiscated, belonging to real British Subjects: and also of the estates, rights, and properties of Persons resident in Districts in the possession of His Majesty's arms, and who have not borne arms against the said United States: and that Persons of any other description shall have free liberty to go to any part or parts of any of the 13 United States, and therein to remain 12 months unmolested in their endeavours to obtain the restitution of such of their estates, rights and properties as may have been confiscated; and that Congress shall also earnestly recommend to the several States, a reconsideration and revision of all Acts or Laws regarding the premises, so as to render the said Laws or Acts perfectly consistent, not only with justice and equity, but with that spirit of conciliation which, on the return of the blessings of Peace, should universally prevail. And that Congress shall also earnestly recommend to the several States, that the estates, rights, and properties of such last-mentioned Persons shall be restored to them, they refunding to any Persons who may be now in possession the *bonâ fide* price (where any has been given) which such Persons may have paid on purchasing any of the said lands, rights or properties since the confiscation.

And it is agreed that all Persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights.

VI. That there shall be no future confiscations made, nor any prosecutions commenced against any Person or Persons, for or by reason of the part which he or they may have taken in the present war; and that no Person shall on that account suffer any future loss or damage either in his person, liberty, or property; and that those who may be in confinement on such charges at the time of the Ratification of the Treaty in America, shall be immediately set at liberty, and the prosecutions so commenced be discontinued.

14 VII. There shall be a firm and perpetual Peace between His Britannic Majesty and the said States, and between the Subjects of the one and the Citizens of the other, wherefore all hostilities both by sea and land shall from henceforth cease: all Prisoners on both sides shall be set at liberty, and His Britannic Majesty shall with all convenient speed, and without causing any destruction, or carrying away any Negroes or other property of the American Inhabitants, withdraw all his Armies, Garrisons, and Fleets from the said United States, and from every Port, Place, and Harbour within the same; leaving in all Fortifications the American Artillery that may be therein: and shall also order and cause all Archives, Records, Deeds, and Papers belonging to any of the said States, of their Citizens, which in the course of the War may have fallen into the hands of his Officers, to be forthwith restored and delivered to the proper States and Persons to whom they belong.

VIII. The navigation of the River Mississippi, from its source to the Ocean, shall for ever remain free and open to the Subjects of Great Britain, and the Citizens of The United States.

IX. In case it should so happen that any Place or Territory belonging to Great Britain, or to The United States, should have been conquered by the arms of either, from the other, before the arrival of the said Provisional Articles in America, it is agreed that the same shall be restored without difficulty, and without requiring any compensation.

X. The solemn Ratifications of the present Treaty, expedited in good and due form, shall be exchanged between the Contracting Parties in the space of 6 months, or sooner if possible, to be computed from the day of the signature of the present Treaty.

In witness whereof, we, the Undersigned, their Ministers Plenipotentiary, have in their name, and in virtue of our Full Powers, signed with our Hands the present Definitive Treaty, and caused the Seals of our Arms to be affixed thereto.

Done at Paris, this 3d day of September, in the year of our Lord, 1783.

[L. s.]

D. HARTLEY.

[L. s.]

JOHN ADAMS.

[L. s.]

B. FRANKLIN.

[L. s.]

[L. s.]

JOHN JAY.

No. 10.—1790, *October 28: Convention between His Britannic Majesty and Spain relative to America. Signed at the Escorial.*

Leurs Majestés Britannique et Catholique, étant disposées à terminer, par un accord prompt et solide, les différends qui se sont élevés en dernier lieu entre les 2 Couronnes, elles ont trouvé que le meilleur moyen de parvenir à ce but salutaire seroit celui d'une transaction à l'amiable, laquelle, en laissant de côté toute discussion rétrospective des droits et des prétensions des 2 Parties, réglât leur position respective à l'avenir sur des bases qui seroient conformes à leurs vrais intérêts, ainsi qu'au désir mutuel dont Leurs dites Majestés sont animées, d'établir entre elles, en tout et en tous lieux, la plus parfaite amitié, harmonie et bonne correspondance.

Dans cette vûe, elles ont nommé et constitué pour leurs Plénipotentiaires; savoir, de la part de Sa Majesté Britannique, le Sieur Alleyne FitzHerbert, du Conseil Privé de Sa dite Majesté dans la Grande Bretagne et en Irlande, et son Ambassadeur Extraordinaire et Plénipotentiaire près Sa Majesté Catholique; et de la part de Sa Majesté Catholique, Don Joseph Monino, Comte de Florida-blanca, Chevalier Grand Croix du Royal Ordre Espagnol de Charles III, Conseiller d'Etat de Sa dite Majesté, et son Premier Secrétaire d'Etat et del Despacho; lesquels après s'être communiqué leurs Pleins pouvoirs respectifs, sont convenus des Articles suivans:

ARTICLE I.

Restoration to British Subjects of Buildings and Lands on the N.W. Coast of N. America of which they were dispossessed by Spanish in 1789.

Il est convenu que les Bâtimens et les Districts de Terrein, situés sur la Côte du Nord-ouest du Continent de l'Amérique Septentrionale, ou bien sur des Iles adjacentes à ce Continent, desquels les Sujets de Sa Majesté Britannique ont été dépossédés, vers le mois d'Avril, 1789, par un Officier Espagnol, seront restitués aux dits Sujets Britanniques.

ARTICLE II.

Compensation to be given for Acts of Violence committed after April, 1789, by Subjects of either Country.

De plus, une juste réparation sera faite, selon la nature du cas, pour tout acte de violence ou d'hostilité qui aura pu avoir été commis, depuis le dit mois d'Avril, 1789, par les Sujets de l'une des 2 Parties Contractantes contre les Sujets de l'autre; et au cas que depuis la dite époque, quelques uns des sujets respectifs aient été forcément dépossédés de leurs Terrains, Bâtimens, Vaisseaux, marchandises, ou autres objets de propriété quelconques, sur le dit Continent, ou sur les Mers ou Iles adjacentes, ils en seront remis en possession, ou une juste compensation leur sera faite pour les pertes qu'ils auront essuyées.

15

ARTICLE III.

Subjects of either Party not to be molested in their Fisheries or Navigation of the Pacific or South Seas, or in landing on the Coasts of those Seas for carrying on Commerce with Natives.

Et, afin de resserrer les liens de l'amitié, et de conserver à l'avenir une parfaite harmonie et bonne intelligence entre les 2 Parties Con-

tractantes, il est convenu que les Sujets Respectifs ne seront point troublés ni molestés, soit en naviguant ou en exerçant leur Pêche dans l'Océan Pacifique, ou dans les Mers de Sud, soit en débarquant sur les Côtes qui bordent ces Mers, dans des endroits non déjà occupés, afin d'y exercer leur commerce avec les Naturels du Pays, ou pour y former des Etablissements. Le tout sujet néanmoins aux restrictions et aux provisions qui seront spécifiées dans les 3 Articles suivans.

ARTICLE IV.

Navigation by British Subjects of Pacific and South Seas not to be made a Pretext for Illicit Trade with Spanish Settlements.—British Subjects not to fish within 10 Leagues of Coasts occupied by Spain.

Sa Majesté Britannique s'engage d'employer les mesures les plus efficaces pour que la Navigation et la Pêche de ses Sujets dans l'Océan Pacifique, ou dans les Mers du Sud, ne deviennent point le Prétexte d'un commerce illicite avec les Etablissements Espagnols; et, dans cette vûe, il est en outre expressément stipulé, que les Sujets Britanniques ne navigueront point, et n'exerceront pas leur Pêche dans les dites Mers, à la distance de 10 lieues maritimes d'aucune partie des Côtes déjà occupées par l'Espagne.

ARTICLE V.

Free Access of Subjects of each State to the Settlements of the Other.

Il est convenu, que tant dans les endroits qui seront restitués aux Sujets Britanniques, en vertu de l'Article I, que dans toutes les autres parties de la Côte du Nord-ouest de l'Amérique Septentrionale, ou des Iles adjacentes, situées au Nord des parties de la dite Côte déjà occupées par l'Espagne, partout où les Sujets de l'une des 2 Puissances auront formé des Etablissements, depuis le mois d'Avril, 1789, ou en formeront par la suite, les Sujets de l'autre auront un accès libre et exerceront leur commerce, sans trouble ni molestation.

ARTICLE VI.

No settlements to be made on Islands adjacent to the Eastern or Western Coasts of S. America South of the Portions already occupied by Spain, but Landing may be effected for Fishery purposes.

Il est encore convenu, par rapport aux Côtes tant Orientales qu'Occidentales de l'Amérique Méridionale, et aux Iles adjacentes, que les Sujets respectifs ne formeront à l'avenir aucun Etablissement sur les parties de ces Côtes situées au Sud des parties de ces mêmes Côtes, et des Iles adjacentes, déjà occupées par l'Espagne; bien entendu que les dits Sujets respectifs conserveront la faculté de débarquer sur les Côtes et Iles ainsi situées, pour les objets de leur Pêche, et d'y bâtir des cabanes, et autres ouvrages temporaires, servant seulement à ces objets.

ARTICLE VII.

Procedure in Case of Infraction of the Convention.

Dans tous les cas de plainte, ou d'infraction des Articles de la présente Convention, les Officiers de part et d'autre, sans se permettre

au préalable aucune violence ou voie de fait, seront tenus de faire un rapport exact de l'affaire, et de ses circonstances, à leurs Cours respectives, qui termineront à l'amiable ces différends.

ARTICLE VIII.

Ratifications.

La présente Convention sera ratifiée et confirmée dans l'espace de 6 semaines, à compter du jour de sa signature, ou plutôt si faire se peut.

En foi de quoi, nous Soussignés Plénipotentiaires de Leurs Majestés Britannique et Catholique, avons signés, en leurs noms, et en vertu de nos Pleinspouvoirs respectifs, la présente Convention, et y avons apposé les Cachets de nos Armes.

Fait à San Loren el Real, le 28 Octobre, 1790.

(L.S.)

EL CONDE DE FLORIDABLANCA.

(L.S.)

ALLEYNE FITZ-HERBERT.

16 No. 11.—1794, November 19: *Treaty between His Britannic Majesty and the United States* ("Jay's Treaty").

Treaty of Amity, Commerce, and Navigation, between His Britannic Majesty and the United States of America, by their President, with the advice and consent of their Senate. Concluded November 19, 1794; ratification exchanged October 28, 1795; proclaimed February 29, 1796.

His Britannic Majesty and the United States of America, being desirous, by a Treaty of Amity, Commerce, and Navigation, to terminate their differences in such a manner, as, without reference to the merits of their respective complaints and pretensions, may be the best calculated to produce mutual satisfaction and good understanding; and also to regulate the commerce and navigation between their respective countries, territories, and people, in such a manner as to render the same reciprocally beneficial and satisfactory; they have, respectively, named their Plenipotentiaries, and given them full powers to treat of, and conclude the said Treaty, that is to say:

His Britannic Majesty has named for his Plenipotentiary, the Right Honourable William Wyndham Baron Grenville of Wotton, one of his Majesty's Privy Council, and his Majesty's Principal Secretary of State for Foreign Affairs; and the President of the said United States, by and with the advice and consent of the Senate thereof, hath appointed for their Plenipotentiary, the Honourable John Jay, Chief Justice of the said United States, and their Envoy Extraordinary to His Majesty;

Who have agreed on and concluded the following articles:

ARTICLE I.

There shall be a firm, inviolable and universal peace, and a true and sincere friendship between His Britannic Majesty, his heirs and successors, and the United States of America; and between their

respective countries, territories, cities, towns and people of every degree, without exception of persons or places.

ARTICLE II.

His Majesty will withdraw all his troops and garrisons from all posts and places within the boundary lines assigned by the treaty of peace to the United States. This evacuation shall take place on or before the first day of June, one thousand seven hundred and ninety-six, and all the proper measures shall in the interval be taken by concert between the Government of the United States and His Majesty's governor-general in America, for settling the previous arrangements which may be necessary respecting the delivery of the said posts: the United States in the meantime, at their discretion, extending their settlements to any part within the said boundary-line, except within the precincts or jurisdiction of any of the said posts. All settlers and traders, within the precincts or jurisdiction of the said posts, shall continue to enjoy, unmolested, all their property of every kind, and shall be protected therein. They shall be at full liberty to remain there, or to remove with all or any part of their effects; And it shall also be free to them to sell their lands, houses, or effects, or to retain the property thereof, at their discretion; such of them as shall continue to reside within the said boundary lines, shall not be compelled to become citizens of the United States, or to take any oath of allegiance to the Government thereof; but they shall be at full liberty so to do if they think proper, and they shall make and declare their election within one year after the evacuation aforesaid. And all persons who shall continue there after the expiration of the said year, without having declared their intention of remaining subjects of His Britannic Majesty, shall be considered as having elected to become citizens of the United States.

ARTICLE III.

It is agreed that it shall at all times be free to His Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America, (the country within the limits of the Hudson's Bay Company only excepted,) and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other. But it is understood that this article does not extend to the admission of vessels of the United States into the sea-ports, harbours, bays, or creeks of His Majesty's said territories; nor into such parts of the rivers in His Majesty's said territories as are between the mouth thereof, and the highest port of entry from the sea, except in small vessels trading bona fide between Montreal and Quebec, under such regulations as shall be established to prevent the possibility of any frauds in this respect. Nor to the admission of British vessels from the sea into the rivers of the United States, beyond the highest ports of entry for foreign vessels from the sea. The River Mississippi shall, however, according to the treaty of peace, be entirely open to both parties; and it is further agreed, that all the ports and places on its eastern side, to whichever of the

parties belonging, may freely be restored to and used by both parties, in as ample a manner as any of the Atlantic ports or places of the United States, or any of the ports or places of His Majesty in Great Britain.

17 All goods and merchandise whose importation into His Majesty's said territories in America shall not be entirely prohibited, may freely, for the purposes of commerce be carried into the same in the manner aforesaid, by the citizens of the United States, and such goods and merchandise shall be subject to no higher or other duties than would be payable by His Majesty's subjects on the importation of the same from Europe into the said territories. And in like manner, all goods and merchandise whose importation into the United States shall not be wholly prohibited, may freely, for the purposes of commerce, be carried into the same, in the manner aforesaid, by His Majesty's subjects, and such goods and merchandise shall be subject to no higher or other duties than would be payable by the citizens of the United States on the importation of the same in American vessels into the Atlantic ports of the said States. And all goods not prohibited to be exported from the said territories respectively, may in like manner be carried out of the same by the two parties respectively, paying duty as aforesaid.

No duty of entry shall ever be levied by either party on peltries brought by land or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians.

No higher or other tolls or rates of ferriage than what are or shall be payable by natives, shall be demanded on either side; and no duties shall be payable on any goods which shall merely be carried over any of the portages or carrying-places on either side, for the purpose of being immediately re-embarked and carried to some other place or places. But as by this stipulation it is only meant to secure to each party a free passage across the portages on both sides, it is agreed that this exemption from duty shall extend only to such goods as are carried in the usual and direct road across the portage, and are not attempted to be in any manner sold or exchanged during their passage across the same, and proper regulations may be established to prevent the possibility of any frauds in this respect.

As this article is intended to render in a great degree the local advantages of each party common to both, and thereby to promote a disposition favourable to friendship and good neighbourhood, it is agreed that the respective Governments will mutually promote this amicable intercourse, by causing speedy and impartial justice to be done, and necessary protection to be extended to all who may be concerned therein.

ARTICLE IV.

Whereas it is uncertain whether the River Mississippi extends so far to the northward as to be intersected by a line to be drawn due west from the Lake of the Woods, in the manner mentioned in the treaty of peace between His Majesty and the United States: it is

agreed that measures shall be taken in concert between His Majesty's Government in America and the Government of the United States, for making a joint survey of the said river from one degree of latitude below the falls of St. Anthony, to the principal source or sources of the said river, and also of the part, adjacent thereto; and that if, on the result of such survey, it should appear that the said river would not be intersected by such a line as is above mentioned, the two parties will thereupon proceed, by amicable negotiation, to regulate the boundary line in that quarter, as well as all other points to be adjusted between the said parties, according to justice and mutual convenience, and in conformity to the intent of said treaty.

ARTICLE V.

Whereas doubts have arisen what river was truly intended under the name of the River St. Croix, mentioned in the said treaty of peace, and forming a part of the boundary therein described; that question shall be referred to the final decision of commissioners to be appointed in the following manner, viz:

One commissioner shall be named by His Majesty, and one by the President of the United States, by and with the advice and consent of the Senate thereof, and the said two commissioners shall agree on the choice of a third; or if they cannot so agree, they shall each propose one person, and of the two names so proposed, one shall be drawn by lot in the presence of the two original commissioners. And the three commissioners so appointed shall be sworn, impartially to examine and decide the said question, according to such evidence as shall respectively be laid before them on the part of the British Government and of the United States. The said commissioners shall meet at Halifax, and shall have power to adjourn to such other place or places as they shall think fit. They shall have power to appoint a secretary, and to employ such surveyors or other persons as they shall judge necessary. The said commissioners shall, by a declaration, under their hands and seals, decide what river is the River St. Croix, intended by the treaty. The said declaration shall contain a description of the said river, and shall particularise the latitude and longitude of its mouth and of its source. Duplicates of this declaration and of the statements of their accounts, and of the journal of their proceedings, shall be delivered by them to the agent of His Majesty, and to the agent of the United States, who may be respectively appointed and authorised to manage the business on behalf of the respective Governments. And both parties agree to consider such decision as final and conclusive, so as that the same shall never thereafter be called into question, or made the subject of dispute or difference between them.

ARTICLE VI.

Whereas it is alleged by divers British merchants and others His Majesty's subjects, that debts, to a considerable amount, which
 18 were bona fide contracted before the peace, still remain owing to them by citizens or inhabitants of the United States, and that by the operation of various lawful impediments since the peace,

not only the full recovery of the said debts has been delayed, but also the value and security thereof have been, in several instances, impaired and lessened, so that, by the ordinary course of judicial proceedings, the British creditors cannot now obtain, and actually have and receive full and adequate compensation for the losses and damages which they have thereby sustained: It is agreed, that in all such cases, where full compensation for such losses and damages cannot, for whatever reason, be actually obtained, had and received by the said creditors in the ordinary course of justice, the United States will make full and complete compensation for the same to the said creditors: But it is distinctly understood, that this provision is to extend to such losses only as have been occasioned by the lawful impediments aforesaid, and is not to extend to losses occasioned by such insolvency of the debtors or other causes as would equally have operated to produce such loss, if the said impediments had not existed; nor to such losses or damages as have been occasioned by the manifest delay or negligence, or wilful omission of the claimant.

For the purpose of ascertaining the amount of any such losses and damages, five commissioners shall be appointed and authorised to meet and act in manner following, viz: Two of them shall be appointed by His Majesty, two of them by the President of the United States by and with the advice and consent of the Senate thereof, and the fifth by the unanimous voice of the other four; and if they should not agree in such choice, then the commissioners named by the two parties shall respectively propose one person, and of the two names so proposed, one shall be drawn by lot, in the presence of the four original commissioners. When the five commissioners thus appointed shall first meet, they shall, before they proceed to act, respectively take the following oath, or affirmation, in the presence of each other; which oath, or affirmation, being so taken and duly attested, shall be entered on the record of their proceedings, viz: I, A. B., one of the commissioners appointed in pursuance of the sixth article of the Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and the United States of America, do solemnly swear (or affirm) that I will honestly, diligently, impartially, and carefully examine, and to the best of my judgment, according to justice and equity, decide all such complaints, as under the said article shall be preferred to the said commissioners: and that I will forbear to act as a commissioner, in any case in which I may be personally interested.

Three of the said commissioners shall constitute a board, and shall have power to do any act appertaining to the said commission, provided that one of the commissioners named on each side, and the fifth commissioner shall be present, and all decisions shall be made by the majority of the voices of the commissioners then present. Eighteen months from the day on which the said commissioners shall form a board, and be ready to proceed to business, are assigned for receiving complaints and applications; but they are nevertheless authorized, in any particular cases in which it shall appear to them to be reasonable and just, to extend the said term of eighteen months, for any term not exceeding six months, after the expiration thereof. The said commissioners shall first meet at Philadelphia, but they shall have power to adjourn from place to place as they shall see cause.

The said commissioners in examining the complaints and applications so preferred to them, are empowered and required, in pursuance of the true intent and meaning of this article, to take into their consideration all claims, whether of principal or interest, or balances of principal and interest, and to determine the same respectively, according to the merits of the several cases, due regard being had to all the circumstances thereof, and as equity and justice shall appear to them to require. And the said commissioners shall have power to examine all such persons as shall come before them, on oath or affirmation, touching the premises; and also to receive in evidence, according as they may think most consistent with equity and justice, all written depositions, or books, or papers, or copies, or extracts thereof; every such deposition, book, or paper, or copy, or extract, being duly authenticated, either according to the legal form now respectively existing in the two countries, or in such other manner as the said commissioners shall see cause to require or allow.

The award of the said commissioners, or of any three of them as aforesaid, shall in all cases be final and conclusive, both as to the justice of the claim, and to the amount of the sum to be paid to the creditor or claimant; and the United States undertake to cause the sum so awarded to be paid in specie to such creditor or claimant without deduction; and at such time or times and at such place or places, as shall be awarded by the said commissioners; and on condition of such releases or assignments to be given by the creditor or claimant, as by the said commissioners may be directed: provided always, that no such payment shall be fixed by the said commissioners to take place sooner than twelve months from the day of the exchange of the ratification of this treaty.

ARTICLE VII.

Whereas complaints have been made by divers merchants and others, citizens of the United States, that during the course of the war in which His Majesty is now engaged, they have sustained considerable losses and damage, by reason of irregular or illegal captures or condemnations of their vessels and other property, under colour of authority or commissions from His Majesty, and that from various circumstances belonging to the said cases, adequate compensation for the losses and damages so sustained cannot now be actually obtained, had, and received by the ordinary course of judicial proceedings; it is agreed, that in all such cases, where adequate compensation cannot, for whatever reason, be now actually obtained, had, and received by the said merchants and others, in the ordinary course of justice, full and complete compensation for the same will be made by the British Government to the said
 19 complainants. But it is distinctly understood that this provision is not to extend to such losses or damages as have been occasioned by the manifest delay or negligence, or wilful omission of the claimant.

That for the purpose of ascertaining the amount of any such losses and damages, five commissioners shall be appointed and authorised to act in London, exactly in the manner directed with respect to those mentioned in the preceding article, and after having taken the same oath or affirmation, (*mutatis mutandis*,) the same term of eighteen

months is also assigned for the reception of claims, and they are in like manner authorised to extend the same in particular cases. They shall receive testimony, books, papers, and evidence in the same latitude, and exercise the like discretion and powers respecting that subject; and shall decide the claims in question according to the merits of the several cases, and to justice, equity, and the laws of nations. The award of the said commissioners, or any such three of them as aforesaid, shall in all cases be final and conclusive, both as to the justice of the claim, and the amount of the sum to be paid to the claimant; and His Britannic Majesty undertakes to cause the same to be paid to such claimant in specie, without any deduction, at such place or places, and at such time or times, as shall be awarded by the said commissioners, and on condition of such releases or assignments to be given by the claimant, as by the said commissioners may be directed.

And whereas certain merchants and others, His Majesty's subjects, complain that, in the course of the war, they have sustained loss and damage by reason of the capture of their vessels and merchandise, taken within the limits and jurisdiction of the States and brought into the ports of the same, or taken by vessels originally armed in ports of the said States:

It is agreed that in all such cases where restitution shall not have been made agreeably to the tenor of the letter from Mr. Jefferson to Mr. Hammond, dated at Philadelphia, Sept. 5, 1793, a copy of which is annexed to this treaty; the complaints of the parties shall be and hereby are referred to the commissioners to be appointed by virtue of this article, who are hereby authorised and required to proceed in the like manner relative to these as to the other cases committed to them; and the United States undertake to pay to the complainants or claimants in specie, without deduction, the amount of such sums as shall be awarded to them respectively by the said commissioners, and at the times and places which in such awards shall be specified; and on condition of such releases or assignments to be given by the claimants as in the said awards may be directed: And it is further agreed, that not only the now-existing cases of both descriptions, but also all such as shall exist at the time of exchanging the ratifications of this treaty, shall be considered as being within the provisions, intent, and meaning of this article.

ARTICLE VIII.

It is further agreed that the commissioners mentioned in this and in the two preceding articles shall be respectively paid in such manner as shall be agreed between the two parties, such agreement being to be settled at the time of the exchange of the ratifications of this treaty. And all other expenses attending the said commissions shall be defrayed jointly by the two parties, the same being previously ascertained and allowed by the majority of the commissioners. And in the case of death, sickness or necessary absence, the place of every such commissioner respectively shall be supplied in the same manner as such commissioner was first appointed, and the new commissioners shall take the same oath or affirmation, and do the same duties.

ARTICLE IX.

It is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold

lands in the dominions of His Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens.

ARTICLE X.

Neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor monies, which they may have in the public funds, or in the public or private banks, shall ever in any event of war or national differences be sequestered or confiscated, it being unjust and impolitic that debts and engagements contracted and made by individuals, having confidence in each other and in their respective Governments, should ever be destroyed or impaired by national authority on account of national differences and discontents.

ARTICLE XI.

It is agreed between His Majesty and the United States of America, that there shall be a reciprocal and entirely perfect liberty of navigation and commerce between their respective people, in the manner, under the limitations, and on the conditions specified in the following articles.

ARTICLE XII.

His Majesty consents that it shall and may be lawful, during the time hereinafter limited, for the citizens of the United States to carry to any of His Majesty's islands and ports in the West Indies from the United States, in their own vessels, not being above the burthen of seventy tons, any goods or merchandises, being of the growth, manufacture, or produce of the said States, which it is or may be lawful to carry to the said islands or ports from the said States in British vessels; and that the said American vessels shall be subject there to no other or higher tonnage duties or charges than shall be payable by British vessels in the ports of the United States; and that the cargoes of the said American vessels shall be subject there to no other or higher duties or charges than shall be payable on the like articles if imported there from the said States in British vessels.

And His Majesty also consents that it shall be lawful for the said American citizens to purchase, load, and carry away in their said vessels to the United States, from the said islands and ports, all such articles, being of the growth, manufacture, or produce of the said islands, as may now by law be carried from thence to the said States in British vessels, and subject only to the same duties and charges on exportation, to which British vessels and their cargoes are or shall be subject in similar circumstances.

Provided always, that the said American vessels do carry and land their cargoes in the United States only, it being expressly agreed and declared that, during the continuance of this article, the United States will prohibit and restrain the carrying any molasses, sugar, coffee, cocoa, or cotton in American vessels, either from His Majesty's islands

or from the United States to any part of the world except the United States, reasonable sea-stores excepted. Provided, also, that it shall and may be lawful, during the same period, for British vessels to import from the said islands into the United States, and to export from the United States to the said islands, all articles whatever, being of the growth, produce, or manufacture of the said islands, or of the United States respectively, which now may, by the laws of the said States, be so imported and exported. And that the cargoes of the said British vessels shall be subject to no other or higher duties or charges, than shall be payable on the same articles if so imported or exported in American vessels.

It is agreed that this article, and every matter and thing therein contained, shall continue to be in force during the continuance of the war in which His Majesty is now engaged; and also for two years from and after the day of the signature of the preliminary or other articles of peace, by which the same may be terminated.

And it is further agreed that, at the expiration of the said term, the two contracting parties will endeavour further to regulate their commerce in this respect, according to the situation in which His Majesty may then find himself with respect to the West Indies, and with a view to such arrangements as may best conduce to the mutual advantage and extension of commerce. And the said parties will then also renew their discussions, and endeavour to agree, whether in any and what cases, neutral vessels shall protect enemy's property; and in what cases provisions and other articles, not generally contraband, may become such. But in the meantime, their conduct towards each other in these respects shall be regulated by the article hereinafter inserted on those subjects.

ARTICLE XIII.

His Majesty consents that the vessels belonging to the citizens of the United States of America shall be admitted and hospitably received in all the sea-ports and harbours of the British territories in the East Indies. And that the citizens of the said United States may freely carry on a trade between the said territories and the said United States, in all articles of which the importation or exportation respectively, to or from the said territories, shall not be entirely prohibited. Provided only, that it shall not be lawful for them in any time of war between the British Government and any other Power or State whatever, to export from the said territories, without the special permission of the British Government there, any military stores, or naval stores, or rice. The citizens of the United States shall pay for their vessels when admitted into the said ports no other or higher tonnage duty than shall be payable on British vessels when admitted into the ports of the United States. And they shall pay no other or higher duties or charges, on the importation or exportation of the cargoes of the said vessels, than shall be payable on the same articles when imported or exported in British vessels. But it is expressly agreed that the vessels of the United States shall not carry any of the articles exported by them from the said British territories to any port or place, except to some port or place in America, where the same shall be unladen and such regulations shall be adopted by both parties as shall from time to time be found necessary to enforce

the due and faithful observance of this stipulation. It is also understood that the permission granted by this article is not to extend to allow the vessels of the United States to carry on any part of the coasting trade of the said British territories; but vessels going with their original cargoes, or part thereof, from one port of discharge to another, are not to be considered as carrying on the coasting trade. Neither is this article to be construed to allow the citizens of the said States to settle or reside within the said territories, or to go into the interior parts thereof, without the permission of the British Government established there; and if any transgression should be attempted against the regulations of the British Government in this respect, the observance of the same shall and may be enforced against the citizens of America in the same manner as against British subjects or others transgressing the same rule. And the citizens of the United States, whenever they arrive in any port or harbour in the said territories, or if they should be permitted in manner aforesaid, to go to any other place therein, shall always be subject to the laws, Government, and jurisdiction of what nature established in such harbour, port, or place, according as the same may be. The citizens of the United States may also touch for refreshment at the Island of St. Helena, but subject in all respects to such regulations as the British Government may from time to time establish there.

ARTICLE XIV.

There shall be between all the dominions of His Majesty in Europe and the territories of the United States a reciprocal and perfect
 21 liberty of commerce and navigation. The people and inhabitants of the two countries, respectively, shall have liberty freely and securely, and without hindrance and molestation, to come with their ships and cargoes to the lands, countries, cities, ports, places, and rivers within the dominions and territories aforesaid, to enter into the same, to resort there, and to remain and reside there, without any limitation of time. Also to hire and possess houses and warehouses for the purposes for their commerce, and generally the merchants and traders on each side shall enjoy the most complete protection and security for their commerce; but subject always as to what respects this article to the laws and statutes of the two countries respectively.

ARTICLE XV.

It is agreed that no other or higher duties shall be paid by the ships or merchandise of the one party in the ports of the other than such as are paid by the like vessels or merchandise of all other nations. Nor shall any other or higher duty be imposed in one country on the importation of any articles the growth, produce, or manufacture of the other, than are or shall be payable on the importation of the like articles being of the growth, produce, or manufacture of any other foreign country. Nor shall any prohibition be imposed on the exportation or importation of any articles to or from the territories of the two parties respectively, which shall not equally extend to all other nations.

But the British Government reserves to itself the right of imposing on American vessels entering into the British ports in Europe a tonnage duty equal to that which shall be payable by British vessels in the ports of America; and also such duty as may be adequate to countervail the difference of duty now payable on the importation of European and Asiatic goods, when imported into the United States in British or in American vessels.

The two parties agree to treat for the more exact equalisation of the duties on the respective navigation of their subjects and people, in such manner as may be most beneficial to the two countries. The arrangements for this purpose shall be made at the same time with those mentioned at the conclusion of the twelfth article of this treaty, and are to be considered as a part thereof. In the interval it is agreed that the United States will not impose any new or additional tonnage duties on British vessels, nor increase the now-subsisting difference between the duties payable on the importation of any articles in British or in American vessels.

ARTICLE XVI.

It shall be free for the two contracting parties, respectively, to appoint consuls for the protection of trade, to reside in the dominions and territories aforesaid; and the said consuls shall enjoy those liberties and rights which belong to them by reason of their function. But before any consul shall act as such, he shall be in the usual forms approved and admitted by the party to whom he is sent; and it is hereby declared to be lawful and proper that, in case of illegal or improper conduct towards the laws or Government, a consul may either be punished according to law, if the laws will reach the case, or be dismissed, or even sent back, the offended Government assigning to the other their reasons for the same.

Either of the parties may except from the residence of consuls such particular places as such party shall judge proper to be so excepted.

ARTICLE XVII.

It is agreed that in all cases where vessels shall be captured or detained on just suspicion of having on board enemy's property, or of carrying to the enemy any of the articles which are contraband of war, the said vessels shall be brought to the nearest or most convenient port; and if any property of an enemy shall be found on board such vessel, that part only which belongs to the enemy shall be made prize, and the vessel shall be at liberty to proceed with the remainder without any impediment. And it is agreed that all proper measures shall be taken to prevent delay in deciding the cases of ships or cargoes so brought in for adjudication, and in the payment or recovery of any indemnification, adjudged or agreed to be paid to the masters or owners of such ships.

ARTICLE XVIII.

In order to regulate what is in future to be esteemed contraband of war, it is agreed that under the said denomination shall be comprised all arms and implements serving for the purposes of war, by land or

sea, such as cannon, muskets, mortars, petards, bombs, grenades, carcasses, saucisses, carriages for cannon, musket-rests, bandoliers, gun-powder, match, saltpetre, ball, pikes, swords, head-pieces, cuirasses, halberts, lances, javelins, horse-furniture, holsters, belts, and generally all other implements of war, as also timber for ship-building, tar or rozin, copper in sheets, sails, hemp, and cordage, and generally whatever may serve directly to the equipment of vessels, unwrought iron and fir planks only excepted; and all the above articles are hereby declared to be just objects of confiscation whenever they are attempted to be carried to an enemy.

And whereas the difficulty of agreeing on the precise cases in which alone provisions and other articles not generally contraband may be regarded as such, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise: it is further agreed that whenever any such articles so becoming contraband, according to the existing laws of nations, shall for that reason be seized, the same shall not be confiscated, but the owners thereof shall be speedily and completely indemnified; and the captors, or, in their default, the Government under whose authority they act, shall pay to the masters or owners of such vessels the full value of all such articles, with a reasonable mercantile profit thereon, together with the freight, and also the demurrage incident to such detention.

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And whereas it frequently happens that vessels sail for a port or place belonging to an enemy without knowing that the same is either besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place; but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless after notice she shall again attempt to enter, but she shall be permitted to go to any other port or place she may think proper; nor shall any vessel or goods of either party that may have entered into such port or place before the same was besieged, blockaded, or invested by the other, and be found therein after the reduction or surrender of such place, be liable to confiscation, but shall be restored to the owners or proprietors thereof.

ARTICLE XIX.

And that more abundant care may be taken for the security of the respective subjects and citizens of the contracting parties, and to prevent their suffering injuries by the men-of-war, or privateers of either party, all commanders of ships of war and privateers, and all others the said subjects and citizens, shall forbear doing any damage to those of the other party or committing any outrage against them, and if they act to the contrary they shall be punished, and shall also be bound in their persons and estates to make satisfaction and reparation for all damages, and the interest thereof, of whatever nature the said damages may be.

For this cause, all commanders of privateers, before they receive their commissions, shall hereafter be obliged to give, before a competent judge, sufficient security by at least two responsible sureties, who have no interest in the said privateer, each of whom, together with the said commander, shall be jointly and severally bound in the sum of fifteen hundred pounds sterling, or, if such ships be provided with above one hundred and fifty seamen or soldiers, in the sum of

three thousand pounds sterling, to satisfy all damages and injuries which the said privateer, or her officers or men, or any of them, may do or commit during their cruise contrary to the tenor of this treaty, or to the laws and instructions for regulating their conduct; and further, that in all cases of aggressions the said commissions shall be revoked and annulled.

It is also agreed that whenever a judge of a Court of Admiralty of either of the parties shall pronounce sentence against any vessel or goods or property belonging to the subjects or citizens of the other party, a formal and duly authenticated copy of all the proceedings in the cause, and of the said sentence, shall, if required, be delivered to the commander of the said vessel, without the smallest delay, he paying all legal fees and demands for the same.

ARTICLE XX.

It is further agreed that both the said contracting parties shall not only refuse to receive any pirates into any of their ports, havens, or towns, or permit any of their inhabitants to receive, protect, harbour, conceal, or assist them in any manner, but will bring to condign punishment all such inhabitants as shall be guilty of such acts or offences.

And all their ships, with the goods or merchandises taken by them and brought into the port of either of the said parties, shall be seized as far as they can be discovered, and shall be restored to the owners, or their factors or agents, duly deputed and authorised in writing by them (proper evidence being first given in the Court of Admiralty for proving the property) even in case such effects should have passed into other hands by sale, if it be proved that the buyers knew or had good reason to believe or suspect that they had been piratically taken.

ARTICLE XXI.

It is likewise agreed that the subjects and citizens of the two nations shall not do any acts of hostility or violence against each other, nor accept commissions or instructions so to act from any foreign Prince or State, enemies to the other party; nor shall the enemies of one of the parties be permitted to invite, or endeavour to enlist in their military service, any of the subjects or citizens of the other party; and the laws against all such offences and aggressions shall be punctually executed. And if any subject or citizen of the said parties respectively shall accept any foreign commission or letters of marque for arming any vessel to act as a privateer against the other party, and be taken by the other party, it is hereby declared to be lawful for the said party to treat and punish the said subject or citizen having such commission or letters of marque as a pirate.

ARTICLE XXII.

It is expressly stipulated that neither of the said contracting parties will order or authorise any acts of reprisal against the other, on complaints of injuries or damages, until the said party shall first

have presented to the other a statement thereof, verified by competent proof and evidence, and demanded justice and satisfaction and the same shall either have been refused or unreasonably delayed.

ARTICLE XXIII.

The ships of war of each of the contracting parties shall, at all times, be hospitably received in the ports of the other, their officers and crews paying due respect to the laws and Government of the country. The officers shall be treated with that respect which is due to the commissions which they bear, and if any insult should be
 23 offered to them by any of the inhabitants, all offenders in this respect shall be punished as disturbers of the peace and amity between the two countries. And His Majesty consents that in case an American vessel should, by stress of weather, danger from enemies, or other misfortune, be reduced to the necessity of seeking shelter in any of His Majesty's ports, into which such vessel could not in ordinary cases claim to be admitted, she shall, on manifesting that necessity to the satisfaction of the Government of the place, be hospitably received, and be permitted to refit and to purchase at the market price such necessaries as she may stand in need of, conformably to such orders and regulations as the Government of the place, having respect to the circumstances of each case, shall prescribe. She shall not be allowed to break bulk or unload her cargo, unless the same should be bona fide necessary to her being refitted. Nor shall be permitted to sell any part of her cargo, unless so much only as may be necessary to defray her expenses, and then not without the express permission of the Government of the place. Nor shall she be obliged to pay any duties whatever, except only on such articles as she may be permitted to sell for the purpose aforesaid.

ARTICLE XXIV.

It shall not be lawful for any foreign privateers (not being subjects or citizens of either of the said parties) who have commissions from any other Prince or State in enmity with either nation to arm their ships in the ports of either of the said parties, nor to sell what they have taken, nor in any other manner to exchange the same; nor shall they be allowed to purchase more provisions than shall be necessary for their going to the nearest port of that Prince or State from whom they obtained their commissions.

ARTICLE XXV.

It shall be lawful for the ships of war and privateers belonging to the said parties respectively to carry whithersoever they please the ships and goods taken from their enemies, without being obliged to pay any fee to the officers of the Admiralty, or to any judges whatever; nor shall the said prizes, when they arrive at and enter the ports of the said parties be detained or seized, neither shall the searchers or other officers of those places visit such prizes, (except for the purpose of preventing the carrying of any part of the cargo thereof on shore in any manner contrary to the established laws of revenue, navigation, or commerce), nor shall such officers take cognizance of

the validity of such prizes; but they shall be at liberty to hoist sail and depart as speedily as may be, and carry their said prizes to the place mentioned in their commissions or patents, which the commanders of the said ships of war or privateers shall be obliged to show. No shelter or refuge shall be given in their ports to such as have made a prize upon the subjects or citizens of either of the said parties; but if forced by stress of weather, or the dangers of the sea, to enter therein, particular care shall be taken to hasten their departure, and to cause them to retire as soon as possible. Nothing in this treaty contained shall, however, be construed or operate contrary to former and existing public treaties with other Sovereigns or States. But the two parties agree that while they continue in amity neither of them will in future make any treaty that shall be inconsistent with this or the preceding article.

Neither of the said parties shall permit the ships or goods belonging to the subjects or citizens of the other to be taken within cannon shot of the coast, nor in any of the bays, ports, or rivers of their territories, by ships of war or others having commission from any Prince, Republic, or State whatever. But, in case it should so happen, the party whose territorial rights shall thus have been violated shall use his utmost endeavours to obtain from the offending party full and ample satisfaction for the vessel or vessels so taken, whether the same be vessels of war or merchant vessels.

ARTICLE XXVI.

If at any time a rupture should take place (which God forbid) between His Majesty and the United States, the merchants and others of each of the two nations residing in the dominions of the other shall have the privilege of remaining and continuing their trade, so long as they behave peaceably and commit no offence against the laws; and in case their conduct should render them suspected, and the respective Government, should think proper to order them to remove, the term of twelve months from the publication of the order shall be allowed them for that purpose, to remove with their families, effects, and property, but this favour shall not be extended to those who shall act contrary to the established laws; and for greater certainty, it is declared that such rupture shall not be deemed to exist while negotiations for accommodating differences shall be depending, nor until the respective Ambassadors or Ministers, if such there shall be, shall be recalled or sent home on account of such differences, and not on account of personal misconduct, according to the nature and degrees of which both parties retain their rights, either to request the recall, or immediately to send home the Ambassador or Minister of the other, and that without prejudice to their mutual friendship and good understanding.

ARTICLE XXVII.

It is further agreed that His Majesty and the United States, on mutual requisitions, by them respectively, or by their respective Ministers or officers authorized to make the same, will deliver up to justice all persons who, being charged with murder or forgery, com-

mitted within the jurisdiction of either, shall seek an asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality as, according to the laws of the place, where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed. The expense of such apprehension and delivery shall be borne and defrayed by those who make the requisition and receive the fugitive.

ARTICLE XXVIII.

It is agreed that the first ten articles of this treaty shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years, to be computed from the day on which the ratifications of this treaty shall be exchanged, but subject to this condition, that whereas the said twelfth article will expire by the limitation therein contained, at the end of two years from the signing of the preliminary or other articles of peace, which shall terminate the present war in which His Majesty is engaged, it is agreed that proper measures shall by concert be taken for bringing the subject of that article into amicable treaty and discussion, so early before the expiration of the said term as that new arrangements on that head may by that time be perfected and ready to take place. But if it should unfortunately happen that His Majesty and the United States should not be able to agree on such new arrangements, in that case all the articles of this treaty, except the first ten, shall then cease and expire together.

Lastly. This treaty, when the same shall have been ratified by His Majesty and by the President of the United States, by and with the advice and consent of their senate, and the respective ratifications mutually exchanged, shall be binding and obligatory on His Majesty and on the said States, and shall be by them respectively executed and observed with punctuality and the most sincere regard to good faith; and whereas it will be expedient, in order the better to facilitate intercourse and obviate difficulties, that other articles be proposed and added to this treaty, which articles, from want of time and other circumstances, cannot now be perfected, it is agreed that the said parties will, from time to time, readily treat of and concerning such articles, and will sincerely endeavour so to form them as that they may conduce to mutual convenience and tend to promote mutual satisfaction and friendship; and that the said articles, after having been duly ratified, shall be added to and make a part of this treaty. In faith whereof we, the undersigned Ministers Plenipotentiary of His Majesty the King of Great Britain and the United States of America, have signed this present treaty, and have caused to be affixed thereto the seal of our arms.

Done at London this nineteenth day of November, one thousand seven hundred and ninety-four.

GRENVILLE. [L. S.]
JOHN JAY. [L. S.]

No. 12.—1802, March 27: *Extract from Treaty between His Britannic Majesty, France, Spain, and the Batavian Republic (Amiens).*

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Article 15. The Fisheries on the coast of Newfoundland and of the adjacent islands and of the Gulph of St. Lawrence are replaced on the same footing on which they were previous to the war. The French Fishermen and the inhabitants of St. Pierre and Miquelon shall have the privilege of cutting such wood as they may stand in need of in the Bays of Fortune and Dispair, for the space of one year from the date of the notification of the present Treaty.

No. 13.—1806, December 31: *Extract from unconfirmed Treaty of Amity, Commerce, and Navigation, between His Britannic Majesty and the United States.*

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Art. 12. And whereas it is expedient to make special provisions respecting the maritime jurisdiction of the high contracting parties on the coast of their respective possessions in North America on account of peculiar circumstances belonging to those coasts, it is agreed that in all cases where one of the said high contracting parties shall be engaged in war, and the other shall be at peace, the belligerent Power shall not stop except for the purpose hereafter mentioned, the vessels of the neutral Power, or the unarmed vessels of other nations, within five marine miles from the shore belonging to the said neutral Power on the American seas.

Provided that the said stipulation shall not take effect in favour of the ships of any nation or nations which shall not have agreed to respect the limits aforesaid, as the line of maritime jurisdiction of the said neutral State. And it is further stipulated, that if
 25 either of the high contracting parties shall be at war with any nation or nations which shall not have agreed to respect the said special limit or line of maritime jurisdiction herein agreed upon, such contracting party shall have the right to stop or search any vessel beyond the limit of a cannon shot, or three marine miles from the said coast of the neutral Power, for the purpose of ascertaining the nation to which such vessel shall belong; and with respect to the ships and property of the nation or nations not having agreed to respect the aforesaid line of jurisdiction, the belligerent Power shall exercise the same rights as if this article did not exist; and the several provisions stipulated by this article shall have full force and effect only during the continuance of the present treaty.

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Art. 19. It shall be lawful for the ships of war and privateers belonging to the said parties, respectively, to carry whithersoever they please the ships and good taken from their enemies, without being obliged to pay any fees to the officers of the Admiralty, or to any judges whatever; nor shall the said prizes, when they arrive at and enter the ports of the said parties, be detained or seized; nor shall the searchers or other officers of those places visit such prizes, (except for

the purpose of preventing the carrying of any part of the cargo thereof on shore in any manner contrary to the established laws of revenue, navigation, or commerce); nor shall such officers take cognizance of the validity of such prizes, but they shall be at liberty to hoist sail and depart as speedily as may be, and carry their said prizes to the places mentioned in their commissions or patents, which the commanders of the said ships of war or privateers shall be obliged to show.

No shelter or refuge shall be given in their ports to such as have made a prize upon the subjects or citizens of either of the said parties; but, if forced by stress of weather or the dangers of the sea to enter them, particular care shall be taken to hasten their departure, and to cause them to retire as soon as possible. Nothing in this treaty contained shall, however, be construed to operate contrary to the former and existing public treaties with other Sovereigns or States; but the two parties agree that, while they continue in amity, neither of them will in future make any treaty that shall be inconsistent with this or the preceding article.

Neither of the said parties shall permit the ships or goods belonging to the subjects or citizens of the other to be taken within cannon shot of the coast, nor within the jurisdiction described in Article 12, so long as the provisions of the said article shall be in force, by ships of war or others having commissions from any Prince, Republic, or State whatever. But in case it should so happen, the party whose territorial rights shall thus have been violated shall use his utmost endeavours to obtain from the offending party full and ample satisfaction for the vessel or vessels so taken, whether the same be vessels of war or merchant vessels.

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No. 14.—1814, May 30: *Extract from Definitive Treaty of Peace and Amity between His Britannic Majesty and France (Paris).*

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VIII. His Britannic Majesty, stipulating for himself and his allies, engages to restore to His Most Christian Majesty, within the term which shall be hereafter fixed, the colonies, fisheries, factories, and establishments of every kind which were possessed by France on the 1st of January, 1792, in the seas and on the continents of America, Africa, and Asia; with the exception, however, of the Islands of Tobago and St. Lucie, and of the Isle of France and its dependencies, especially Rodrigue and the les Séchelles, which several colonies and possessions His Most Christian Majesty cedes in full right and sovereignty to His Britannic Majesty, and also the portion of St. Domingo ceded to France by the treaty of Basle, and which His Most Christian Majesty restores in full right and sovereignty to His Catholic Majesty.

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XIII. The French right of fishery upon the Great Bank of Newfoundland, upon the coasts of the island of that name, and of the adjacent islands in the Gulf of St. Lawrence, shall be replaced upon the footing on which it stood in 1792.

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No. 15.—1814, December 24: *Treaty of Peace and Amity between His Britannic Majesty and the United States of America (Treaty of Ghent)*.

His Britannic Majesty and the United States of America, desirous of terminating the war which has unhappily subsisted between the two countries, and of restoring, upon principles of perfect reciprocity, peace, friendship, and good understanding between
26 them, have for that purpose appointed their respective plenipotentiaries; that is to say, His Britannic Majesty, on his part, has appointed the Right Honourable James Lord Gambier, late Admiral of the White, now Admiral of the Red squadron of His Majesty's Fleet, Henry Goulburn, Esquire, a member of the Imperial Parliament, and Under Secretary of State, and William Adams, Esquire, Doctor of Civil Laws: and the President of the United States, by and with the advice and consent of the Senate thereof, has appointed John Quincy Adams, James A. Bayard, Henry Clay, Jonathan Russell, and Albert Gallatin, citizens of the United States, who, after a reciprocal communication of their respective full powers, have agreed upon the following articles:

Article 1. There shall be a firm and universal peace between His Britannic Majesty and the United States, and between their respective countries, territories, cities, towns, and people of every degree, without exception of places or persons. All hostilities, both by sea and land, shall cease as soon as this treaty shall have been ratified by both parties, as hereinafter mentioned. All territory, places, and possession whatsoever taken by either party from the other during the war, or which may be taken after the signing of this treaty, excepting only the islands hereinafter mentioned, shall be restored without delay, and without causing any destruction or carrying away any of the artillery or other public property originally captured in the said forts or places, and which shall remain therein upon the exchange of the ratifications of this treaty, or any slaves or other private property. And all archives, records, deeds, and papers, either of a public nature or belonging to private persons, which in the course of the war may have fallen into the hands of the officers of either party, shall be, as far as may be practicable, forthwith restored and delivered to the proper authorities and persons to whom they respectively belong. Such of the islands in the Bay of Passamaquoddy as are claimed by both parties shall remain in the possession of the party in whose occupation they may be at the time of the exchange of the ratifications of this treaty, until the decision respecting the title to the said islands shall have been made, in conformity with the fourth article of this treaty. No disposition made by this treaty, as to such possession of the islands and territories claimed by both parties, shall in any manner whatever be construed to affect the right of either.

Art. 2. Immediately after the ratifications of this treaty by both parties, as hereinafter mentioned, orders shall be sent to the armies, squadrons, officers, subjects, and citizens of the two Powers to cease from all hostilities; and to prevent all causes of complaint which might arise on account of the prizes which may be taken at sea after the said ratifications of this treaty, it is reciprocally agreed that all vessels and effects which may be taken after the space of twelve days from the said ratifications, upon all parts of the coast of North

America, from the latitude of twenty-three degrees north to the latitude of fifty degrees north, and as far eastward in the Atlantic Ocean as the thirty-sixth degree of west longitude from the meridian of Greenwich, shall be restored on each side; that the time shall be thirty days in all other parts of the Atlantic Ocean north of the equinoctial line or equator, and the same time for the British and Irish Channels, for the Gulf of Mexico, and all parts of the West Indies; forty days for the North Seas, for the Baltic, and for all parts of the Mediterranean; sixty days for the Atlantic Ocean south of the equator as far as the latitude of the Cape of Good Hope; ninety days for every part of the world south of the Equator, and one hundred and twenty days for all other parts of the world, without exception.

Art. 3. All prisoners of war taken on either side, as well by land as by sea, shall be restored as soon as practicable after the ratifications of this treaty, as hereinafter mentioned, on their paying the debts which they may have contracted during their captivity. The two contracting parties respectively engage to discharge, in specie, the advances which may have been made by the other for the sustenance and maintenance of such prisoners.

Art. 4. Whereas it was stipulated by the second article in the Treaty of Peace of one thousand seven hundred and eighty-three between His Britannic Majesty and the United States of America, that the boundary of the United States should comprehend all islands within twenty leagues of any part of the shores of the United States, and lying between lines to be drawn due east from the points where the aforesaid boundaries between Nova Scotia on the one part, and East Florida on the other, shall respectively touch the Bay of Fundy and the Atlantic Ocean, excepting such islands as now are, or heretofore have been, within the limits of Nova Scotia; and whereas several islands in the Bay of Passamaquoddy, which is part of the Bay of Fundy, and the Island of Grand Manan, in the said Bay of Fundy, are claimed by the United States as being comprehended within their aforesaid boundaries, which said islands are claimed as belonging to His Britannic Majesty, as having been at the time of, and previous to, the aforesaid treaty of one thousand seven hundred and eighty-three within the limits of the Province of Nova Scotia: in order, therefore, finally to decide upon these claims, it is agreed that they shall be referred to two commissioners, to be appointed in the following manner, viz: One commissioner shall be appointed by His Britannic Majesty, and one by the President of the United States, by and with the advice and consent of the Senate thereof; and the said two commissioners so appointed shall be sworn impartially to examine and decide upon the said claims, according to such evidence as shall be laid before them, on the part of His Britannic Majesty and of the United States, respectively. The said commissioners shall meet at St. Andrew's, in the Province of New Brunswick, and shall have power to adjourn to such other place or places as they shall think fit. The said commissioners shall, by a declaration or report under their hands and seals, decide to which of the two contracting parties the several islands aforesaid do respectively belong, in conformity with the true intent of the said treaty of peace of one thousand seven hundred and eighty-three; and if the said commissioners shall agree in their decision, both parties shall consider such decision

as final and conclusive. It is further agreed, that in the event of the two commissioners differing upon all or any of the matters so referred to them, or in the event of both or either of the said
 27 commissioners refusing, or declining, or wilfully omitting to act as such, they shall make, jointly or separately, a report or reports, as well to the Government of His Britannic Majesty as to that of the United States, stating in detail the points on which they differ, and the grounds upon which their respective opinions have been formed, or the grounds upon which they, or either of them, have so refused, declined, or omitted to act. And His Britannic Majesty and the Government of the United States hereby agree to refer the report or reports of the said commissioners to some friendly Sovereign or State, to be then named for that purpose, and who shall be requested to decide on the differences which may be stated in the said report or reports, or upon the report of one commissioner, together with the grounds upon which the other commissioner shall have refused, declined, or omitted to act, as the case may be; and if the commissioner so refusing, declining, or omitting to act, shall also wilfully omit to state the grounds upon which he has so done, in such manner that the said statement may be referred to such friendly Sovereign or State, together with the report of such other commissioner, then such Sovereign or State shall decide *ex parte* upon the said report alone. And His Britannic Majesty and the Government of the United States engage to consider the decision of some friendly Power or State to be such and conclusive on all the matters so referred.

Art. 5. Whereas neither that point of the highlands lying due north from the source of the River St. Croix, and designated in the former treaty of peace between the two Powers as the northwest angle of Nova Scotia, now the northwesternmost head of Connecticut River, has yet been ascertained; and whereas that part of the boundary line between the dominions of the two Powers which extends from the source of the River St. Croix, directly north, to the above-mentioned northwest angle of Nova Scotia; thence along the said islands which divide those rivers that empty themselves into the River St. Lawrence from those which fall into the Atlantic Ocean, to the north-westernmost head of Connecticut River; thence down along the middle of that river to the forty-fifth degree of north latitude; thence by a line due west on said latitude, until it strikes the River Iroquois or Cataraguy, which has not yet been surveyed: it is agreed that, for these several purposes, two commissioners shall be appointed, sworn, and authorised to act exactly in the manner directed with respect to those mentioned in the next preceding article, unless otherwise specified in the present article. The said commissioners shall meet at St. Andrew's, in the province of New Brunswick, and shall have power to adjourn to such other place or places as they shall think fit. The said commissioners shall have power to ascertain and determine the points above mentioned, in conformity with the provisions of the said treaty of peace of one thousand seven hundred and eighty-three, and shall cause the boundary aforesaid, from the source of the River St. Croix to the River Iroquois or Cataraguy, to be surveyed and marked according to the said provisions. The said commissioners shall make a map of the said boundary, and annex to it a declaration under their hands and seals certifying it to be the true map of the said boundary, and particularising the latitude and longitude of the northwest angle

of Nova Scotia, of the northwesternmost head of Connecticut River, and of such other points of the said boundary as they may deem proper; and both parties agree to consider such map and declaration as finally and conclusively fixing the said boundary. And in the event of the said two commissioners differing, or both or either of them refusing, or declining, or wilfully omitting to act, such reports, declarations, or statements shall be made by them, or either of them, and such reference to a friendly Sovereign or State shall be made in all respects as in the latter part of the fourth article is contained, and in as full a manner as if the same was herein repeated.

Art. 6. Whereas, by the former treaty of peace, that portion of the boundary of the United States from the point where the forty-fifth degree of north latitude strikes the River Iroquois or Cataraguy to the Lake Superior was declared to be "along the middle of said river into Lake Ontario; through the middle of said lake, until it strikes the communication by water between that lake and Lake Erie; thence along the middle of said communication into Lake Erie, through the middle of said lake, until it arrives at the water communication into the Lake Huron; thence through the middle of said lake, to the water communication between that Lake and Lake Superior"; and whereas doubts have arisen what was the middle of the said river, lakes, and water communications, and whether certain islands lying in the same were within the dominions of His Britannic Majesty or of the United States: in order, therefore, finally to decide these doubts, they shall be referred to two commissioners to be appointed, sworn, and authorised to act exactly in the manner directed with respect to those mentioned in the next preceding article, unless otherwise specified in this present article. The said commissioners shall meet in the first instance at Albany, in the State of New York, and shall have power to adjourn to such other place or places as they shall think fit. The said commissioners shall, by a report or declaration under their hands and seals, designate the boundary through the said river, lakes, and water communications, and decide to which of the two contracting parties the several islands lying within the said river, lakes, and water communications do respectively belong, in conformity with the true intent of the said treaty of one thousand seven hundred and eighty-three; and both parties agree to consider such designation and decision as final and conclusive. And in the event of the said two commissioners differing, or both or either of them refusing, declining, or wilfully omitting to act, such reports, declarations, or statements shall be made by them, or either of them, and such reference to a friendly Sovereign or State shall be made in all respects as in the latter part of the fourth article is contained, and in as full a manner as if the same was herein repeated.

Art. 7. It is further agreed that the said two last mentioned commissioners, after they shall have executed the duties assigned to them in the preceding article, shall be, and they are hereby, authorised upon their oaths impartially to fix and determine, according to the true intent of the said treaty of peace of one thousand seven hundred and eighty-three, that part of the boundary between the dominions of the two Powers, which extends from the water communication between Lake Huron, and Lake Superior, to the most northwestern point of the Lake of the Woods, to decide to

which of the two parties the several islands lying in the lakes, water communications, and rivers, forming the said boundary, do respectively belong, in conformity with the true intent of the said treaty of peace of one thousand seven hundred and eighty-three, and to cause such parts of the said boundary as require it to be surveyed and marked. The said commissioners shall, by a report or declaration under their hands and seals, designate the boundary aforesaid, state their decision on the points thus referred to them, and particularise the latitude and longitude of the most northwestern point of the Lake of the Woods, and of such other parts of the said boundary as they may deem proper; and both parties agree to consider such designation and decision as final and conclusive. And in the event of the said two commissioners differing, or both or either of them refusing, declining, or wilfully omitting to act, such reports, declarations, or statements shall be made by them, or either of them, and such reference to a friendly Sovereign or State shall be made in all respects as in the latter part of the fourth article is contained, and in as full a manner as if the same was herein repeated.

Art. 8. The several boards of two commissioners mentioned in the four preceding articles shall respectively have power to appoint a secretary, and to employ such surveyors or other persons as they shall judge necessary. Duplicates of all their respective reports, declarations, statements, and decisions, and of their accounts, and of the journal of their proceedings, shall be delivered by them to the agents of His Britannic Majesty, and to the agents of the United States, who may be respectively appointed and authorised to manage the business on behalf of their respective Governments. The said commissioners shall be respectively paid in such manner as shall be agreed between the two contracting parties, such agreement being to be settled at the time of the exchange of the ratifications of this treaty; and all other expenses attending the said commission shall be defrayed equally by the two parties. And in the case of death, sickness, resignation, or necessary absence, the place of every such commissioner respectively shall be supplied in the same manner as such commissioner was first appointed; and the new commissioner shall take the same oath or affirmation, and do the same duties. It is further agreed between the two contracting parties, that in case any of the islands mentioned in any of the preceding articles, which ere [were] in the possession of one of the parties prior to the commencement of the present war between the two countries, should, by the decision of any of the boards of commissioners aforesaid, or of the Sovereign or State so referred to, as in the four next preceding articles contained, fall within the dominions of the other party, all grants of land made previous to the commencement of the war by the party having had such possession shall be as valid as if such island or islands had, by such decision or decisions, been adjudged to be within the dominions of the party having had such possession.

Art. 9. The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification, and forthwith to restore to such tribes or nations, respectively, all the possessions, rights and privileges which they may have enjoyed, or been entitled to, in one thousand eight hundred and eleven, previous to such hostilities: provided

always, that such tribes or nations shall agree to desist from all hostilities against the United States of America, their citizens and subjects, upon the ratification of the present treaty being notified to such tribes or nations, and shall so desist accordingly. And His Britannic Majesty engages, on his part, to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom he may be at war at the time of such ratification, and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed, or been entitled to, in one thousand eight hundred and eleven, previous to such hostilities: provided always, that such tribes or nations shall agree to desist from all hostilities against His Britannic Majesty and his subjects, upon the ratification of the present treaty being notified to such tribes or nations, and shall so desist accordingly.

Art. 10. Whereas the traffic in slaves is irreconcilable with the principles of humanity and justice; and whereas both His Majesty and the United States are desirous of continuing their efforts to promote its entire abolition, it is hereby agreed that both the contracting parties shall use their best endeavours to accomplish so desirable an object.

Art. 11. This treaty, when the same shall have been ratified on both sides, without alteration by either of the contracting parties, and the ratifications mutually exchanged, shall be binding on both parties, and the ratifications shall be exchanged at Washington in the space of four months from this day, or sooner if practicable.

In faith whereof, we, the respective plenipotentiaries, have signed this treaty, and have hereunto affixed our seals.

Done, in triplicate, at Ghent, the twenty-fourth day of December, one thousand eight hundred and fourteen.

GAMBIER.	[L. S.]
HENRY GOULBURN.	[L. S.]
WILLIAM ADAMS.	[L. S.]
JOHN QUINCY ADAMS.	[L. S.]
J. A. BAYARD.	[L. S.]
HENRY CLAY.	[L. S.]
JONATHAN RUSSELL.	[L. S.]
ALBERT GALLATIN.	[L. S.]

29 No. 16.—1815, July 3: *Convention between the United States and His Britannic Majesty to regulate the Commerce between the Territories of the United States and those of His Britannic Majesty.*

The United States of America and His Britannic Majesty, being desirous, by a convention, to regulate the commerce and navigation between their respective countries, territories, and people, in such manner as to render the same reciprocally beneficial and satisfactory, have respectively named plenipotentiaries, and given them full powers to treat of and conclude such convention: that is to say, the President of the United States, by and with the advice and consent of the Senate thereof, hath appointed for their plenipotentiaries

John Quincy Adams, Henry Clay, and Albert Gallatin, citizens of the United States; and His Royal Highness the Prince Regent, acting in the name and on the behalf of His Majesty, has named for his plenipotentiaries the Right Honourable Frederick John Robinson, vice-president of the committee of Privy Council for trade and plantations, joint paymaster of His Majesty's forces, and a member of the Imperial Parliament; Henry Goulburn, Esq., a member of the Imperial Parliament, and Under Secretary of State; and William Adams, Esq., doctor of civil laws: and the said plenipotentiaries, having mutually produced and shown their said full powers, and exchanged copies of the same, have agreed on and concluded the following articles, viz:

Art. 1. There shall be, between the territories of the United States of America and all the territories of His Britannic Majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports, and rivers in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively.

Art. 2. No higher or other duties shall be imposed on the importation into the United States of any articles the growth, produce, or manufacture of His Britannic Majesty's territories in Europe, and no higher or other duties shall be imposed on the importation into the territories of His Britannic Majesty in Europe of any articles the growth, produce, or manufacture of the United States, than are, or shall be, payable on the like articles being the growth, produce, or manufacture of any other foreign country; nor shall any higher or other duties or charges be imposed in either of the two countries, on the exportation of any articles to the United States, or to His Britannic Majesty's territories in Europe, respectively, than such as are payable on the exportation of the like articles to any other foreign country; nor shall any prohibition be imposed on the exportation or importation of any articles the growth, produce, or manufacture of the United States, or of His Britannic Majesty's territories in Europe, to or from the said territories of His Britannic Majesty in Europe, or to or from the said United States, which shall not equally extend to all other nations.

No higher or other duties or charges shall be imposed, in any of the ports of the United States, on British vessels, than those payable in the same ports by vessels of the United States; nor in the ports of any of His Britannic Majesty's territories in Europe on the vessels of the United States, than shall be payable in the same ports on British vessels.

The same duties shall be paid on the importation into the United States of any articles the growth, produce, or manufacture of His Britannic Majesty's territories in Europe, whether such importation shall be in vessels of the United States or in British vessels; and the same duties shall be paid on the importation into the ports of any of His Britannic Majesty's territories in Europe, of any article the

growth, produce, or manufacture of the United States, whether such importation shall be in British vessels or in vessels of the United States.

The same duties shall be paid, and the same bounties allowed, on the exportation of any articles the growth, produce, or manufacture of His Britannic Majesty's territories in Europe, to the United States, whether such exportation shall be in vessels of the United States or in British vessels; and the same duties shall be paid, and the same bounties allowed, on the exportation of any articles the growth, produce, or manufacture of the United States, to His Britannic Majesty's territories in Europe, whether such exportation shall be in British vessels or in vessels of the United States.

It is further agreed, that, in all cases where drawbacks are, or may be, allowed upon the re-exportation of any goods the growth, produce, or manufacture of either country, respectively, the amount of the said drawbacks shall be the same, whether the said goods shall have been originally imported in a British or an American vessel. But when such re-exportation shall take place from the United States in a British vessel, or from the territories of His Britannic Majesty in Europe in an American vessel, to any other foreign nation, the two contracting parties reserve to themselves, respectively, the right of regulating or diminishing, in such case, the amount of the said drawbacks.

The intercourse between the United States and His Britannic Majesty's possessions in the West Indies and on the continent of North America shall not be affected by any of the provisions of this article, but each party shall remain in the complete possession of its rights with respect to such an intercourse.

Art. 3. His Britannic Majesty agrees that the vessels of the United States of America shall be admitted, and hospitably received, at the principal settlements of the British dominions in the East Indies, viz: Calcutta, Madras, Bombay, and Prince of Wales's Island, and

that the citizens of the said United States may freely carry on
30 trade between the said principal settlements and the said

United States, in all articles of which the importation and exportation, respectively, to and from the said territories, shall not be entirely prohibited: *Provided, only*, that it shall not be lawful for them, in any time of war between the British Government and any State or Power whatever, to export from the said territories, without the special permission of the British Government, any military stores, or naval stores, or rice. The citizens of the United States shall pay for their vessels, when admitted, no higher or other duty or charge than shall be payable on the vessels of the most favoured European nations; and they shall pay no higher or other duties or charges on the importation or exportation of the cargoes of the said vessels than shall be payable on the same articles when imported or exported in the vessels of the most favoured European nations. But it is expressly agreed, that the vessels of the United States shall not carry any articles from the said principal settlements to any port or place, except to some port or place in the United States of America, where the same shall be unladen.

It is also understood that the permission granted by this article is not intended to allow the vessels of the United States to carry on any part of the coasting trade of the said British territories;

but the vessels of the United States, having in the first instance proceeded to one of the said principal settlements of the British dominions in the East Indies, and then going with their original cargoes, or part thereof, from one of the said principal settlements to another, shall not be considered as carrying on the coasting trade.

The vessels of the United States may also touch for refreshment, but not for commerce, in the course of their voyage to or from the British territories in India, or to or from the dominions of the Emperor of China, at the Cape of Good Hope, the Island of St. Helena, or such other places as may be in the possession of Great Britain, in the African or Indian Seas; it being well understood that, in all that regards this article, the citizens of the United States shall be subject in all respects to the laws and regulations of the British Government from time to time established.

Art. 4. It shall be free for each of the two contracting parties, respectively, to appoint consuls for the protection of trade to reside in the dominions and territories of the other party; but, before any consul shall act as such, he shall, in the usual form, be approved and admitted by the Government to which he is sent; and it is hereby declared, that in case of illegal or improper conduct towards the laws or Government of the country to which he is sent, such consul may either be punished according to law, if the laws will reach the case, or be sent back; the offended Government assigning to the other the reasons for the same.

It is hereby declared, that either of the contracting parties may except from the residence of consuls such particular places as such party shall judge fit to be excepted.

Art. 5. This convention, when the same shall have been duly ratified by the President of the United States, by and with the advice and consent of their Senate, and by His Britannic Majesty, and the respective ratifications mutually exchanged, shall be binding and obligatory on the United States and His Majesty for four years from the date of its signature; and the ratifications shall be exchanged in six months from this time, or sooner, if possible.

Done at London, this third day of July, in the year of our Lord one thousand eight hundred and fifteen.

JOHN QUINCY ADAMS,
HENRY CLAY,
ALBERT GALLATIN,
FREDERICK JOHN ROBINSON,
HENRY GOULBURN,
WILLIAM ADAMS.

No. 17.—1818, *October 20: Convention between United States and His Britannic Majesty.*

The United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland, desirous to cement the good understanding which happily subsists between them, have, for that purpose, named their respective plenipotentiaries, that is to say: the President of the United States, on his part, has appointed

Albert Gallatin, their Envoy Extraordinary and Minister Plenipotentiary to the Court of France; and Richard Rush, their Envoy Extraordinary and Minister Plenipotentiary to the Court of His Britannic Majesty; and His Majesty has appointed the Right Honourable Frederick John Robinson, treasurer of His Majesty's navy, and President of the Committee of Privy Council for Trade and Plantations; and Henry Goulburn, Esq., one of His Majesty's Under Secretaries of State: who, after having exchanged their respective full powers, to be in due and proper form, have agreed to and concluded the following articles:

Art. 1. Whereas differences have arisen respecting the liberty, claimed by the United States for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbours, and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties that the inhabitants of the said United States shall have, for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Ramea Islands, on the western and northern coast of Newfoundland; from the said Cape Ray to the Quirpon Islands; on the shores of the Magdalen Islands; and also on the coasts, bays, harbours, and creeks, from Mount Joli, on the southern coast of Labrador, to and through the Straits of Belleisle, and thence northwardly, indefinitely, along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company: and that the American fishermen shall also have liberty, for ever, to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland, hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce, for ever, any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America, not included within the above-mentioned limits: *Provided, however,* that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

Art. 2. It is agreed that a line drawn from the most northwestern point of the Lake of the Woods, along the forty-ninth parallel of north latitude, or, if the said point shall not be in the forty-ninth parallel of north latitude, then that a line drawn from the said point due north or south, as the case may be, until the said line shall intersect the said parallel of north latitude, and from the point of such intersection, due west, along and with the said parallel, shall be the line of demarcation between the territories of the United States and those of His Britannic Majesty, and that the said line shall form the northern boundary of the said territories of the United

States, and the southern boundary of the territories of His Britannic Majesty, from the Lake of the Woods to the Stony Mountains.

Art. 3. It is agreed that any country that may be claimed by either party on the northwest coast of America, westward of the Stony Mountains, shall, together with its harbours, bays, and creeks, and the navigation of all rivers within the same, be free and open, for the term of ten years from the date of the signature of the present convention, to the vessels, citizens, and subjects of the two Powers: it being well understood that this agreement is not to be construed to the prejudice of any claim which either of the two high contracting parties may have to any part of the said country, nor shall it be taken to affect the claims of any other Power or State to any part of the said country; the only object of the high contracting parties, in that respect, being to prevent disputes and differences amongst themselves.

Art. 4. All the provisions of the convention "to regulate the commerce between the territories of the United States and of His Britannic Majesty," concluded at London on the third day of July, in the year of our Lord one thousand eight hundred and fifteen, with the exception of the clause which limited its duration to four years, and excepting, also, so far as the same was affected by the declaration of His Majesty respecting the Island of St. Helena, are hereby extended and continued in force for the term of ten years from the date of the signature of the present convention, in the same manner as if all the provisions of the said convention were herein specially recited.

Art. 5. Whereas it was agreed, by the first article of the treaty of Ghent, that "all territory, places, and possessions whatsoever, taken by either party from the other during the war, or which may be taken after the signing of this treaty, excepting only the islands hereinafter mentioned, shall be restored without delay, and without causing any destruction, or carrying away any of the artillery or other public property originally captured in the said forts or places, and which shall remain therein upon the exchange of the ratifications of this treaty, or any slaves or other private property:" and whereas, under the aforesaid article, the United States claim for their citizens, and as their private property, the restitution of, or full compensation for, all slaves who, at the date of the exchange of the ratifications of the said treaty, were in any territory, places, or possessions whatsoever, directed by the said treaty to be restored to the United States, but then still occupied by the British forces, whether such slaves were, at the date aforesaid, on shore, or on board any British vessel lying in waters within the territory or jurisdiction of the United States: and whereas differences have arisen whether, by the true intent and meaning of the aforesaid article of the treaty of Ghent, the United States are entitled to the restoration of, or full compensation for, all or any slaves, as above described, the high contracting parties hereby agree to refer the said differences to some friendly Sovereign or State, to be named for that purpose; and the high contracting parties further engage to consider the decision of such friendly Sovereign or State to be final and conclusive on all the matters referred.

Art. 6. This convention, when the same shall have been duly ratified by the President of the United States, by and with the advice and consent of their Senate, and by His Britannic Majesty,

and the respective ratifications mutually exchanged, shall be binding and obligatory on the said United States and on His Majesty: and the ratifications shall be exchanged in six months from this date, or sooner if possible.

In witness whereof, the respective plenipotentiaries have signed the same, and have hereunto affixed the seal of their arms. Done at London, this twentieth day of October, in the year of our Lord one thousand eight hundred and eighteen.

[L. S.]	ALBERT GALLATIN,
[L. S.]	RICHARD RUSH,
[L. S.]	FREDERICK JOHN ROBINSON,
[L. S.]	HENRY GOULBURN.

32 No. 18.—1839, August 2: *Extract from Convention between Her Britannic Majesty and the King of the French, defining and regulating the Limits of the Oyster and other Fishery on the Coasts of Great Britain and of France.—Signed at Paris, August 2, 1839.*

* * * * *

ART. 9.

The subjects of Her Britannic Majesty shall enjoy the exclusive right of fishery within the distance of three miles from low water mark, along the whole extent of the coasts of the British Islands, and the subjects of the King of the French shall enjoy the exclusive Right of fishery within the distance of three miles from low water mark along the whole extent of the coasts of France, it being understood that, upon that part of the coast of France which lies between *Cape Carteret* and *Point Meinga*, French subjects shall enjoy the exclusive Right of all kinds of fishery within the limits assigned in Art. 1st of this Convention for the French oyster fishery.

It is equally agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries, shall, with respect to Bays the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from Headland to Headland.

ART. 10.

It is agreed and understood that the miles mentioned in the present Convention are geographical miles whereof sixty make a degree of latitude.

* * * * *

No. 19.—1843, June 23: *Declaration of Great Britain and France confirming the Regulations of May 24, 1843 for the guidance of British and French Fishermen in the Seas lying between the Coasts of the two Countries.*

Declaration.

The Undersigned, Her Britannic Majesty's Principal Secretary of State for Foreign Affairs, on the one part, and the Ambassador Ex-

traordinary of His Majesty the King of the French at the Court of London, on the other part, having examined the annexed Regulations for the guidance of the Fishermen of Great Britain and of France in the seas lying between the coasts of the two countries; which Regulations have been prepared, in pursuance of the provisions of the eleventh Article of the Convention concluded at Paris on the 2d. of August 1839, between Her Britannic Majesty and His Majesty the King of the French, by the two Commissioners duly authorised to that effect by their said Majesties;—have, in the name and on the behalf of Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and of His Majesty the King of the French, and by virtue of their respective full powers, approved and confirmed, and do by these presents approve and confirm, the said Regulations:—reserving to their respective Governments, conformably to the terms of the abovementioned Article, to propose, if necessary, to the Legislatures of both countries, the measures which may be required for carrying the said Regulations into execution.—

In witness whereof the Undersigned have signed the present Declaration, and have affixed thereto the seals of their arms.

Done at London, the twenty third day of June, in the year of Our Lord one thousand eight hundred and forty three.—

(L. S.)

ABERDEEN.

(L. S.)

STE. AULAIRE.

No. 20.—1846, June 15: *Treaty between Her Britannic Majesty and the United States for Settlement of the Oregon Boundary. Signed at Washington, June 15, 1846.*—[Ratifications exchanged at London, July 17, 1846.]

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and The United States of America, deeming it to be desirable for the future welfare of both countries, that the state of
 33 doubt and uncertainty which has hitherto prevailed respecting the Sovereignty and Government of the Territory on the North west Coast of America, lying westward of the Rocky or Stony Mountains, should be finally terminated by an amicable compromise of the rights mutually asserted by the two Parties over the said Territory, have respectively named Plenipotentiaries to treat and agree concerning the terms of such settlement, that is to say;

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, has, on Her part, appointed the Right Honourable Richard Pakenham, a Member of Her Majesty's Most Honourable Privy Council, and Her Majesty's Envoy Extraordinary and Minister Plenipotentiary to the United States; and the President of the United States of America, has, on his part, furnished with full powers, James Buchanan, Secretary of State of the United States; who after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following Articles.

ARTICLE I.

From the point on the forty ninth parallel of north latitude, where the boundary laid down in existing Treaties and Conventions be-

tween Great Britain and the United States terminates, the line of boundary between the territories of Her Britannic Majesty and those of the United States shall be continued westward along the said forty ninth parallel of north latitude, to the middle of the channel which separates the continent from Vancouver's Island; and thence southerly through the middle of the said channel, and of Fuca's Straits, to the Pacific Ocean; provided, however, that the navigation of the whole of the said channel and straits south of the forty ninth parallel of north latitude remain free and open to both Parties.

ARTICLE II.

From the point at which the forty ninth parallel of north latitude shall be found to intersect the great northern branch of the Columbia River, the navigation of the said branch shall be free and open to the Hudson's Bay Company, and to all British subjects trading with the same, to the point where the said branch meets the main stream of the Columbia, and thence down the said main stream to the ocean, with free access into and through the said river or rivers; it being understood, that all the usual portages along the line thus described shall in like manner be free and open.

In navigating the said river or rivers, British subjects, with their goods and produce, shall be treated on the same footing as citizens of the United States; it being, however, always understood that nothing in this Article shall be construed as preventing, or intended to prevent the Government of the United States from making any regulations respecting the navigation of the said river or rivers, not inconsistent with the present Treaty.

ARTICLE III.

In the future appropriation of the territory south of the forty ninth parallel of north latitude, as provided in the First Article of this Treaty, the possessory rights of the Hudson's Bay Company, and of all British subjects, who may be already in the occupation of land or other property, lawfully acquired within the said territory shall be respected.

ARTICLE IV.

The farms lands and other property of every description, belonging to the Puget's Sound Agricultural Company on the north side of the Columbia River, shall be confirmed to the said Company. In case, however, the situation of those farms and lands should be considered by the United States to be of public and political importance, and the United States Government should signify a desire to obtain possession of the whole, or of any part thereof, the property so required shall be transferred to the said Government at a proper valuation, to be agreed upon between the parties.

ARTICLE V.

The present Treaty shall be ratified by Her Britannic Majesty, and by the President of the United States, by and with the advice and consent of the Senate thereof; and the ratifications shall be exchanged

at London at the expiration of six months from the date hereof, or sooner if possible.

In witness whereof the respective Plenipotentiaries have signed the same and have affixed thereto the seals of their arms.

Done at Washington the fifteenth day of June in the year of our Lord one thousand eight hundred and forty six.

RICHARD PAKENHAM (L. S.)

JAMES BUCHANAN (L. S.)

34 No. 21.—1848, February 2: *Extract from Treaty of Peace, Friendship, Limits and Settlement, between the United States and Mexico (Treaty of Gaudalupe Hidalgo).*

Concluded February 2, 1848; ratification advised by the Senate, with amendments, March 10, 1848; ratified by the President March 16, 1848; ratifications exchanged May 30, 1848; proclaimed July 4, 1848. (Treaties and Conventions, 1889, p. 681.)

* * * * *

ARTICLE V.

The boundary line between the two Republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence, up the middle of that river, following the deepest channel, where it has more than one to the point where it strikes the Southern Boundary of New Mexico; thence, westwardly along the whole Southern Boundary of New Mexico (which runs north of the town called *Paso*) to its western termination; thence, northward, along the western line of New Mexico, until it intersects the first branch of the river Gila; (or if it should not intersect any branch of that river, then, to the point on the said line nearest to such branch, and thence in a direct line to the same;) thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence, across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

* * * * *

The boundary line established by this Article shall be religiously respected by each of the two Republics, and no change shall ever be made therein, except by the express and free consent of both nations, lawfully given by the General Government of each, in conformity with its own constitution.

* * * * *

[This article was amended by Article I of the Treaty of 1853, December 30. See No. 23 Appendix, p. 35.]

No. 22.—1853, February 8: *Extract from Convention between Her Britannic Majesty and the United States of America, for the settlement of outstanding Claims by a Mixed Commission. Signed at London, February 8, 1853. [Ratifications exchanged at London, July 26, 1853.]*

Whereas claims have at various times since the signature of the treaty of peace and friendship between Great Britain and the United States of America, concluded at Ghent on the 24th of December, 1814, been made upon the government of her Britannic Majesty on the part of corporations, companies, and private individuals, citizens of the United States, and upon the government of the United States on the part of corporations, companies, and private individuals, subjects of her Britannic Majesty; and whereas some of such claims are still pending, and remain unsettled; her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and the President of the United States of America, being of opinion that a speedy and equitable settlement of all such claims will contribute much to the maintenance of the friendly feelings which subsist between the two countries, have resolved to make arrangements for that purpose by means of a convention, and have named as their plenipotentiaries, to confer and agree thereupon, that is to say:

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, the Right Honourable John Russell (commonly called Lord John Russell), a member of her Britannic Majesty's most honourable privy council, a member of parliament, and her Britannic Majesty's principal secretary of state for foreign affairs;

And the President of the United States of America, Joseph Reed Ingersoll, envoy extraordinary and minister plenipotentiary of the United States to her Britannic Majesty;

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed as follows:

35

ARTICLE I.

The High Contracting Parties agree that all claims on the part of corporations, companies, or private individuals, subjects of her Britannic Majesty, upon the government of the United States, and all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the government of her Britannic Majesty, which may have been presented to either government for its interposition with the other since the signature of the treaty of peace and friendship concluded between Great Britain and the United States of America at Ghent, on the 24th of December, 1814, and which yet remain unsettled, as well as any other such claims which may be presented within the time specified in article III hereinafter, shall be referred to two commissioners, to be appointed in the following manner, that is to say: One commissioner shall be named by her Britannic Majesty, and one by the President of the United States. In case of the death, absence, or incapacity of either commissioner, or in the event of either commissioner omitting or ceasing to act as such, Her Britannic Majesty, or the President of the United States, respectively, shall forthwith name another person to act as commissioner in the place or stead of the commissioner originally named.

The commissioners so named shall meet at London at the earliest convenient period after they shall have been respectively named, and shall, before proceeding to any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to justice and equity, without fear, favor, or affection to their own country, upon all such claims as shall be laid before them on the part of the governments of Her Britannic Majesty and of the United States, respectively; and such declaration shall be entered on the record of their proceedings.

The commissioners shall then, and before proceeding to any other business, name some third person to act as an arbitrator or umpire in any case or cases on which they may themselves differ in opinion. If they should not be able to agree upon the name of such third person, they shall each name a person; and in each and every case in which the commissioners may differ in opinion as to the decision which they ought to give, it shall be determined by lot which of the two persons so named shall be the arbitrator or umpire in that particular case. The person or persons so to be chosen to be arbitrator or umpire shall, before proceeding to act as such in any case, make and subscribe a solemn declaration, in a form similar to that which shall already have been made and subscribed by the commissioners, which shall be entered on the record of their proceedings. In the event of the death, absence, or incapacity of such person or persons, or of his or their omitting, or declining, or ceasing to act as such arbitrator or umpire, another and different person shall be named as aforesaid to act as such arbitrator or umpire in the place and stead of the person so originally named as aforesaid, and shall make and subscribe such declaration as aforesaid.

* * * * *

No. 23.—1853, December 30: *Extract from Treaty of Boundary, Cession of Territory, Transit of Isthmus of Tehuantepec, &c., between United States and Mexico (Gadsden Treaty)*

Concluded December 30, 1853; ratification advised by the Senate with amendments April 25, 1854; ratified by the President June 29, 1854; ratifications exchanged June 30, 1854; proclaimed June 30, 1854. (Treaties and Conventions, 1889, p. 694.)

* * * * *

ARTICLE 1ST.

The Mexican Republic agree to designate the following as her true limits with the United States for the future, Retaining the same dividing lines between the two Californias, as already defined and established according to the 5th Article of the Treaty of Guadalupe Hidalgo, the limits between the Two Republics shall be as follows: Beginning in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande as provided in the fifth article of the treaty

of Guadalupe Hidalgo, thence as defined in the said article up the middle of that river to the point where the parallel of $31^{\circ} 47'$ north latitude crosses the same, thence due west one hundred miles, thence south to the parallel of $31^{\circ} 20'$ north latitude, thence along the said parallel of $31^{\circ} 20'$ to the 111th meridian of longitude west of Greenwich, thence in a straight line to a point on the Colorado River twenty English miles below the junction of the Gila and Colorado rivers, thence up the middle of the said river Colorado until it intersects the present line between the United States and Mexico.

For the performance of this portion of the treaty each of the two Governments shall nominate one commissioner to the end that, by common consent the two thus nominated having met in the city of Paso del Norte, three months after the exchange of the ratifications of this treaty may proceed to survey and mark out upon the land the dividing line stipulated by this article, where it shall not have already been surveyed and established by the mixed commission, according to the treaty of Guadalupe keeping a journal and making
36 proper plans of their operations. For this purpose if they should judge it necessary. The contracting parties shall be at liberty each to unite to its respective commissioner scientific or other assistants, such as astronomers and surveyors whose concurrences shall not be considered necessary for the settlement and ratification of a true line of division between the two republics; that line shall be alone established upon which the commissioners may fix, their consent in this particular being considered decisive and an integral part of this treaty, without necessity of ulterior ratification or approval, and without room for interpretation of any kind by either of the parties contracting.

The dividing line thus established shall in all time be faithfully respected by the two Governments without any variation therein, unless of the express and free consent of the two, given in conformity to the principles of the Law of Nations, and in accordance with the constitution of each country respectively.

In consequence, the stipulation in the 5th Article of the Treaty of Guadalupe upon the Boundary line therein described is no longer of any force, wherein it may conflict with that here established, the said line being considered annulled and abolished wherever it may not coincide with the present, and in the same manner remaining in full force where in accordance with the same.

* * * * *

No. 24.—1854, June 5: *Treaty between Her Britannic Majesty and the United States extending the Right of Fishing and regulating Commerce and Navigation between United States and British Possessions in North America (Washington).*

The Government of the United States being equally desirous with Her Majesty the Queen of Great Britain to avoid further misunderstanding between their respective citizens and subjects in regard to the extent of the right of fishing on the coasts of British North America, secured to each by article I of a convention between the United States and Great Britain, signed at London on the 20th day

of October, 1818; and being also desirous to regulate the commerce and navigation between their respective territories and people, and more especially between Her Majesty's possessions in North America and the United States, in such manner as to render the same reciprocally beneficial and satisfactory, have, respectively, named Plenipotentiaries to confer and agree thereupon, that is to say:

The President of the United States of America, William L. Marcy, Secretary of State of the United States, and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, James, Earl of Elgin and Kincardine, Lord Bruce and Elgin, a peer of the United Kingdom, Knight of the most ancient and most noble Order of the Thistle, and Governor General in and over all Her Britannic Majesty's provinces on the continent of North America, and in and over the island of Prince Edward;

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon the following articles:

ARTICLE I.

It is agreed by the high contracting parties that in addition to the liberty secured to the United States fishermen by the above-mentioned convention of October 20, 1818, of taking, curing, and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbours, and creeks of Canada, New Brunswick, Nova Scotia, Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the coasts and shores of those colonies and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property, or with British fishermen, in the peaceable use of any part of the said coast in their occupancy for the same purpose.

It is understood that the above-mentioned liberty applies solely to the sea fishery, and that the salmon and shad fisheries, and all fisheries in rivers and the mouths of rivers, are hereby reserved exclusively for British fishermen.

And it is further agreed that, in order to prevent or settle any disputes as to the places to which the reservation of exclusive right to British fishermen contained in this article, and that of fishermen of the United States contained in the next succeeding article, apply, each of the high contracting parties, on the application of either to the other, shall, within six months thereafter, appoint a commissioner. The said Commissioners, before proceeding to any business, shall make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to justice and equity, without fear, favor, or affection to their own country, upon all such places as are intended to be reserved and excluded from the common liberty of fishing under this and the next succeeding article; and such declaration shall be entered on the record of their proceedings.

37 The Commissioners shall name some third person to act as an Arbitrator or Umpire in any case or cases on which they may themselves differ in opinion. If they should not be able to agree upon the name of such third person, they shall each name a person, and it shall be determined by lot which of the two persons so named shall be the Arbitrator or Umpire in cases of difference or disagreement between the Commissioners. The person so to be chosen to be Arbitrator or Umpire shall, before proceeding to act as such in any case, make and subscribe a solemn declaration in a form similar to that which shall already have been made and subscribed by the Commissioners, which shall be entered on the record of their proceedings. In the event of the death, absence, or incapacity of either of the Commissioners, or of the Arbitrator or Umpire, or of their or his omitting, declining, or ceasing to act as such Commissioner, Arbitrator,^a or Umpire, another and different person shall be appointed or named as aforesaid to act as such Commissioner, Arbitrator, or Umpire, in the place and stead of the person so originally appointed or named as aforesaid, and shall make and subscribe such declaration as aforesaid.

Such Commissioners shall proceed to examine the coasts of the North American provinces and of the United States, embraced within the provisions of the first and second articles of this treaty, and shall designate the places reserved by the said articles from the common right of fishing therein.

The decision of the Commissioners and of the Arbitrator or Umpire shall be given in writing in each case, and shall be signed by them respectively.

The high contracting parties hereby solemnly engage to consider the decision of the Commissioners conjointly, or of the Arbitrator or Umpire, as the case may be, as absolutely final and conclusive in each case decided upon by them or him respectively.

ARTICLE II.

It is agreed by the high contracting parties that British subjects shall have, in common with the citizens of the United States the liberty to take fish of every kind, except shell-fish, on the eastern sea-coasts and shores of the United States north of the 36th parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbors, and creeks of the said sea-coasts and shores of the United States and of the said islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States and of the islands aforesaid, for the purpose of drying their nets and curing their fish: Provided that, in so doing, they do not interfere with the rights of private property, or with the fishermen of the United States, in the peaceable use of any part of the said coasts in their occupancy for the same purpose.

It is understood that the above-mentioned liberty applies solely to the sea fishery, and that salmon and shad fisheries, and all fisheries in rivers and mouths of rivers, are hereby reserved exclusively for fishermen of the United States.

^a *Qy.* Arbitrator.

ARTICLE III.

It is agreed that the articles enumerated in the schedule hereunto annexed, being the growth and produce of the aforesaid British colonies or of the United States, shall be admitted into each country respectively free of duty:

Schedule.

Grain, flour, and breadstuffs, of all kinds.
 Animals of all kinds.
 Fresh, smoked, and salted meats.
 Cotton-wool, seeds, and vegetables.
 Undried fruits, dried fruits.
 Fish of all kinds.
 Products of fish, and of all other creatures living in the water.
 Poultry, eggs.
 Hides, furs, skins, or tails, undressed.
 Stone or marble, in its crude or unwrought state.
 Slate.
 Butter, cheese, tallow.
 Lard, horns, manures.
 Ores of metals, of all kinds.
 Coal.
 Pitch, tar, turpentine, ashes.
 Timber and lumber of all kinds, round, hewed, and sawed, unmanufactured in whole or in part.
 Firewood.
 Plants, shrubs, and trees.
 Pelts, wool.
 Fish-oil.
 Rice, broom-corn, and bark.
 Gypsum, ground or unground.
 Hewn, or wrought, or unwrought burr or grindstones.
 Dyestuffs.
 Flax, hemp, and tow, unmanufactured.
 Unmanufactured tobacco.
 Rags.

ARTICLE IV.

It is agreed that the citizens and inhabitants of the United States shall have the right to navigate the River St. Lawrence, and
 38 the Canals in Canada used as the means of communicating between the great lakes and the Atlantic Ocean, with their vessels, boats, and crafts, as fully and freely as the subjects of Her Britannic Majesty, subject only to the same tolls and other assessments as now are, or may hereafter be, exacted of Her Majesty's said subjects; it being understood, however, that the British Government retains the right of suspending this privilege on giving due notice thereof to the Government of the United States.

It is further agreed that if at any time the British Government should exercise the said reserved right, the Government of the United States shall have the right of suspending, if it think fit, the operations of Art. III of the present treaty, in so far as the province of Canada is affected thereby, for so long as the suspension of the free navigation of the River St. Lawrence or the canals may continue.

It is further agreed that British subjects shall have the right freely to navigate Lake Michigan with their vessels, boats, and crafts so long as the privilege of navigating the River St. Lawrence, secured to American citizens by the above clause of the present article, shall continue; and the Government of the United States further engages

to urge upon the State governments to secure to the subjects of Her Britannic Majesty the use of the several State canals on terms of equality with the inhabitants of the United States.

And it is further agreed that no export duty, or other duty, shall be levied on lumber or timber of any kind cut on that portion of the American territory in the State of Maine watered by the River St. John and its tributaries, and floated down that river to the sea, when the same is shipped to the United States from the province of New Brunswick.

ARTICLE V.

The present treaty shall take effect as soon as the laws required to carry it into operation shall have been passed by the Imperial Parliament of Great Britain and by the Provincial Parliaments of those of the British North American colonies which are affected by this treaty on the one hand, and by the Congress of the United States on the other. Such assent having been given, the treaty shall remain in force for ten years from the date at which it may come into operation, and further until the expiration of twelve months after either of the high contracting parties shall give notice to the other of its wish to terminate the same; each of the high contracting parties being at liberty to give such notice to the other at the end of the said term of ten years, or at any time afterwards.

It is clearly understood, however, that this stipulation is not intended to affect the reservation made by article IV of the present treaty, with regard to the right of temporarily suspending the operations of articles III and IV thereof.

ARTICLE VI.

And it is hereby further agreed that the provisions and stipulations of the foregoing articles shall extend to the island of Newfoundland, so far as they are applicable to that colony. But if the Imperial Parliament, the Provisional Parliament of Newfoundland, or the Congress of the United States shall not embrace in their laws, enacted for carrying this treaty into effect, the colony of Newfoundland, then this article shall be of no effect; but the omission to make provision by law to give it effect, by either of the legislative bodies aforesaid, shall not in any way impair the remaining articles of this treaty.

ARTICLE VII.

The present treaty shall be duly ratified, and the mutual exchange of ratifications shall take place in Washington within six months from the date hereof, or earlier if possible.

In faith whereof we, the respective Plenipotentiaries, have signed this treaty and have hereunto affixed our seals.

Done in triplicate, at Washington, the fifth day of June, anno Domini one thousand eight hundred and fifty-four.

W. L. MARCY. [L. s.]

ELGIN AND KINCARDINE. [L. s.]

[The preceding treaty was terminated on March 17, 1866, in virtue of notice given by the United States, March 17, 1865, pursuant to article five.]

No. 25.—1867, November 11: *Extract from Convention between Her Britannic Majesty and France relative to Fisheries in the Seas between Great Britain and France.—Signed in the English and French languages at Paris, November 11, 1867.*

* * * * *

ART: 1^{er}.

British Fishermen shall enjoy the exclusive right of fishery within the distance of three miles of low-water mark, along the whole extent of the coasts of the British islands; and French fishermen shall enjoy the exclusive right of fishery within the distance of three miles from low-water mark along the whole extent of the coast of France, the only exception to this rule being that part of the coast of France which lies between Cape Carteret and Point Meinga.

The distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.

The miles mentioned in the present Convention are geographical miles whereof sixty make a degree of latitude.

* * * * *

No. 26.—1871, May 8: *Extract from Treaty between Her Britannic Majesty and the United States relative to Claims, Fisheries, &c. (Washington).*

* * * * *

ARTICLE XVIII.

It is agreed by the high contracting parties that, in addition to the liberty secured to the United States fishermen by the convention between the United States and Great Britain, signed at London on the 20th day of October, 1818, of taking, curing, and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty, for the term of years mentioned in Article XXXIII of this treaty, to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbours, and creeks, of the Provinces of Quebec, Nova Scotia, and New Brunswick, and the colony of Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the said coasts and shores and islands, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property, or with British fishermen, in the peaceable use of any part of the said coasts in their occupancy for the same purpose.

It is understood that the above-mentioned liberty applies solely to the sea fishery, and that the salmon and shad fisheries, and all other fisheries in rivers and the mouths of rivers, are hereby reserved exclusively for British fishermen.

ARTICLE XIX.

It is agreed by the high contracting parties that British subjects shall have, in common with the citizens of the United States, the liberty, for the term of years mentioned in Article XXXIII of this treaty, to take fish of every kind, except shell-fish, on the eastern sea-coasts and shores of the United States north of the thirty-ninth parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbours, and creeks of the said sea-coasts and shores of the United States and of the said islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States and of the islands aforesaid, for the purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property, or with the fishermen of the United States in the peaceable use of any part of the said coasts in their occupancy for the same purpose.

It is understood that the above-mentioned liberty applies solely to the sea fishery, and that salmon and shad fisheries, and all other fisheries in rivers and mouths of rivers, are hereby reserved exclusively for fishermen of the United States.

ARTICLE XX.

It is agreed that the places designated by the Commissioners appointed under the first article of the treaty between the United States and Great Britain, concluded at Washington on the 5th of June, 1854, upon the coasts of Her Britannic Majesty's dominions and the United States, as places reserved from the common right of fishing under that treaty, shall be regarded as in like manner reserved from the common right of fishing under the preceding articles. In case any question should arise between the Governments of the United States and of Her Britannic Majesty as to the common right of fishing in places not thus designated as reserved, it is agreed that a Commission shall be appointed to designate such places, and shall be constituted in the same manner, and have the same powers, duties, and authority as the Commission appointed under the said first article of the treaty of the 5th of June, 1854.

ARTICLE XXI.

It is agreed that, for the term of years mentioned in Article XXXIII of this treaty, fish oil and fish of all kinds, (except fish of the inland lakes, and of the rivers falling into them, and
40 except fish preserved in oil,) being the produce of the fisheries of the United States, or of the Dominion of Canada, or of Prince Edward's Island, shall be admitted into each country, respectively free of duty.

ARTICLE XXII.

Inasmuch as it is asserted by the Government of Her Britannic Majesty, that the privileges accorded to the citizens of the United States under Article XVIII of this treaty are of greater value than those accorded by Articles XIX and XXI of this treaty to the sub-

jects of Her Britannic Majesty, and this assertion is not admitted by the Government of the United States, it is further agreed that Commissioners shall be appointed to determine, having regard to the privileges accorded by the United States to the subjects of Her Britannic Majesty, as stated in Articles XIX and XXI of this treaty, the amount of any compensation which, in their opinion, ought to be paid by the Government of the United States to the Government of Her Britannic Majesty in return for the privileges accorded to the citizens of the United States under Article XVIII of this treaty; and that any sum of money which the said Commissioners may so award shall be paid by the United States Government, in a gross sum, within twelve months after such award shall have been given.

ARTICLE XXIII.

The Commissioners referred to in the preceding article shall be appointed in the following manner, that is to say: One Commissioner shall be named by the President of the United States, one by Her Britannic Majesty, and a third by the President of the United States and Her Britannic Majesty conjointly; and in case the third Commissioner shall not have been so named within a period of three months from the date, when this article shall take effect, then the third Commissioner shall be named by the Representative at London of His Majesty the Emperor of Austria and King of Hungary. In case of the death, absence, or incapacity of any Commissioner, or in the event of any Commissioner omitting or ceasing to act, the vacancy shall be filled in the manner hereinbefore provided for making the original appointment, the period of three months in case of such substitution being calculated from the date of the happening of the vacancy.

The Commissioners so named shall meet in the city Halifax, in the Province of Nova Scotia, at the earliest convenient period after they have been respectively named, and shall, before proceeding to any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide the matters referred to them to the best of their judgment, and according to justice and equity; and such declaration shall be entered on the record of their proceedings.

Each of the high contracting parties shall also name one person to attend the commission as its Agent, to represent it generally in all matters connected with the commission.

ARTICLE XXIV.

The proceedings shall be conducted in such order as the Commissioners appointed under Articles XXII and XXIII of this treaty shall determine. They shall be bound to receive such oral or written testimony as either Government may present. If either party shall offer oral testimony, the other party shall have the right of cross-examination, under such rules as the Commissioners shall prescribe.

If in the case submitted to the Commissioners either party shall have specified or alluded to any report or document in its own exclusive possession, without annexing a copy, such party shall be bound, if the other party thinks proper to apply for it, to furnish that

party with a copy thereof; and either party may call upon the other, through the Commissioners, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance such reasonable notice as the Commissioners may require.

The case on either side shall be closed within a period of six months from the date of the organization of the Commission, and the Commissioners shall be requested to give their award as soon as possible thereafter. The aforesaid period of six months may be extended for three months in case of a vacancy occurring among the Commissioners under the circumstances contemplated in Article XXIII of this treaty.

* * * * *

ARTICLE XXV.

The Commissioners shall keep an accurate record and correct minutes or notes of all their proceedings, with the dates thereof, and may appoint and employ a Secretary and any other necessary officer or officers to assist them in the transaction of the business which may come before them.

Each of the high contracting parties shall pay its own Commissioner and Agent or Counsel; all other expenses shall be defrayed by the two Governments in equal moieties.

ARTICLE XXVI.

The navigation of the river St. Lawrence, ascending and descending, from the forty-fifth parallel of north latitude, where it ceases to form the boundary between the two countries, from, to, and into the sea, shall forever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain, or of the Dominion of Canada, not inconsistent with such privilege of free navigation.

The navigation of the rivers Yukon, Porcupine, and Stikine, ascending and descending, from, to, and into the sea, shall forever remain free and open for the purposes of commerce to the subjects of Her Britannic Majesty and to the citizens of the United States, subject to any laws and regulations of either country within its own territory, not inconsistent with such privilege of free navigation.

ARTICLE XXVII.

The Government of Her Britannic Majesty engages to urge upon the Government of the Dominion of Canada to secure to the citizens of the United States the use of the Welland, St. Lawrence, and other canals in the Dominion on terms of equality with the inhabitants of the Dominion and the Government of the United States engages that the subjects of Her Britannic Majesty shall enjoy the use of the St. Clair Flats canal on terms of equality with the inhabitants of the United States, and further engages to urge upon the State Governments to secure to the subjects of Her Britannic Majesty the use of the several State canals connected with the navigation of the lakes or rivers traversed by or contiguous to the boundary-line between the possessions of the high contracting parties, on terms of equality with the inhabitants of the United States.

ARTICLE XXVIII.

The navigation of Lake Michigan shall also, for the term of years mentioned in Article XXXIII of this treaty, be free and open for the purposes of commerce to the subjects of Her Britannic Majesty, subject to any laws and regulations of the United States or of the States bordering thereon not inconsistent with such privilege of free navigation.

ARTICLE XXIX.

It is agreed that, for the term of years mentioned in Article XXXIII of this Treaty, goods, wares, or merchandize arriving at the ports of New York, Boston, and Portland, and any other ports in the United States which have been or may, from time to time, be specially designated by the President of the United States, and destined for Her Britannic Majesty's possessions in North America, may be entered at the proper Custom-house and conveyed in transit, without the payment of duties, through the territory of the United States, under such rules, regulations, and conditions for the protection of the revenue as the Government of the United States may from time to time prescribe; and under like rules, regulations, and conditions, goods, wares, or merchandize may be conveyed in transit, without the payment of duties, from such possessions through the territory of the United States for export from the said ports of the United States.

It is further agreed that, for the like period, goods, wares, or merchandize arriving at any of the ports of Her Britannic Majesty's possessions in North America, and destined for the United
41 States, may be entered at the proper custom-house and conveyed in transit, without the payment of duties, through the said possessions, under such rules and regulations, and conditions for the protection of the revenue, as the Governments of the said possessions may from time to time prescribe; and, under like rules, regulations, and conditions, goods, wares, or merchandize may be conveyed in transit, without payment of duties, from the United States through the said possessions to other places in the United States, or for export from ports in the said possessions.

ARTICLE XXX.

It is agreed that, for the terms of years mentioned in Article XXXIII of this Treaty, subjects of Her Britannic Majesty may carry in British vessels, without payment of duty, goods, wares, or merchandize from one port or place within the territory of the United States upon the St. Lawrence, the Great Lakes, and the rivers connecting the same, to another port or place within the territory of the United States as aforesaid: Provided, That a portion of such transportation is made through the Dominion of Canada by land carriage and in bond, under such rules and regulations as may be agreed upon between the Government of Her Britannic Majesty and the Government of the United States.

Citizens of the United States may for the like period carry in United States vessels, without payment of duty, goods, wares, or merchandize from one port or place within the possessions of Her Britannic Majesty in North America to another port or place within

the said possessions: Provided, That a portion of such transportation is made through the territory of the United States by land carriage and in bond, under such rules and regulations as may be agreed upon between the Government of the United States and the Government of Her Britannic Majesty.

The Government of the United States further engages not to impose any export duties on goods, wares, or merchandize carried under this Article through the territory of the United States; and Her Majesty's Government engages to urge the Parliament of the Dominion of Canada and the Legislatures of the other Colonies not to impose any export duties on goods, wares, or merchandize carried under this Article; and the Government of the United States may, in case such export duties are imposed by the Dominion of Canada, suspend, during the period that such duties are imposed, the right of carrying granted under this Article in favour of the subjects of Her Britannic Majesty.

The Government of the United States may suspend the right of carrying granted in favour of the subjects of Her Britannic Majesty under this Article, in case the Dominion of Canada should at any time deprive the citizens of the United States of the use of the canals in the said Dominion on terms of equality with the inhabitants of the Dominion, as provided in Article XXVII.

* * * * *

ARTICLE XXXIII.

The foregoing Articles XVIII to XXV, inclusive, and Article XXX of this treaty, shall take effect as soon as the laws required to carry them into operation shall have been passed by the Imperial Parliament of Great Britain, by the Parliament of Canada, and by the Legislature of Prince Edward's Island on the one hand, and by the Congress of the United States on the other. Such assent having been given, the said articles shall remain in force for the period of ten years from the date at which they may come into operation; and further until the expiration of two years after either of the high contracting parties shall have given notice to the other of its wish to terminate the same; each of the high contracting parties being at liberty to give such notice to the other at the end of the said period of ten years or at any time afterward.

* * * * *

No. 27.—1882, May 6: *Extract from Convention between Her Britannic Majesty, Germany, Belgium, Denmark, France, and the Netherlands, for regulating the Police of the North Sea Fisheries.—Signed at The Hague, May 6, 1882.*

* * * * *

ARTICLE I.

Les dispositions de la présente Convention, qui a pour objet de régler la police de la pêche dans la Mer du Nord, en dehors des eaux territoriales, sont applicables aux nationaux des Hautes Parties Contractantes.

ARTICLE II.

Les pêcheurs nationaux jouiront du droit exclusif de pêche dans le rayon de 3 milles, à partir de la laisse de basse mer, le long de toute l'étendue des côtes de leurs pays respectifs, ainsi que des îles et des bancs qui en dépendent.

42 Pour les baies, le rayon de 3 milles sera mesuré à partir d'une ligne droite, tirée en travers de la baie, dans la partie la plus rapprochée de l'entrée, au premier point où l'ouverture n'excèdera pas 10 milles.

Le présent Article ne porte aucune atteinte à la libre circulation reconnue aux bateaux de pêche, naviguant ou mouillant dans les eaux territoriales, à la charge par eux de se conformer aux règles spéciales de police édictées par les Puissances Riveraines.

ARTICLE III.

Les milles mentionnés dans l'Article précédent sont des milles géographiques de soixante au degré de latitude.

* * * * *

No. 28.—1888, *February 15: Unratified Treaty between Her Britannic Majesty and the United States concerning the interpretation of Article I of the Convention of 1818, October 20.*

Whereas differences have arisen concerning the interpretation of Article I. of the Convention of October 20, 1818; the United States of America, and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, being mutually desirous of removing all causes of misunderstanding in relation thereto, and of promoting friendly intercourse and good neighborhood between the United States and the Possessions of Her Majesty in North America, have resolved to conclude a Treaty to that end, and have named as their Plenipotentiaries, that is to say:

The President of the United States, Thomas F. Bayard, Secretary of State; William L. Putnam, of Maine; and James B. Angell, of Michigan:

And Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, The Right Hon. Joseph Chamberlain, M. P. The Honorable Sir Lionel Sackville Sackville West, K. C. M. G., Her Britannic Majesty's Envoy Extraordinary and Minister Plenipotentiary to the United States of America; and Sir Charles Tupper, G. C. M. G., C. B., Minister of Finance of the Dominion of Canada;

Who, having communicated to each other their respective Full Powers, found in good and due form, have agreed upon the following articles:

ARTICLE I.

The High Contracting Parties agree to appoint a Mixed Commission to delimit, in the manner provided in this Treaty, the British waters, bays, creeks, and harbours, of the coasts of Canada and of Newfoundland. as to which the United States, by Article I. of the

convention of October 20, 1818, between the United States and Great Britain, renounced forever any liberty to take, dry, or cure fish.

ARTICLE II.

The Commission shall consist of two Commissioners to be named by her Britannic Majesty, and of two Commissioners to be named by the President of the United States, without delay, after the exchange of ratifications of this Treaty.

The Commission shall meet and complete the delimitation as soon as possible thereafter.

In case of the death, absence, or incapacity of any Commissioner, or in the event of any Commissioner omitting or ceasing to act as such, the President of the United States or Her Britannic Majesty, respectively, shall forthwith name another person to act as Commissioner instead of the Commissioner originally named.

ARTICLE III.

The delimitation referred to in Article I. of this Treaty shall be marked upon British Admiralty charts by a series of lines regularly numbered and duly described. The charts so marked shall, on the termination of the work of the Commission, be signed by the Commissioners in quadruplicate, one copy whereof shall be delivered to the Secretary of State of the United States, and three copies to Her Majesty's Government. The delimitation shall be made in the following manner, and shall be accepted by both the High Contracting Parties as applicable for all purposes under Article I. of the Convention of October 20, 1818, between the United States and Great Britain.

The three marine miles mentioned in Article I. of the Convention of October 20, 1818, shall be measured seaward from low water mark; but at every bay, creek, or harbour, not otherwise specially provided for in this Treaty, such three marine miles shall be measured seaward from a straight line drawn across the bay, creek, or harbor, in the part nearest the entrance at the first point where the width does not exceed ten marine miles.

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ARTICLE IV.

At or near the following bays the limits of exclusion under Article I. of the Convention of October 20, 1818, at points more than three marine miles from low water mark, shall be established by the following lines, namely:

At the Baie des Chaleurs the line from the Light at Birch Point on Miscou Island to Macquereau Point Light; at the Bay of Miramichi, the line from the Light at Point Escuminac to the light on the Eastern Point of Tabisintac Gully; at Egmont Bay, in Prince Edward Island, the line from the Light at Cape Egmont to the Light at West Point; and off St. Ann's Bay, in the Province of Nova Scotia, the line from Cape Smoke to the Light at Point Anconi.

At Fortune Bay, in Newfoundland, the line from Connaigre Head to the Light on the Southeasterly end of Brunet Island, thence to Fortune Head; at Sir Charles Hamilton Sound, the line from the

Southeast point of Cape Fogo to White Island, thence to the North end of Peckford Island, and from the South end of Peckford Island to the East Headland of Ragged Harbor.

At or near the following bays the limits of exclusion shall be three marine miles seaward from the following lines, namely:

At or near Barrington Bay, in Nova Scotia, the line from the Light on Stoddart Island to the Light on the south point of Cape Sable, thence to the light at Baccaro Point; at Chedabucto and St. Peter's Bays, the line from Cranberry Island Light to Green Island Light, thence to Point Rouge; at Mira Bay, the line from the Light on the East Point of Scatari Island to the Northeasterly Point of Cape Morien; and at Placentia Bay, in Newfoundland, the line from Latine Point, on the Eastern mainland shore, to the most Southerly Point of Red Island, thence by the most Southerly Point of Merasheen Island to the mainland.

Long Island and Bryer Island, on St. Mary's Bay, in Nova Scotia, shall, for the purpose of delimitation, be taken as the coasts of such bay.

ARTICLE V.

Nothing in this Treaty shall be construed to include within the common waters any such interior portions of any bays, creeks, or harbors as can not be reached from the sea without passing within the three marine miles mentioned in Article I of the Convention of October 20, 1818.

ARTICLE VI.

The Commissioners shall from time to time report to each of the High Contracting Parties, such lines as they may have agreed upon, numbered, described, and marked as herein provided, with quadruplicate charts thereof; which lines so reported shall forthwith from time to time be simultaneously proclaimed by the High Contracting Parties, and be binding after two months from such proclamation.

ARTICLE VII.

Any disagreement of the Commissioners shall forthwith be referred to an Umpire selected by the Secretary of State of the United States and Her Britannic Majesty's Minister at Washington; and his decision shall be final.

ARTICLE VIII.

Each of the High Contracting Parties shall pay its own Commissioners and officers. All other expenses jointly incurred, in connection with the performance of the work, including compensation to the Umpire, shall be paid by the High Contracting Parties in equal moieties.

ARTICLE IX.

Nothing in this Treaty shall interrupt or affect the free navigation of the Strait of Canso by fishing vessels of the United States.

ARTICLE X.

United States fishing vessels entering the bays or harbours referred to in Article I. of this Treaty shall conform to harbour regulations common to them and to fishing vessels of Canada or of Newfoundland.

They need not report, enter, or clear, when putting into such bays or harbors for shelter or repairing damages, nor when putting into the same, outside the limits of established ports of entry, for the purpose of purchasing wood or of obtaining water; except that any such vessel remaining more than twenty-four hours, exclusive of Sundays and legal holidays, within any such port, or communicating with the shore therein, may be required to report, enter, or clear; and no vessel shall be excused hereby from giving due information to boarding officers.

They shall not be liable in any such bays or harbors for compulsory pilotage; nor, when therein for the purpose of shelter, of repairing damages, of purchasing wood, or of obtaining water, shall they be liable for harbor dues, tonnage dues, buoy dues, light dues, or other similar dues; but this enumeration shall not permit other charges inconsistent with the enjoyment of the liberties reserved or secured by the Convention of October 20, 1818.

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ARTICLE XI.

United States fishing vessels entering the ports, bays, and harbors of the Eastern and Northeastern coasts of Canada or of the coasts of Newfoundland under stress of weather or other casualty may unload, reload, tranship, or sell, subject to customs laws and regulations, all fish on board, when such unloading, transshipment, or sale is made necessary as incidental to repairs, and may replenish outfits, provisions and supplies damaged or lost by disaster; and in case of death or sickness shall be allowed all needful facilities, including the shipping of crews.

Licenses to purchase in established ports of entry of the aforesaid coasts of Canada or of Newfoundland, for the homeward voyage, such provisions and supplies as are ordinarily sold to trading vessels, shall be granted to United States fishing vessels in such ports, promptly upon application and without charge; and such vessels, having obtained licenses in the manner aforesaid, shall also be accorded upon all occasions such facilities for the purchase of casual or needful provisions and supplies as are ordinarily granted to the trading vessels; but such provisions or supplies shall not be obtained by barter, nor purchased for re-sale or traffic.

ARTICLE XII.

Fishing vessels of Canada and Newfoundland shall have on the Atlantic coast of the United States all the privileges reserved and secured by this Treaty to United States fishing vessels in the aforesaid waters of Canada and Newfoundland.

ARTICLE XIII.

The Secretary of the Treasury of the United States shall make regulations providing for the conspicuous exhibition by every United States fishing vessel, of its official number on each bow; and any such vessel, required by law to have an official number, and failing to comply with such regulations, shall not be entitled to the licenses provided for in this Treaty.

Such regulations shall be communicated to Her Majesty's Government previously to their taking effect.

ARTICLE XIV.

The penalties for unlawfully fishing in the waters, bays, creeks, and harbors, referred to in Article I of this Treaty, may extend to forfeiture of the boat or vessel, and appurtenances, and also of the supplies and cargo aboard when the offense was committed; and for preparing in such waters to unlawfully fish therein, penalties shall be fixed by the court, not to exceed those for unlawfully fishing; and for any other violation of the laws of Great Britain, Canada, or Newfoundland relating to the right of fishery in such waters, bays, creeks, or harbors, penalties shall be fixed by the court, not exceeding in all three dollars for every ton of the boat or vessel concerned. The boat or vessel may be holden for such penalties and forfeitures.

The proceedings shall be summary and as inexpensive as practicable. The trial (except on appeal) shall be at the place of detention, unless the judge shall, on request of the defense, order it to be held at some other place adjudged by him more convenient. Security for costs shall not be required of the defense, except when bail is offered. Reasonable bail shall be accepted. There shall be proper appeals available to the defense only; and the evidence at the trial may be used on appeal.

Judgments of forfeiture shall be reviewed by the Governor-General of Canada in Council, or the Governor in Council of Newfoundland, before the same are executed.

ARTICLE XV.

Whenever the United States shall remove the duty from fish-oil, whale-oil, seal-oil, and fish of all kinds (except fish preserved in oil), being the produce of fisheries carried on by the fishermen of Canada and Newfoundland, including Labrador, as well as from the usual and necessary casks, barrels, kegs, cans, and other usual and necessary coverings containing the products above mentioned, the like products, being the produce of fisheries carried on by the fishermen of the United States, as well as the usual and necessary coverings of the same, as above described, shall be admitted free of duty into the Dominion of Canada and Newfoundland.

And upon such removal of duties, and while the aforesaid articles are allowed to be brought into the United States by British subjects, without duty being reimposed thereon, the privilege of entering the ports, bays, and harbors of the aforesaid coasts of Canada and New-

foundland shall be accorded to United States fishing vessels by annual licenses, free of charge, for the following purposes, namely:

1. The purchase of provisions, bait, ice, seines, lines, and all other supplies and outfits;

2. Transshipment of catch, for transport by any means of conveyance;

3. Shipping of crews.

Supplies shall not be obtained by barter, but bait may be so obtained.

The like privileges shall be continued or given to fishing vessels of Canada and of Newfoundland on the Atlantic coasts of the United States.

ARTICLE XVI.

This Treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate; and by Her
45 Britannic Majesty, having received the assent of the Parliament of Canada and of the Legislature of Newfoundland; and the ratifications shall be exchanged at Washington as soon as possible.

In faith whereof, We, the respective Plenipotentiaries, have signed this Treaty, and have hereunto affixed our seals.

Done in duplicate, at Washington, this fifteenth day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

T. F. BAYARD.	[SEAL.]
WILLIAM L. PUTNAM,	[SEAL.]
JAMES B. ANGELL.	[SEAL.]
J. CHAMBERLAIN.	[SEAL.]
L. S. SACKVILLE WEST.	[SEAL.]
CHARLES TUPPER.	[SEAL.]

No. 29.—1891: *Unratified Convention between Great Britain and the United States of America for the Improvement of Commercial Relations between the United States and Her Britannic Majesty's Colony of Newfoundland.*

The Governments of Great Britain and the United States desiring to improve the commercial relations between the United States and Her Britannic Majesty's Colony of Newfoundland, have appointed as their respective Plenipotentiaries, and given them full powers to treat of and conclude such convention, that is to say:

Her Britannic Majesty on her part has appointed Sir Julian Pauncefoot; and the President of the United States has appointed on the part of the United States James G. Blaine, Secretary of State.

And the said Plenipotentiaries, after having exchanged their full powers, which were found to be in due and proper form have agreed to and concluded the following articles:—

ARTICLE I.

United States fishing vessels entering the waters of Newfoundland shall have the privilege of purchasing herring, caplin, squid, and

other bait fishes, at all times on the same terms and conditions, and subject to the same penalties in all respects as Newfoundland vessels.

They shall also have the privilege of touching and trading, selling fish and oil, and procuring supplies in Newfoundland, conforming to the harbor regulations, but without other charge than the payment of such light, harbor, and Customs dues as are or may be levied on Newfoundland fishing vessels.

ARTICLE II.

Dry codfish, cod oil, seal oil, sealskins, herrings, salmon, trout and salmon trout, lobsters, cod roes, tongues, and sounds, the product of the fisheries of Newfoundland, shall be admitted into the United States free of duty. Also all hogsheads, barrels, kegs, boxes, or tin cans, in which the articles above named may be carried, shall be admitted free of duty. It is understood, however, that "green" codfish are not included in the provisions of this Article.

ARTICLE III.

The officer of the Customs at the Newfoundland port where a vessel laden with the articles named in Article II clears shall give to the master of said vessel a sworn certificate that the fish shipped were taken in the waters of Newfoundland; which certificate shall be countersigned by the Consul or Consular Agent of the United States, and delivered to the proper officer of Customs at the port of destination in the United States.

ARTICLE IV.

When this convention shall come into operation, and during the continuance thereof, the duties to be levied and collected upon the following enumerated merchandise imported into the Colony of Newfoundland from the United States shall not exceed the following amounts, viz:—

Flour	25 cents per barrel.
Pork	1½ cents per lb.
Bacon and hams, tongues, smoked beef and sausage	2½ cents per lb. or \$2.50 per 112 lbs.
Beef, pigs' heads, hocks, and feet, salted or cured	½ cent per lb.
Indian meal	25 cents per barrel.
Peas	30 cents per barrel.
Oatmeal	30 cents per barrel of 200 lbs.
Bran, Indian corn, and rice	12½ per cent. <i>ad valorem</i> .
Salt (in bulk)	20 cents per ton of 2,240 lbs.
Kerosene oil	6 cents per gallon.

46 And the following articles imported free from the Colony of Newfoundland from the United States shall be admitted free of duty:—

Agricultural implements and machinery imported by agricultural societies for the promotion of agriculture.

Crushing mills for mining purposes.

Raw cotton.

Corn for the manufacture of brooms.

Gas engines, when protected by patent.
 Ploughs and harrows.
 Reaping, raking, ploughing, potato-digging and seed-sowing machines to be used in the colony.
 Printing presses and printing types.

ARTICLE V.

It is understood that if any reduction is made by the Colony of Newfoundland, at any time during the term of this convention, in the rates of duty upon the articles named in Article IV of this convention, the said reduction shall apply to the United States.

ARTICLE VI.

The present convention shall take effect as soon as the laws required to carry it into operation shall have been passed by the Congress of the United States on the one hand, and by the Imperial Parliament of Great Britain and the Provincial Legislature of Newfoundland on the other hand. Such assent having been given, the convention shall remain in force for five years from the date at which it may come into operation, and further, until the expiration of twelve months after either of the high contracting Parties shall give notice to the other of its wish to terminate the same; each of the high contracting parties being at liberty to give such notice to the other at the end of the said term of five years, or at any time afterwards.

ARTICLE VII.

This convention shall be duly ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by Her Britannic Majesty; and the ratifications shall be exchanged at Washington on the 1st day of February, 1891, or as soon thereafter as practicable.

In faith whereof, we, the respective Plenipotentiaries, have signed this convention and have hereunto affixed our seals.

Done in duplicate, at Washington, this day of , in the year of our Lord one thousand eight hundred and

No. 30.—1902, November 8: *Unratified Convention between Great Britain and the United States of America for the Improvement of Commercial Relations between the United States and His Britannic Majesty's Colony of Newfoundland.*

The Governments of Great Britain and the United States, desiring to improve the commercial relations between the United States and His Britannic Majesty's Colony of Newfoundland, have appointed as their respective Plenipotentiaries, and given them full powers to treat of and conclude such Convention, that is to say:—

His Britannic Majesty, on his part, has appointed the Right Honourable Sir Michael Herbert, K.C.M.G., C.B., His Britannic Majesty's Ambassador Extraordinary and Plenipotentiary at Washing-

ton; and the President of the United States has appointed, on the part of the United States, John Hay, Secretary of State:

And the said Plenipotentiaries, after having exchanged their full powers, which were found to be in due and proper form, have agreed to and concluded the following Articles:—

ARTICLE I.

United States' fishing-vessels entering the waters of Newfoundland shall have the privilege of purchasing herring, caplin, squid, and other bait fishes at all times, on the same terms and conditions, and subject to the same penalties as Newfoundland vessels.

They shall also have the privilege of touching and trading, buying and selling fish and oil, and procuring supplies in Newfoundland, conforming to the Harbour Regulations, but without other charge than the payment of such light, harbour, and customs dues as are, or may be, levied on Newfoundland fishing-vessels.

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ARTICLE II.

Codfish, cod oil, seal oil, whale oil, unmanufactured whalebone, seal-skins, herrings, salmon, trout, and salmon-trout, lobsters, cod roes, tongues, and sounds, being the produce of the fisheries carried on by the fishermen of Newfoundland, and ores of metals, the product of Newfoundland mines, and slates from the quarry untrimmed, shall be admitted into the United States free of duty. Also all packages in which the said fish and oils may be exported shall be admitted free of duty. It is understood, however, that unsalted or fresh codfish are not included in the provisions of this Article.

ARTICLE III.

The officer of Customs at the Newfoundland port where the vessel clears shall give to the master of the vessel a sworn certificate that the fish shipped were the produce of the fisheries carried on by the fishermen of Newfoundland, which certificate shall be countersigned by the Consul or Consular Agent of the United States.

ARTICLE IV.

When this Convention shall come into operation, and during the continuance thereof, the following articles imported into the Colony of Newfoundland from the United States shall be admitted free of duty:—

Agricultural implements and machinery imported by Agricultural Societies for the promotion of agriculture.

Cranes, derricks, fire clay, fire brick, rock drills, rolling mills, crushing mills, separators, drill steel, machinery of every description for mining used within the mine proper or at the surface of the mine, smelting machinery of all kinds when imported directly by persons engaged in mining, or to be used in their mining operations and not for sale.

Brick machines.

Dynamite, detonators, blasting powder, and fuse.

Raw cotton and cotton yarn.

Corn for the manufacture of brooms and whisks.

Chair cane, unmanufactured.

Cotton seed oil, olive oil, boracic acid, acetic acid, preservantine, when imported by manufacturers to be used in the preservation of fish or fish-glue.

Hemp, hemp yarn, coir yarn, sisal, manilla, jute, flax, and tow.

Indian corn.

Oil cake, oil cake meal, cotton seed cake, cotton seed meal, pease meal, bran, and other preparations for cattle feed.

Manures and fertilizers of all kinds, and sulphuric acid when imported to be used in the manufacture of manures.

Lines and twines used in connection with the fisheries, not including sporting tackle.

Ores to be used as flux.

Gas engines when protected by patent.

Ploughs, harrows, reaping, raking, potatoe-digging, and seed-sowing machines when imported by those engaged in agriculture, and not for sale.

Engravers' plates of steel, polished, for engraving thereon; photo-engraving machinery, viz.: Router, bevelling, and squaring machines, screen-holders, cross line screens, and chemicals for use in engraving, wood for blocking, engraving tools, and process plates.

Printing presses, printing paper, printing types, printers' ink, when imported by *bonâ fide* printers for use in their business.

Salt, in bulk, when imported for use in the fisheries; and the duties to be levied and collected upon the following enumerated merchandise imported into the Colony of Newfoundland from the United States shall not exceed the following amounts, viz.:—

Flour.....	25 cents per barrel.
Pork.....	1 dol. 50c. per barrel of 200 lbs.
Bacon and hams, tongues, smoked beef, and sausages.....	24 cents per lb. or 2 dol. 50c. per 112 lbs.
Beef, pigs' heads, hocks, and feet, salt- ed and cured.....	1 dollar per barrel of 200 lbs.
Indian meal.....	20 cents per barrel.
Peas.....	30 cents per barrel.
Oatmeal.....	30 cents per barrel of 200 lbs.
Rice.....	1 cent per lb.
Kerosene oil.....	6 cents per gallon.

ARTICLE V.

It is understood that if any reduction is made by the Colony of Newfoundland, at any time during the term of this Convention, in the rate of duty upon the articles named in Article IV of this Convention, coming from any other Country, the said reduction shall apply to the United States, and that no heavier duty shall be imposed on articles coming from the United States than is imposed on such articles coming from elsewhere.

ARTICLE VI.

The present Convention shall be duly ratified by His Britannic Majesty and by the President of the United States of America, by

and with the advice and consent of the Senate thereof, and the ratifications shall be exchanged at Washington as soon thereafter as practicable.

48 Its provisions shall go into effect thirty days after the exchange of ratifications, and shall continue and remain in full force for the term of five years from the date at which it may come into operation, and, further, until the expiration of twelve months after either of the Contracting parties shall give notice to the other at the end of the said term of five years, or at any time afterwards.

In faith whereof we, the respective Plenipotentiaries, have signed this Convention, and have hereunto affixed our seals.

Done in duplicate at Washington, this 8th day of November, in the year of our Lord 1902.

No. 31.—1904, April 8: *Convention between the United Kingdom and France respecting Newfoundland and West and Central Africa. Signed at London, April 8, 1904.*—[Ratifications exchanged at London, December 8, 1904.]

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, and the President of the French Republic, having resolved to put an end, by a friendly Arrangement, to the difficulties which have arisen in Newfoundland, have decided to conclude a Convention to that effect, and have named as their respective Plenipotentiaries:

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, the Most Honourable Henry Charles Keith Petty-Fitzmaurice, Marquess of Lansdowne, His Majesty's Principal Secretary of State for Foreign Affairs; and

The President of the French Republic, his Excellency Monsieur Paul Cambon, Ambassador of the French Republic at the Court of His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India;

Sa Majesté le Roi du Royaume-Uni de la Grande-Bretagne et d'Irlande et des Territoires Britanniques au delà des Mers, Empereur des Indes, et le Président de la République Française, ayant résolu de mettre fin, par un arrangement amiable, aux difficultés survenues à Terre-Neuve, ont décidé de conclure une Convention à cet effet, et ont nommé pour leurs Plénipotentiaires respectifs:

Sa Majesté le Roi du Royaume-Uni de la Grande-Bretagne et d'Irlande et des Territoires Britanniques au delà des Mers, Empereur des Indes, le Très Honorable Henry Charles Keith Petty-Fitzmaurice, Marquis de Lansdowne, Principal Secrétaire d'État de Sa Majesté au Département des Affaires Étrangères; et

Le Président de la République Française, son Excellence Monsieur Paul Cambon, Ambassadeur de la République Française près Sa Majesté le Roi du Royaume-Uni de la Grande-Bretagne et d'Irlande et des Territoires Britanniques au delà des Mers, Empereur des Indes;

Who, after having communicated to each other their full powers, found in good and due form, have agreed as follows, subject to the approval of their respective Parliaments:—

ARTICLE I.

France renounces the privileges established to her advantage by Article XIII of the Treaty of Utrecht, and confirmed or modified by subsequent provisions.

ARTICLE II.

France retains for her citizens, on a footing of equality with British subjects, the right of fishing in the territorial waters on that portion of the coast of Newfoundland comprised between Cape St. John and Cape Ray, passing by the north; this right shall be exercised during the usual fishing season closing for all persons on the 20th October of each year.

The French may therefore fish there for every kind of fish, including bait and also shell fish. They may enter any port or harbour on the said coast and may there obtain supplies or bait and shelter on the same conditions as the inhabitants of Newfoundland, but they will remain subject to the local Regulations in force; they may also fish at the mouths of the rivers, but without going beyond a straight line
49 drawn between the two extremities of the banks, where the river enters the sea.

They shall not make use of stake-nets or fixed engines without permission of the local authorities.

Lesquels, après s'être communiqué leurs pleins pouvoirs, trouvés en bonne et due forme, sont convenus de ce qui suit, sous réserve de l'approbation de leurs Parlements respectifs:—

ARTICLE I.

La France renonce aux privilèges établis à son profit par l'Article XIII du Traité d'Utrecht et confirmés ou modifiés par les dispositions postérieures.

ARTICLE II.

La France conserve pour ses ressortissants, sur le pied d'égalité avec les sujets Britanniques, le droit de pêche dans les eaux territoriales sur la partie de la côte de Terre-Neuve comprise entre le Cap Saint-Jean et le Cap Raye en passant par le nord; ce droit s'exercera pendant la saison habituelle de pêche finissant pour tout le monde le 20 Octobre de chaque année.

Les Français pourront donc y pêcher toute espèce de poisson, y compris la doëtte, ainsi que les crustacés. Ils pourront entrer dans tout port ou havre de cette côte et s'y procurer des approvisionnements ou de la boëtte et s'y abriter dans les mêmes conditions que les habitants de Terre-Neuve, en restant soumis aux Règlements locaux en vigueur; ils pourront aussi pêcher à l'em bouchure des rivières, sans toutefois pouvoir dépasser une ligne droite qui serait tirée de l'un à l'autre des points extrêmes du rivage entre lesquels la rivière se jette dans la mer.

Ils devront s'abstenir de faire usage d'engins de pêche fixes ("stake-nets and fixed engines") sans la permission des autorités locales.

On the above-mentioned portion of the coast, British subjects and French citizens shall be subject alike to the laws and Regulations now in force, or which may hereafter be passed for the establishment of a close time in regard to any particular kind of fish, or for the improvement of the fisheries. Notice of any fresh laws or Regulations shall be given to the Government of the French Republic three months before they come into operation.

The policing of the fishing on the above-mentioned portion of the coast, and for prevention of illicit liquor traffic and smuggling of spirits, shall form the subject of Regulations drawn up in agreement by the two Governments.

ARTICLE III.

A pecuniary indemnity shall be awarded by His Britannic Majesty's Government to the French citizens engaged in fishing or the preparation of fish on the "Treaty Shore," who are obliged, either to abandon the establishments they possess there, or to give up their occupation, in consequence of the modification introduced by the present Convention into the existing state of affairs.

This indemnity cannot be claimed by the parties interested unless they have been engaged in their business prior to the closing of the fishing season of 1903.

Claims for indemnity shall be submitted to an Arbitral Tribunal, composed of an officer of each nation, and, in the event of disagreement, of an Umpire appointed in accordance with the procedure laid down by Article XXXII of The Hague Convention. The details regulating the constitution of the Tribunal and the conditions of the inquiries to

Sur la partie de la côte mentionnée ci-dessus, les Anglais et les Français seront soumis sur le pied d'égalité aux Lois et Règlements actuellement en vigueur ou qui seraient édictés, dans la suite, pour la prohibition, pendant un temps déterminé, de la pêche de certains poissons ou pour l'amélioration des pêcheries. Il sera donné connaissance au Gouvernement de la République Française des Lois et Règlements nouveaux, trois mois avant l'époque où ceux-ci devront être appliqués.

La police de la pêche sur la partie de la côte susmentionnée, ainsi que celle du trafic illicite des liqueurs et de la contrebande des alcools, feront l'objet d'un Règlement établi d'accord entre les deux Gouvernements.

ARTICLE III.

Une indemnité pécuniaire sera allouée par le Gouvernement de Sa Majesté Britannique aux citoyens Français se livrant à la pêche ou à la préparation du poisson sur le "Treaty Shore," qui seront obligés soit d'abandonner les établissements qu'ils y possèdent, soit de renoncer à leur industrie, par suite de la modification apportée par la présente Convention à l'état de choses actuel.

Cette indemnité ne pourra être réclamée par les intéressés que s'ils ont exercé leur profession antérieurement à la clôture de la saison de pêche de 1903.

Les demandes d'indemnité seront soumises à un Tribunal Arbitral composé d'un officier de chaque nation, et en cas de désaccord d'un surarbitre désigné suivant la procédure instituée par l'Article XXXII de la Convention de La Haye. Les détails réglant la constitution du Tribunal et les conditions des enquêtes à ouvrir pour mettre les de-

be instituted for the purpose of substantiating the claims, shall form the subject of a special Agreement between the two Governments.

ARTICLE IV.

His Britannic Majesty's Government, recognizing that, in addition to the indemnity referred to in the preceding Article, some territorial compensation is due to France in return for the surrender of her privilege in that part of the Island of Newfoundland referred to in Article II, agree with the Government of the French Republic to the provisions embodied in the following Articles:—

ARTICLE V.

The present frontier between Senegambia and the English Colony of the Gambia shall be modified so as to give to France Yarboutenda and the lands and landing-places belonging to that locality.

In the event of the river not being open to maritime navigation up to that point, access shall be assured to the French Government at a point lower down on the River Gambia, which shall be recognised by mutual agreement as being accessible to merchant ships engaged in maritime navigation.

50 The conditions which shall govern transit on the River Gambia and its tributaries, as well as the method of access to the point that may be reserved to France in accordance with the preceding paragraph, shall form the subject of future agreement between the two Governments.

In any case, it is understood that these conditions shall be at least as favourable as those of

mandes en état feront l'objet d'un Arrangement spécial entre les deux Gouvernements.

ARTICLE IV.

Le Gouvernement de Sa Majesté Britannique, reconnaissant qu'en outre de l'indemnité mentionnée dans l'Article précédent, une compensation territoriale est due à la France pour l'abandon de son privilège sur la partie de l'Île de Terre-Neuve visée à l'Article II, convient avec le Gouvernement de la République Française des dispositions qui font l'objet des Articles suivants:—

ARTICLE V.

La frontière existant entre la Sénégal et la Colonie Anglaise de la Gambie sera modifiée de manière à assurer à la France la possession de Yarboutenda et des terrains et points d'atterrissement appartenant à cette localité.

Au cas où la navigation maritime ne pourrait s'exercer jusqu'à, un accès sera assuré en aval au Gouvernement Français sur un point de la Rivière Gambie qui sera reconnu d'un commun accord comme étant accessible aux bâtiments marchands se livrant à la navigation maritime.

Les conditions dans lesquelles seront réglés le transit sur la Rivière Gambie et ses affluents, ainsi que le mode d'accès au point qui viendrait à être réservé à la France, en exécution du paragraphe précédent, feront l'objet d'arrangements à concerter entre les deux Gouvernements.

Il est, dans tous les cas entendu que ces conditions seront au moins aussi favorables que celle du

the system instituted by application of the General Act of the African Conference of the 26th February, 1885, and of the Anglo-French Convention of the 14th June, 1898, to the English portion of the basin of the Niger.

ARTICLE VI.

The group known as the Iles de Los, and situated opposite Konakry, is ceded by His Britannic Majesty to France.

ARTICLE VII.

Persons born in the territories ceded to France by Article V and VI of the present Convention may retain British nationality by means of an individual declaration to that effect, to be made before the proper authorities by themselves, or, in the case of children under age, by their parents or guardians.

The period within which the declaration of option referred to in the preceding paragraph must be made, shall be one year, dating from the day on which French authority shall be established over the territory in which the persons in question have been born.

Native laws and customs now existing will, as far as possible, remain undisturbed.

In the Iles de Los, for a period of thirty years from the date of exchange of the ratifications of the present Convention, British fishermen shall enjoy the same rights as French fishermen with regard to anchorage in all weathers, to taking in provisions and water, to making repairs, to transshipment of goods, to the sale of fish, and to the landing and drying of nets, provided always that they observe the conditions laid down in the French Laws and

régime institué par application de l'Acte Général de la Conférence Africaine du 26 Février, 1885, et de la Convention Franco-Anglaise du 14 Juin, 1898, dans la partie Anglaise du bassin du Niger.

ARTICLE VI.

Le groupe désigné sous le nom d'Iles de Los, et situé en face de Konakry, est cédé par Sa Majesté Britannique à la France.

ARTICLE VII.

Les personnes nées sur les territoires cédés à la France par les Articles V et VI de la présente Convention pourront conserver la nationalité Britannique moyennant une déclaration individuelle faite à set effet devant l'autorité compétente par elles-mêmes, ou, dans le cas d'enfants mineurs, par leurs parents ou tuteurs.

Le délai dans lequel devra se faire la déclaration d'option prévue au paragraphe précédent sera d'un an à dater du jour de l'installation de l'autorité Française sur le territoire où seront nées les dites personnes.

Les lois et coutumes indigènes actuellement en vigueur seront respectées autant que possible.

Aux Iles de Los, et pendant une période de trente années à partir de l'échange des ratifications de la présente Convention, les pêcheurs Anglais bénéficieront en ce qui concerne le droit d'ancrage par tous les temps, d'approvisionnement et d'aiguade, de réparation, de transbordement de marchandises, de vent de poisson, de descente à terre et de séchage des filets, du même régime que les pêcheurs Français, sous réserve, toutefois, par eux de l'observation

Regulations which may be in force there.

des prescriptions édictées dans les Lois et Règlements Français qui y seront en vigueur.

ARTICLE VIII.

To the east of the Niger the following line shall be substituted for the boundary fixed between the French and British possessions by the Convention of the 14th June, 1898, subject to the modifications which may result from the stipulations introduced in the sixth and seventh paragraphs of the present Article.

Starting from the point on the left bank of the Niger laid down in Article III of the Convention of the 14th June, 1898, that is to say, the median line of the Dallul Mauri, the frontier shall be drawn along this median line until it meets the circumference of a circle drawn from the town of Sokoto as a centre, with a radius of 160,932 mètres (100 miles). Thence it shall follow the northern arc of this circle to a point situated 5 kilomètres south of the point of intersection of the above-mentioned arc of the circle with the route from Dosso to Matankari viâ Maourédé.

Thence it shall be drawn in a direct line to a point 20 kilomètres north of Konni (Birni-N'Kouni), and then in a direct line to a point 15 kilomètres south of Maradi, and thence shall be continued in a direct line to the point of intersection of the parallel of 13° 20' north latitude with a meridian passing 70 miles to the east of the second intersection of the 14th degree of north latitude and the northern arc of the above-mentioned circle.

Thence the frontier shall follow in an easterly direction the parallel of 13° 20' north latitude until it strikes the left bank of the River Komadugu Waubé (Komadougou Ouobé), the thalweg of

ARTICLE VIII.

A l'est du Niger, et sous réserve des modifications que pourront y comporter les stipulations insérées aux paragraphes six et sept du présent Article, le tracé suivant sera substitué à la délimitation établie entre les possessions Françaises et Anglaises par la Convention du 14 Juin, 1898 :—

Partant du point sur la rive gauche du Niger indiqué à l'Article III de la Convention du 14 Juin, 1898, c'est-à-dire, la ligne médiane du Dallul-Maouri, la frontière suivra cette ligne médiane jusqu'à sa rencontre avec la circonférence d'un cercle décrit du centre de la ville de Sokoto avec un rayon de 160,932 mètres (100 milles). De ce point, elle suivra l'arc septentrional de ce cercle jusqu'à un point situé à 5 kilomètres au sud du point d'intersection avec le dit arc de cercle de la route de Dosso à Matankari par Maourédé.

Elle gagnera de là, en ligne droite, un point situé à 20 kilomètres au nord de Konni (Birni-N'Kouni), puis de là, également en ligne droite, un point situé à 15 kilomètres au sud de Maradi, et rejoindra ensuite directement l'intersection du parallèle 13° 20' de latitude nord avec un méridien passant à 70 milles à l'est de la seconde intersection du 14° degré de latitude nord avec l'arc septentrional du cercle précité.

De là, la frontière suivra, vers l'est, le parallèle 13° 20' de latitude nord jusqu'à sa rencontre avec la rive gauche de la Rivière Komadougou Ouobé (Komadugu Waubé), dont elle suivra le thal-

which it will then follow to Lake Chad. But, if before meeting this river the frontier attains a distance of 5 kilomètres from the caravan route from Zinder to Yo, through Sua Kololua (Sua Kololoua), Adeber, and Kabi, the boundary shall then be traced at a distance of 5 kilomètres to the south of this route until it strikes the left of the River Komadugu Waubé (Komadougou Ouobé), it being, nevertheless understood that, if the boundary thus drawn should happen to pass through a village, this village, with its lands, shall be assigned to the Government to which would fall the larger portion of the village and its lands. The boundary will then, as before, follow the thalweg of the said river to Lake Chad.

Thence it will follow the degree of latitude passing through the thalweg of the mouth of the said river up to its intersection with the meridian running 35' east of the centre of the town of Kouka, and will then follow this meridian southwards until it intersects the southern shore of Lake Chad.

It is agreed, however, that, when the Commissioners of the two Governments at present engaged in delimiting the line laid down in Article IV of the Convention of the 14th June, 1898, return home and can be consulted, the two Governments will be prepared to consider any modifications of the above frontier line which may seem desirable for the purpose of determining the line of demarcation with greater accuracy. In order to avoid the inconvenience to either party which might result from the adoption of a line deviating from recognized and well-established frontiers, it is agreed that in those portions of the projected line where the frontier is not determined by the trade routes, regard shall be had

weg jusqu'au Lac Tchad. Mais si, avant de rencontrer cette rivière, la frontière arrive à une distance de 5 kilomètres de la route de caravane de Zinder à Yo, par Sua Kololoua (Sua Kololoua), Adeber, et Kabi, la frontière sera tracée à une distance de 5 kilomètres au sud de cette route jusqu'à sa rencontre avec la rive gauche de la Rivière Komadougou Ouobé (Komadugu Waubé), étant toutefois entendu qu'il si la frontière ainsi tracée venait à traverser un village, ce village, avec ses terrains, serait attribué au Gouvernement auquel se rattacherait la partie majeure du village et de ses terrains. Elle suivra ensuite, comme ci-dessus, le thalweg de la dite rivière jusqu'au Lac Tchad.

De là elle suivra le degré de latitude passant par le thalweg de l'embouchure de la dite rivière jusqu'à son intersection avec le méridien passant à 35' est du centre de la ville de Kouka, puis ce méridien vers le sud jusqu'à son intersection avec la rive sud du Lac Tchad.

Il est convenu, cependant que lorsque les Commissaires des deux Gouvernements qui procèdent en ce moment à la délimitation de la ligne établie dans l'Article IV de la Convention du 14 Juin, 1898, seront revenus et pourront être consultés, les deux Gouvernements prendront en considération toute modification à la ligne-frontière ci-dessus qui semblerait désirable pour déterminer la ligne de démarcation avec plus de précision. Afin d'éviter les inconvénients qui pourraient résulter de part et d'autre d'un tracé qui s'écarterait des frontières reconnues et bien constatées, il est convenu que dans la partie du tracé où la frontière n'est pas déterminée par les routes commerciales, il sera tenu compte des divisions

to the present political divisions of the territories so that the tribes belonging to the territories of Tessaoua - Maradi and Zinder shall, as far as possible, be left to France, and those belonging to the territories of the British zone shall, as far as possible, be left to Great Britain.

It is further agreed that, on Lake Chad, the frontier line shall, if necessary, be modified so as to assure to France a communication through open water at all seasons between her possessions on the north-west and those on the south-east of the Lake, and a portion of the surface of the open waters of the Lake at least proportionate to that assigned to her by the map forming Annex 2 of the Convention of the 14th June, 1898.

In that portion of the River Komadugu which is common to both parties, the populations on the banks shall have equal rights of fishing.

ARTICLE IX.

The present Convention shall be ratified, and the ratifications shall be exchanged, at London, within eight months, or earlier if possible.

52 In witness whereof his Excellency the Ambassador of the French Republic at the Court of His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, and His Majesty's Principal Secretary of State for Foreign Affairs, duly authorized for that purpose, have signed the present Convention and have affixed thereto their seals.

Done at London, in duplicate, the 8th day of April, 1904.

(L. S.)

LANSDOWNE.

politiques actuelles des territoires, de façon à ce que les tribus relevant des territoires de Tessaoua-Maradi et Zinder soient, autant que possible, laissées à la France, et celles relevant des territoires de la zone Anglaise soient, autant que possible, laissées à la Grande-Bretagne.

Il est en outre entendu que, sur le Tchad, la limite sera, s'il est besoin, modifiée de façon à assurer à la France une communication en eau libre en toute saison entre ses possessions du nord-ouest et du sud-est du Lac, et une partie de la superficie des eaux libres du Lac au moins proportionnelle à celle qui lui était attribuée par la carte formant l'Annexe No. 2 de la Convention du 14 Juin, 1898.

Dans la partie commune de la Rivière Komadougou, les populations riveraines auront égalité de droits pour la pêche.

ARTICLE IX.

La présente Convention sera ratifiée, et les ratifications en seront échangées, à Londres, dans le délai de huit mois, ou plus tôt si faire se peut.

En foi de quoi son Excellence l'Ambassadeur de la République Française près Sa Majesté le Roi du Royaume-Uni de la Grande-Bretagne et d'Irlande et des Territoires Britanniques au delà des Mers, Empereur des Indes, et le Principal Secrétaire d'État pour les Affaires Étrangères de Sa Majesté Britannique, dûment autorisés à cet effet, ont signé la présente Convention et y ont apposé leurs cachets.

Lait à Londres, en double expédition, le 8 Avril, 1904.

(L. S.)

PAUL CAMBON.

NORTH ATLANTIC COAST FISHERIES

APPENDIX TO THE CASE

PRESENTED ON THE PART OF

THE GOVERNMENT OF HIS
BRITANNIC MAJESTY

TO THE

TRIBUNAL CONSTITUTED UNDER AN AGREEMENT SIGNED
AT WASHINGTON ON THE 27TH DAY OF JANUARY,
1909, BETWEEN HIS BRITANNIC MAJESTY AND
THE UNITED STATES OF AMERICA

(IN THREE PARTS)

PART 2

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PART II.

DESPATCHES, REPORTS, CORRESPONDENCE, &C.

No. 1.—1786, August 23: *Extract from Instructions to Lord Dorchester as Governor of the Province of Quebec.*

* * * * *

30. The extension of the limits of the Province of Quebec necessarily calls forth your attention to a variety of new matter and new objects of consideration: The protection and control of the various settlements of Canadian subjects and the regulation of the peltry-trade in the upper or interior country on the one hand, and the protection of the fisheries in the Gulf of St. Lawrence and on the Labrador coast on the other hand point to regulations that require deliberation and dispatch.

* * * * *

33. The fisheries on the coast of Labrador and the islands adjacent thereto are objects of the greatest importance, not only on account of the commodities they produce, but also as nurseries of seamen, upon whom the strength & security of our kingdom depend.

34. Justice & equity demand that the real and actual property & possession of the Canadian subjects on that coast should be preserved entire, and that they should not be molested or hindered in the exercise of any sedentary fisheries they may have established there.

35. Their claims however extend to but a small district of the coast, on the greatest part of which district a cod-fishery is stated to be impracticable.

36. On all such parts of the coast where there are no Canadian possessions, and more especially where a valuable cod-fishery may be carried on, it will be your duty to make the interest of our British subjects going out to fish there in ships fitted out from Great Britain the first object of your care, and as far as circumstances will admit to establish on that coast the regulations in favour of British fishing ships, which have been so wisely adopted by the Act of Parliament passed in the reign of King William the Third for the encouragement of the Newfoundland fishery and you are on no account to allow any possession to be taken, or sedentary fisheries to be established upon any parts of the coast that are not already private property by any persons whatever, except only such as shall produce annually a certificate of their having fitted out from some port in Great Britain.

* * * * *

No. 2.—1791, February 1: *Extract from Report of Thomas Jefferson, United States Secretary of State, on Cod and Whale Fisheries made to the House of Representatives.*^a

* * * * *

It will now be proper to count the advantages which aid, and the disadvantages which oppose us, in this conflict.

Our advantages are—

1. The neighbourhood of the great fisheries, which permits our fishermen to bring home their fish to be salted by their wives and children.

2. The shore fisheries, so near at hand as to enable the vessels to run into port in a storm, and so lessen the risk, for which distant nations must pay insurance.

3. The winter fisheries, which, like household manufactures, employ portions of time which would otherwise be useless.

4. The smallness of the vessels which the shortness of the voyage enables us to employ, and which consequently require but a small capital.

5. The cheapness of our vessels, which do not cost above the half of the Baltic fur vessels, computing price and duration.

6. Their excellence as sea-boats, which decreases the risk and quickens the return.

7. The superiority of our mariners in skill, activity, enterprise, sobriety, and order.

8. The cheapness of provisions.

9. The cheapness of casks, which of itself is said to be equal to an extra profit of 15 per cent.

54 These advantages are of such force that, while experience has proved that no other nation can make a mercantile profit on the Newfoundland fishery, nor can support it without national aid, we can make a living profit if vent for our fish can be procured.

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No. 3.—1793, May 15: *Letter from Mr. Jefferson (United States Secretary of State) to M. Ternant (French Minister).*

PHILADELPHIA, May 15, 1793.

SIR: Having received several memorials from the British Minister, on subjects arising out of the present war, I take the liberty of inclosing them to you, and shall add an explanation of the determinations of the Government thereon. These will serve to vindicate the principles on which it is meant to proceed, and which are to be applied with impartiality to the proceedings of both parties. They will form, therefore, as far as they go, a rule of action for them and for us.

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The capture of the British ship *Grange*, by the French frigate *l'Embuscade*, within the Delaware, has been the subject of a former letter to you. On full and mature consideration, the Government

^a Relates to fishery competition with other nationalities.

deems the capture to have been unquestionably within its jurisdiction; and that, according to the rules of neutrality, and the protection it owes to all persons while within its limits, it is bound to see that the crew be liberated, and the vessel and cargo restored to their former owners. The Attorney-General of the United States has made a statement of the grounds of this determination, a copy of which I have the honour to enclose you. I am, in consequence, charged by the President of the United States to express to you his expectation, and, at the same time, his confidence, that you will be pleased to take immediate and effectual measures for having the ship *Grange* and her cargo restored to the British owners, and the persons taken on board her set at liberty.

I am persuaded, Sir, you will be sensible, on mature consideration, that, in forming these determinations, the Government of the United States has listened to nothing but the dictates of immutable justice: They consider the rigorous exercise of that virtue, as the surest means of preserving perfect harmony between the United States and the Powers at war.

I have the honour to be, &c.

TH: JEFFERSON.

No. 4.—*Report of the Attorney-General enclosed in above.*

The Attorney General of the United States has the honour of submitting to the Secretary of State his opinion concerning the seizure of the ship *Grange*.

The essential facts are, That the River Delaware takes its rise within the limits of the United States;

That, in the whole of its descent to the Atlantic Ocean, it covered on each side by the territory of the United States;

That, from tide water, to the distance of about 60 miles from the Atlantic Ocean, it is called the *River* Delaware;

That, at this distance from the sea, it widens and assumes the name of the *Bay* of Delaware, which it retains to the mouth;

That its mouth is formed by the Capes Henlopen and May; the former belonging to the State of Delaware, in property and jurisdiction, the latter to the State of New Jersey;

That the Delaware does not lead from the sea to the dominions of any foreign nation;

That, from the establishment of the British provinces on the banks of the Delaware to the American revolution, it was deemed the peculiar navigation of the British Empire;

That, by the treaty of Paris, on the third day of September, 1783, His Britannic Majesty relinquished, with the privity of France, the sovereignty of those provinces, as well as of the other provinces and colonies;

And that the *Grange* was arrested in the Delaware, *within the capes*, before she had reached the sea, after her departure from the port of Philadelphia.

It is a principle, firm in reason, supported by the civilians, and tacitly approved in the document transmitted by the French Minister, that, to attack an enemy in a neutral territory, is absolutely unlawful.

Hence the inquiry is reduced to this simple form, whether the place of seizure was in the territory of the United States?

From a question originating under the foregoing circumstances, is obviously and properly excluded every consideration of a dominion over the sea. The solidity of our neutral right does not depend, in this case, on any of the various distances claimed on that element by different nations possessing the neighbouring shore; but if it did, the field would probably be found more extensive, and more favourable to our demand, than is supposed by the document above referred to. For the *necessary* or *natural* law of nations, unchanged as it is, in this instance, by any compact or other obligation of the United States, will, perhaps, when combined with the treaty of Paris in 1783, justify us in attaching to our coasts an extent into the sea beyond the reach of cannon shot.

In like manner is excluded every consideration, how far the spot of seizure was capable of being defended by the United States. For, although it will not be conceded that this could not be done, yet will it rather appear, that the mutual rights of the States of New Jersey and Delaware, up to the middle of the river, supersede the necessity of such an investigation.

No; the corner stone of our claim is, that the United States are proprietors of the lands on both sides of the Delaware, from its head to its entrance into the sea.

The high ocean, *in general*, it is true, is unsusceptible of becoming property. It is a gift of nature, manifestly destined for the use of all mankind; inexhaustible in its benefits; not admitting metes and bounds. But rivers may be appropriated, because the reverse is their situation. Were they open to all the world, they would prove the inlets of perpetual disturbance and discord; would soon be rendered barren by the number of those who would share in their products; and moreover may be defined.

A river, considered merely as such, in the property of the people through whose lands it flows, or of him under whose jurisdiction that people is.—*Grot. b. 2, c. 2, s. 12.*

Rivers might be held in property; though neither where they rise, nor where they discharge themselves, be within our territory. but they join to both, or the sea. It is sufficient for us that the larger part of water, that is, the sides, is shut up in our banks, and that the river, in respect of our land, is itself small and insignificant.—*Grot. b. 2, c. 3, s. 7; and Barbeyrac*, in his note, subjoins, that neither of those is necessary.

Rivers may be the property of whole States.—*Puff. b. 3, c. 3, s. 4.*

To render a thing capable of being appropriated, it is not strictly necessary that we should enclose it, or be able to enclose it, within artificial bounds. or such as are different from its own substance; it is sufficient, if the compass and extent of it can be any way determined. And therefore Grotius hath given himself a needless trouble, when, to prove rivers capable of property, he useth this argument, that, although they are bounded by the land at neither end, but united to the other rivers or the sea, yet it is enough that the greater part of them, that is their sides, are enclosed.—*Puff. b. 4, c. 5, s. 3.*

When a nation takes possession of a country in order to settle there, it possesses everything included in it, as lands, lakes, rivers, &c.—*Vattel, b. 1, c. 22, s. 266.*

To this list might be added Bynkershoek and Selden. But the dissertation of the former, *de dominio maris*, cannot be quoted with advantage in detachment; and the authority of the latter, *on this* head, may, in the judgment of some, partake too much of affection for the hypothesis of *mare clausum*. As Selden, however, sinks in influence

on this question, so must Grotius rise, who contended for the *mare liberum*; and his accurate commentator, Rutherford, confirms his principles in the following passage:

A nation, by settling upon any tract of land, which at the time of such settlement had no other owner, acquires, in respect of all other nations, an exclusive right of full or absolute property, not only in the land, but in the waters likewise that are included within the land, such as rivers, pools, creeks, or bays. The absolute property of a nation, in what it has thus seized upon, is its right of territory.—2 *Ruth.* b. 2, c. 9, s. 6.

Congress, too, have acted on these ideas, when, in their collection laws, they ascribe to a State the rivers wholly within that State.

It would seem, however, that the spot of seizure is attempted to be withdrawn from the protection of these respectable authorities, as being in the *Bay* of Delaware, instead of the *River* Delaware.

Who can seriously doubt the identity of the *River* and *Bay* of Delaware? How often are different portions of the same stream denominated differently? This is sometimes accidental; sometimes, for no other purpose than to assist the intercourse between man and man, by easy distinctions of space. Are not this river and this bay fed by the same springs from the land, and the same tides from the ocean? Are not both doubly flanked by the territory of the United States? Have any local laws, at any time, provided variable arrangements for the river and the bay? Has not the jurisdiction of the contiguous States been exercised equally on both?

But suppose that the *river* was dried up, and the *bay* alone remained, Grotius continues the argument of the 7th section, of the 3d chapter, of the 2d book above cited, in the following words:

By this instance it seems to appear, that the property and dominion of the sea might belong to him, who is in possession of the lands on both sides, though it be open above, as a gulf, or above and below, as a strait; provided it is not so great a part of the sea, that, when compared with the lands on both sides, it cannot be supposed to be some part of them. And now, what is thus lawful to one king or people, may be also lawful to two or three, if they have a mind to take possession of a sea, thus enclosed within their lands: for it is in this manner that a river, which separates two nations, has first been possessed by both, and then divided.

The gulfs and channels, or arms of the sea, are, according to the regular course, supposed to be belong to the people with whose lands they are encompassed.—Puff. b. 4, c. 5, s. 8.

Valin, in b. 5, tit. 1, p. 685, of his commentary on the marine ordonnance of France, virtually acknowledges that *particular* seas may be appropriated. After reviewing the contest between

56 Grotius and Selden, he says, "S'il (Selden) s'en fût donc tenu là, ou plutôt, s'il eût distingué l'océan des mers particulières, et même dans l'océan, l'étendue de mer, qui doit être censée appartenir aux Souverains des côtes, qui en sont baignées, sa victoire eût été complète."

These remarks may be enforced by asking, what nation can be injured in its rights, by the Delaware being appropriated to the United States? And to what degree may not the United States be injured, on the contrary ground? It communicates with no foreign dominion; no foreign nation has ever before, exacted a community of right in it, as if it were a main sea: under the former and present Governments, the exclusive jurisdiction has been asserted; by the very first collection law of the United States, passed in 1789, the county of Cape May, which includes Cape May itself, and all the

waters thereof, theretofore within the jurisdiction of the State of New Jersey, are comprehended in the district of Bridgetown; the whole of the State of Delaware, reaching to Cape Henlopen, is made one district. Nay, unless these positions can be maintained, the Bay of Chesapeake, which, in the same law, is so fully assumed to be within the United States, and which, for the length of the Virginia territory, is subject to the process of several counties to any extent, will become a rendezvous to all the world, without any possible control from the United States. Nor will the evil stop here. It will require but another short link in the process of reasoning, to disappropriate the mouths of some of our most important rivers. If, as Vattel inclines to think in the 294th section of his first book, the Romans were free to appropriate the Mediterranean, merely because they secured, by one single stroke, the immense range of their coast, how much stronger must the vindication of the United States be, should they adopt maxims for prohibiting foreigners from gaining, without permission, access into the heart of their country.

This inquiry might be enlarged by a minute discussion of the practice of foreign nations, in such circumstances. But I pass it by; because the United States, in the commencement of their career, ought not to be precipitate in declaring their approbation of any usages, (the precise facts concerning which we may not thoroughly understand) until those usages shall have grown into principles, and are incorporated into the Law of Nations; and because no usage has ever been accepted, which shakes the foregoing principles.

The conclusion then is, that the Grange has been seized on neutral ground. If this be admitted, the duty arising from the illegal act is restitution.

EDMUND RANDOLPH.

May 14, 1793.

No. 5.—1793, November 8: *Letter from Mr. Jefferson (United States Secretary of State) to M. Genet (Minister of France).*

GERMANTOWN, November 8, 1793.

SIR: I have now to acknowledge and answer your letter of September 13, wherein you desire that we may define the extent of the line of territorial protection on the coasts of the United States, observing that Governments and jurisconsults have different views on this subject.

It is certain that, heretofore, they have been much divided in opinion as to the distance from their sea coasts, to which they might reasonably claim a right of prohibiting the commitment of hostilities. The greatest distance, to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea-league. Some intermediate distances have also been insisted on, and that of three sea-leagues has some authority in its favour. The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation, as any nation whatever. Not proposing,

however, at this time, and without a respectful and friendly communication with the Powers interested in this navigation, to fix on the distance to which we may ultimately insist on the right of protection, the President gives instructions to the officers, acting under his authority, to consider those heretofore given them as restrained for the present to the distance of one sea-league, or three geographical miles from the sea shores. This distance can admit of no opposition, as it is recognised by treaties between some of the powers with whom we are connected in commerce and navigation, and is as little or less than is claimed by any of them on their own coasts.

Future occasions will be taken to enter into explanations with them, as to the ulterior extent to which we may reasonably carry our jurisdiction. For that of the rivers and bays of the United States, the laws of the several States are understood to have made provision, and they are, moreover, as being landlocked, within the body of the United States.

Examining, by this rule, the case of the British brig *Fanny*, taken on the 8th of May last, it appears from the evidence, that the capture was made four or five miles from the land, and consequently without the line provisionally adopted by the President, as before mentioned.

I have the honour to be, &c.

TH: JEFFERSON.

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- 57 No. 6.—1793, November 8: Letter from Mr. Jefferson (*United States Secretary of State*) to Mr. Hammond (*British Minister at Philadelphia*).

GERMANTOWN, Nov. 8, 1793.

SIR: The President of the United States thinking that before it shall be finally decided to what distance from our sea shores the territorial protection of the United States shall be exercised, it will be proper to enter into friendly conferences and explanations with the powers chiefly interested in the navigation of the seas on our coasts, and relying that convenient occasions may be taken for these hereafter, finds it necessary in the mean time, to fix provisionally on some distance for the present government of these questions. You are sensible that very different opinions and claims have been heretofore advanced on this subject. The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of 20 miles, and the smallest distance I believe, claimed by any nation whatever is the utmost range of a cannon ball, usually stated at one sea league. Some intermediate distances have also been insisted on, and that of three sea leagues has some authority in its favor. The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us in reason to as broad a margin of protected navigation as any nation whatever. Reserving however the ultimate extent of this for future deliberation the President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of one sea league or three geographical miles from the sea shores. This distance can admit of no opposition as it is recog-

nized by treaties between some of the Powers with whom we are connected in commerce and navigation, and is as little or less than is claimed by any of them on their own coasts.

For the jurisdiction of the rivers and bays of the United States the laws of the several States are understood to have made provision, and they are moreover as being land locked, within the body of the United States.

Examining by this rule the case of the British brig *Fanny*, taken on the 8th of May last, it appears from the evidence that the capture was made four or five miles from the land, and consequently without the line provisionally adopted by the President as before mentioned.

I have the honor to be with sentiments of respect and esteem, Sir,
your most obedient and most humble servant

(Signed) TH. JEFFERSON.

MR. HAMMOND.

No. 7.—1802, November 10: Letter from Mr. Leonard (*Superintendent of Trade and Fisheries at Canso, N. S.*), to Mr. Sullivan (*Under Secretary of State*).

SAINT JOHN NEW BRUNSWICK November 10th 1802

SIR. I beg leave to request you will inform the Right Honorable Lord Hobart that on the 19th of May last, I received an Official Letter from His Excellency Sir John Wentworth, Governor of Nova Scotia, recommending the cruizing of the "Union" in the Bay of Fundy and the shores near the entrance, where the principal part of the contraband trade has been carried on within the District, and where the American vessels who have hitherto refused to comply with the regulations of the Ports in that quarter, generally resort, and as the "Lilly" Sloop of War was at the request of Sir John Wentworth stationed for the season on the eastern part of Nova Scotia for the same purposes, and the "Pheasant" Sloop of War guarded the Coast from Halifax to the Bay of Passamaquady, I immediately complied with his Excellency's direction, and I have the satisfaction to inform his Lordship that our endeavours to prevent illicit trade, and to enforce a submission to the regulations of the Acts of Assembly of Nova Scotia, have in a great measure been successful, as an American vessel is seldom seen near the shores, and those that do appear come merely for the purpose of fishing agreeably to the treaty of 1783, whereas previous to the establishment of the Union frequent disputes took place between His Majesty's subjects and those of the United States of America respecting the right of Fishery in the Bays and Harbours to the great injury of the former and benefit of the latter; that such has been the benefit of the establishment, I have reason to think from the present disposition of the people of these provinces that the House of Assembly will by a grant enable me to make her usefulness more extensive than can be done by the sum allotted by parliament.

I further beg leave to suggest to you for his Lordship's consideration, that it would be beneficial to the interests of His Majesty's subjects in the provinces of Nova Scotia and New Brunswick

if an Act of Parliament should pass preventing the landing of Plaister of Paris northward and eastward of Boston, from British vessels as that article has become valuable in the Southern States for the production of grain and grass, and cannot be procured in any part of America, but in His Majesty's provinces; British vessels would then have the sole benefit of carrying it to the place of consumption and it would furnish a good nursery for seamen of his Majesty's ships of war, at present most of this advantage is enjoyed by American subjects as it is principally brought from the mines by small vessels owned in Nova Scotia and this Province and landed at the boundary line in the Bay of Passamaquady about 40 leagues from the mines; it is there re-shipped in American vessels: and conveyed to the place of consumption, to the great injury of our carrying trade, as these Provinces can furnish any quantity of shipping necessary to supply the whole United States with that article. It would also remove the pretence for illegal traffick which has been hitherto carried on by American vessels at the Boundary line who came under pretence of loading plaister of Paris, with contraband Articles on board which were clandestinely shipped in the small British vessels belonging to the small harbours and creeks in Nova Scotia and New Brunswick, who can easily elude the vigilance of cruizers, or officers of the Customs, to the great injury of the Revenue and fair trader. As no laws in the Colonies can be made to counteract this evil, I humbly conceive it must be by Act of Parliament.

I have the honour to be with the greatest respect

your most obedient Humble Servant

GEO: LEONARD

Superf. Trade and Fishery.

JOHN SULLIVAN Esqre

Under Secretary of State, &c &c &c.

No. 8.—1804, January 5: *Extract from Letter from Mr. Madison (Secretary of State), to Mr. James Monroe.*

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2d. The British pretensions to domain over the narrow seas are so absolute, and so indefensible, that they never would have occurred as a probable objection in this case, if they had not actually frustrated an arrangement settled by Mr. King with the British Ministry on the subject of impressments from American vessels on the high seas. At the moment when the articles were expected to be signed, an exception of the "narrow seas" was urged and insisted on by Lord St. Vincent; and being utterly inadmissible on our part, the negotiation was abandoned.

The objection in itself has certainly not the slightest foundation. The time has been, indeed, when England not only claimed but exercised pretensions scarcely inferior to full sovereignty over the seas surrounding the British Isles, and even as far as Cape Finesterre to the south, and Van Staten in Norway to the north. It was a time, however, when reason had little share in determining the law, and the intercourse of nations, when power alone decided questions of rights,

and when the ignorance and want of concert among other maritime countries facilitated such an usurpation.

The progress of civilisation and information has produced a change in all those respects; and no principle in the code of public law is at present better established than the common freedom of the seas beyond a very limited distance from the territories washed by them. This distance is not, indeed, fixed with absolute precision. It is varied in a small degree by written authorities, and perhaps it may be reasonably varied in some degree by local peculiarities. But the greatest distance which would now be listened to anywhere would make a small proportion of the narrowest part of the narrowest seas in question.

What are, in fact, the prerogatives claimed and exercised by Great Britain over these seas? If they were really a part of her domain, her authority would be the same there as within her other domain. Foreign vessels would be subject to all the laws and regulations framed for them, as much as if they were within the harbours or rivers of the country. Nothing of this sort is pretended. Nothing of this sort would be tolerated. The only instances in which these seas are distinguished from other seas, or in which Great Britain enjoys within them any distinction over other nations are, first, the compliment paid by other flags to hers; secondly, the extension of her territorial jurisdiction in certain cases to the distance of four leagues from the coast. The first is a relic of ancient usurpation, which has thus long escaped the correction, which modern and more enlightened times have applied to other usurpations. The prerogative has been often contested, however, even at the expense of bloody wars, and is still borne with ill will and impatience by her neighbours. At the last treaty of peace at Amiens the abolition of it was repeatedly and strongly pressed by France; and it is not improbable, that at no remote day it will follow the fate of the title of "King of France" so long worn by the British monarchs, and at length so properly sacrificed to the lessons of a unanimous wisdom. As far as this homage to the British flag has any

59 foundation at present, it rests merely on long usage and long acquiescence, which are construed, as in a few other cases of maritime claims, into the effect of a general, though tacit convention. The second instance is the extension of the territorial jurisdiction to four leagues from the shore. This, too, as far as the distance may exceed that which is generally allowed, rests on a like foundation, strengthened, perhaps, by the local facility of smuggling, and the peculiar interest which Great Britain has in preventing a practice affecting so deeply her whole system of revenue, commerce, and manufactures: whilst the limitation itself to four leagues necessarily implies that beyond that distance no territorial jurisdiction is assumed.

But, whatever may be the origin or the value of these prerogatives over foreign flags in one case, and within a limited portion of these seas in another, it is obvious that neither of them will be violated by the exemption of American vessels from impressments, which are nowise connected with either; having never been made on the pretext either of withholding the wonted homage to the British flag, or of smuggling in defiance of British laws.

This extension of the British law to four leagues from the shore is inferred from an Act of Parliament, passed in the year 1736, (9

Geo. 2, c. 35,) the terms of which comprehend all vessels foreign as well as British; it is possible, however, that the former are constructively excepted. Should your inquiries ascertain this to be the case, you will find yourself on better ground than the concession here made.

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From every view of the subject, it is reasonable to expect, that the exception of the narrow seas from the stipulation against impressments, will not be inflexibly maintained: should it be so, your negotiation will be at an end. The truth is, that so great a proportion of our trade, direct and circuitous, passes through those channels, and such is its peculiar exposure in them to the wrong practised, that, with such an exception, any remedy would be very partial. And we can never consent to purchase a partial remedy by confirming a general evil, and by subjecting ourselves to our own reproaches as well as to those of other nations.

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No. 9.—1804, September 8: *Extract from Letter from Mr. Jefferson (President of the United States), to the Secretary of the Treasury.*

MONTICELLO, September 8, 1804.

DEAR SIR,—As we shall have to lay before Congress the proceedings of the British vessels at New York, it will be necessary for us to say to them with certainty which specific aggressions were committed within the common law, which within the admiralty jurisdiction, and which on the high seas. The rule of the common law is that wherever you can see from land to land, all the water within the line of sight is in the body of the adjacent country and within common law jurisdiction. Thus, if in this curvature *a* *c* *b* you can see from *a* to *b*, all the water within the line of sight is within common law jurisdiction, and a murder committed at *c* is to be tried as at common law. Our coast is generally visible, I believe, by the time you get within about twenty-five miles. I suppose that at New York you must be some miles out of the Hook before the opposite shores recede twenty-five miles from each other. The three miles of maritime jurisdiction is always to be counted from this line of sight. It will be necessary we should be furnished with the most accurate chart to be had of those shores and waters in the neighborhood of the Hook; and that we may be able to ascertain on it the spot of every aggression.

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No. 10.—1805, November 30: *Extract from Memoirs of Mr. John Quincy Adams.*

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Washington, November 30th.—Paid visits this morning to the President, whom I found at home, and the Secretaries of State and

of the Navy, whom I did not see. Called also on M. Otis at his office, where I met Mr. Plumer. At the President's door I met Mr. Israel Smith and M. Gaillard, who were on the same visit as myself. The President mentioned a late act of hostility committed by a French privateer near Charleston, South Carolina, and said that we ought to assume as a principle that the neutrality of our territory should extend to the Gulf Stream, which was a natural boundary, and within which we ought not to suffer any hostility to be committed. M. Gaillard observed that on a former occasion, in Mr. Jefferson's correspondence with Genest, and by an Act of Congress at that

60 period, we had seemed only to claim the usual distance of three miles from the coast; but the President replied that he had then assumed that principle because Genest by his intemperance forced us to fix on some point, and we were not then prepared to assert the claim of jurisdiction to the extent we are in reason entitled to; but he had then taken care expressly to reserve the subject for future consideration, with a view to this same doctrine for which he now contends. I observed that it might be well, before we ventured to assume a claim so broad, to wait for a time when we should have a force competent to maintain it. But in the mean time, he said, it was advisable *to squint at it*, and to accustom the nations of Europe to the idea that we should claim it in future. The subject was not pushed any farther.

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No. 11.—1806, May 17: *Extract from Letter from Mr. Madison (United States Secretary of State) to Messrs. Monroe and Pinkney (Ministers Extraordinary and Plenipotentiary of the United States in London).*

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There remains, as an object of great importance, some adequate provision against the insults and injuries committed by British cruisers in the vicinity of our shores and harbours. These have been heretofore a topic of remonstrance, and have, in a late instance, been repeated with circumstances peculiarly provoking, as they include the murder of an American seaman within the jurisdictional limits of the United States. Mr. Monroe is in full possession of the documents explaining a former instance. Herewith will be received those relating to the late one. They not only support a just demand of an exemplary punishment of the offenders, and of indemnity for the spoliations, but call for some stipulations guarding against such outrages in future. With this view, it is proper that all armed belligerent ships should be expressly and effectually restrained from making seizures or searches within a certain distance from our coasts, or taking stations near our harbours commodious for those purposes.

In defining the distance protected against belligerent proceedings, it would not, perhaps, be unreasonable, considering the extent of the United States, the shoalness of their coast, and the natural indication furnished by the well defined path of the Gulf Stream, to expect an immunity for the space between that limit and the American shore. But at least it may be insisted that the extent of the neutral

immunity should correspond with the claims maintained by Great Britain, around her own territory. Without any particular inquiry into the extent of these, it may be observed, 1st. That the British Act of Parliament in the year 1736, 9 G. II. c. 35, supposed to be that called the Hovering Act, assumes, for certain purposes of trade, the distance of four leagues from the shores. 2d. That it appears that, both in the reign of James I, and of Charles II, the security of the commerce with British ports was provided for by express prohibitions, against the roving or hovering of belligerent ships so near the neutral harbours and coasts of Great Britain, as to disturb or threaten vessels homeward or outward bound, as well as against belligerent proceedings generally, within an inconvenient approach towards British territory.

With this example, and with a view to what is suggested by our own experience, it may be expected that the British Government will not refuse to concur in an article to the following effect:

It is agreed that all armed vessels belonging to either of the parties engaged in war, shall be effectually restrained by positive orders, and penal provisions, from seizing, searching, or otherwise interrupting or disturbing vessels to whomsoever belonging, whether outward or inward bound, within the harbours or the chambers formed by headlands, or anywhere at sea, within the distance of four leagues from the shore, or from a right line from one headland to another; it is further agreed, that, by like orders and provisions, all armed vessels shall be effectually restrained by the party to which they respectively belong, from stationing themselves, or from roving or hovering so near the entry of any of the harbours or coasts of the other, as that merchantmen shall apprehend their passage to be unsafe, or in danger of being set upon and surprised; and that in all cases where death shall be occasioned by any proceeding contrary to these stipulations, and the offender cannot conveniently be brought to trial and punishment under the laws of the party offended, he shall, on demand made within ——— months, be delivered up for that purpose.

If the distance of four leagues cannot be obtained, any distance not less than one sea league may be substituted in the article. It will occur to you that the stipulation against the roving and hovering of armed ships on our coasts so as to endanger or alarm trading vessels, will acquire importance as the space entitled to immunity shall be narrowed.

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61 No. 12.—1806, November 14: *Letter from Lord Holland and Lord Auckland (British Commissioners) to Lord Howick.*

Private.

HOLLAND HOUSE Nov. 14th 1806

MY LORD, In elucidation of the subject of our public despatch we beg leave to lay before you the following observations on the nature of the extension of jurisdiction suggested by the American Commissioners, on the real value of such a concession compared with that which they seem to set upon it as well as the reasons which in our opinion induce them to urge it so strenuously.

The distance of a cannon shot from shore is as far as we have been able to ascertain the general limit of maritime jurisdiction and that distance is for the sake of convenience practically construed

into three miles or a league. All independent nations possess such jurisdiction on their coasts; and the right to it is not only generally contained in the acknowledgement of the independence of the United States, but seems to have been specifically alluded to in the 25th article of the treaty of 1794. Particular circumstances resulting from immemorial usage, geographical position or stipulations of treaty have sometimes led to an extension of jurisdiction, and may therefore when applicable, be urged as a justification of such a pretension.

The natural causes which should lead to such exceptions are variously stated by authors and those urged by the American commissioners as applicable to their country are to be found occasionally among them. Thus, the *remoteness of a country* from the jurisdiction of all others is acknowledged as diminishing the inconvenience of an extension of her own. The practice of some nations even at this day though not of great authority is founded on such a claim, and even the admitted jurisdiction over an inland sea seems to rest on reasoning nearly similar. Selden, who had however a strong bias in favour of extended jurisdictions argues from such a principle in favour of the maritime pretensions of England, and the claim of a division of the sovereignty of a sea lying between two Powers such as Great Britain and Spain has been asserted and is still seriously maintained in our law books of authority.

The space between headlands is more generally laid down, and admitted by Grotius himself, as subject to the exclusive jurisdiction of the power to whom the land belongs. But neither in theory nor in practice do we find the distance between the headlands to which such a rule must exclusively apply accurately defined. James 1st by his royal proclamation dated 1st of March 1604, prohibiting hostilities between belligerent nations within his jurisdiction, stated headlands more than 90 miles distant one from another as forming bays necessarily dependent on and belonging to the adjoining territory—but it is remarkable that the Spaniards who were one of the objects of this prohibition, considered the order as a relaxation not as an extension of his lawful jurisdiction over the seas.

The circumstance however on which the American commissioners have chiefly relied is the *shelving nature of their coast*; and though from the east end of Long Island northwards it does not deserve such a description they allege that it is so broken with rocks as to oblige coasting vessels to keep at a considerable distance from the land. A shelving coast is urged as a reason for an extension of jurisdiction on the principle that a right over the neighbouring parts of the sea is not solely founded on power but on convenience for the protection of trade from the molestation of belligerent vessels; and an inference may be thence drawn in favour of an extension of jurisdiction on a coast where the usual limits admit of little or no navigation.

Though such protection afforded to their coasters give them a local exemption from our right of impressment, it would diminish it is said, the odium attached to that practice among them in a much greater degree than it would abridge the advantages resulting from it to us. For, one instance of vexation within sight of the shore excites more discontent than many of a similar nature which do not reach the country till the passions of the parties have in a great measure subsided.

Though claims of an extension of jurisdiction beyond the cannon shot or the three miles have been asserted and maintained in particular instances by most maritime Powers and especially by ourselves and the Spaniards we meet with few instances of a recognition of such claims in treaties, probably owing to the unreasonable extent to which the respective honour of nations has been pledged to support them. The acquiescence in the right of fisheries at a considerable distance from the coast, sometimes at twenty leagues, and the submission to revenue laws, such as our hovering Acts &c, might indeed be argued with some plausibility as a proof of the exception allowed by nations to the general limitation of maritime jurisdiction.

By our treaty of peace and commerce with Tripoli, concluded 19th of September 1751, it is stipulated that the vessels of Tripoli shall not cruise or look for prizes within sight of the island of Minorca or city of Gibraltar; and the same stipulation is introduced into our treaty with Tunis, of the 19th of October 1751, with this addition, that any prize taken by the ships of Tunis within ten miles of the aforesaid places shall be restored without any contradiction; and Spain in her treaty with Tripoli, of 1784, stipulated that the Tripoline corsairs should not capture vessels within ten leagues of her coast.

If your Lordship should deem it expedient on other grounds to concede any extension of jurisdiction to the United States beyond that which their independence necessarily implies, the
62 American commissioners have more than once assured us that they are ready in the article itself to acknowledge it as an exception to the general rule arising from the particular circumstances of their situation and peculiar nature of their coast. We shall also observe that their utmost expectation after our conversations on the subject, is two marine leagues.

The disadvantages of such a stipulation to us would be the additional protection of a league to our enemies and to our deserters in the American service, and a fear has also been expressed by a very intelligent sea officer, that the difficulty of ascertaining the distance would add to the frequency of the disputes. But without dwelling on the uncertainty of the criterion at present resorted to for ascertaining the distance, viz the depth of the water, a reference to the cases which have occurred during this and the late war would amply prove that as far as the practice of our cruisers is concerned, the present limits of jurisdiction are no security against mistake or at least against litigation.

We might on the other hand derive some little advantage from the claim it would justify of an extended jurisdiction and consequent protection of revenue and commerce on the coasts of our colonial possessions. But the chief benefit we could expect to derive from it is the conviction in the American public of our conciliatory disposition towards them, an object which the language and conduct of Mr. Monroe and Mr. Pinkney have persuaded us that they and the American Government have as much at heart as any of those which were the immediate causes of their mission. They are anxious to remove the causes which led to the misunderstanding between the two countries, but it is obvious that they are more anxious to prevent the consequences of that misunderstanding. The ferment occasioned by it is

considered by them as the chief obstacle to the adoption of a system more friendly to Great Britain, and in urging the extension of jurisdiction they evidently consider the effect on the public mind in America more than the intrinsic value of the acquisition

We have the honour to be &c &c &c

VASSALL HOLLAND
AUCKLAND

Lord Viscount Howick.

&c &c &c

No. 13.—1807, *January 3: Extract from Letter from Messrs. Monroe and Pinkney (at London) to Mr. Madison.*

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The twelfth article establishes the maritime jurisdiction of the United States to the distance of five marine miles from their coast, in favour of their own vessels and the unarmed vessels of all other Powers who may acknowledge the same limit. This Government contended that three marine miles was the greatest extent to which the pretension could be carried by the law of nations, and resisted, at the instance of the Admiralty and the law officers of the Crown, in Doctors' Commons, the concession, which was supposed to be made by this arrangement, with great earnestness. The Ministry seemed to view our claim in the light of an innovation of dangerous tendency, whose admission, especially at the present time, might be deemed an act unworthy of the Government. The outrages lately committed on our coast, which made some provision of the kind necessary as a useful lesson to the commanders of their squadrons, and a reparation for the insults offered to our Government, increased the difficulty of obtaining any accommodation whatever. The British commissioners did not fail to represent that which is contained in this article, as a strong proof of a conciliating disposition in their Government towards the Government and people of the United States. The limit established was not so extensive as that which we had contended for, and expected to have obtained; we persuade ourselves, however, that the great object which was contemplated by any arrangement of the subject, will result from that which has been made. The article in the treaty, in connection with the causes which produced it, forms an interesting occurrence in the history of our country, which cannot fail to produce the most salutary consequences. It is fair to presume, that the sentiment of respect which Great Britain has shown by this measure for the United States, will be felt and observed in future by her squadrons in their conduct on our coast, and in our bays and harbours. It is equally fair to presume, that the example of consideration which it affords in their favour, by a nation so vastly preponderant at sea, will be followed by other Powers.

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63 No. 14.—1815, June 17: *Letter from Lord Bathurst to Governor Keats.*

DOWNING STREET, June 17, 1815.

SIR, As the Treaty of Peace lately concluded with the United States contains no provision with respect to the fisheries which the subjects of the United States enjoyed under the IIIrd Article of the Peace of 1783, His Majesty's Government consider it not unnecessary that you should be informed as to the extent to which those privileges are affected by the omission of any stipulation in the present Treaty, and of the line of conduct which it is, in consequence, advisable for you to adopt.

You cannot but be aware that the IIIrd Article of the Treaty of Peace of 1873 contained two distinct stipulations; the one recognizing the rights which the United States had to take fish upon the high seas, and the other granting to the United States the privilege of fishing within the British jurisdiction, and of using, under certain conditions, the shores and territories of His Majesty for purposes connected with the fishery; of these, the former, being considered permanent, cannot be altered or affected by any change of the relative situation of the two countries; but the other, being a privilege derived from the Treaty of 1783 alone, was, as to its duration, necessarily limited to the duration of the Treaty itself. On the declaration of war by the American Government, and the consequent abrogation of the then existing Treaties, the United States forfeited, with respect to the fisheries, those privileges which are purely conventional, and (as they have not been renewed by a stipulation in the present Treaty) the subjects of the United States can have no pretence to any right to fish within the British jurisdiction, *or to use the British territory* for purposes connected with fishery.

Such being the view taken of the question of the fisheries as far as relates to the United States, I am commanded by His Royal Highness the Prince Regent to instruct you to abstain most carefully from any interference with the fishery in which the subjects of the United States may be engaged, either on the Grand Bank of Newfoundland, the Gulf of St. Lawrence, or other places in the sea. At the same time you will prevent them, except under the circumstances hereinafter mentioned, from using the British territory for purposes connected with the fishery, and will exclude their fishing-vessels from the bays, harbours, rivers, creeks, and inlets of all His Majesty's possessions. In case, however, it should have happened that the fishermen of the United States through ignorance of the circumstances which affect this question, should, previous to your arrival, have already commenced a fishery similar to that carried on by them previous to the late war, and should have occupied the British harbours and former establishments on the British territory which could not be suddenly abandoned without very considerable loss, His Royal Highness the Prince Regent, willing to give every indulgence to the citizens of the United States which is compatible with His Majesty's rights, has commanded me to instruct you to abstain from molesting such fishermen or impeding the progress of their fishing during the present year, unless they should, by attempts to carry on a contraband trade, render themselves unworthy of pro-

tection or indulgence. You will, however, not fail to communicate to them the tenor of the instructions which you have received and the view which His Majesty's Government take of the question of the fishery, and you will, above all, be careful to explain to them that they are not in any future season to expect a continuance of the same indulgence.

I have, &c.

(Signed)

BATHURST.

No. 15.—1815, July 21: *Extract from Letter from Mr. Monroe (United States Secretary of State) to Mr. Adams (United States Minister at London).*

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Among the acts which we have to complain of with greatest earnestness is a late warning given by the commander of a British sloop of war to our fishermen near the coast of the British northern colonies to retire thence to the distance of twenty leagues. This, it is presumed, has been done under a construction of the late treaty of peace, which, by being silent on the subject, left that important interest to rest on the ground on which it was placed by the treaty of 1783. The right to the fisheries required no new stipulation to support it. It was sufficiently secured by the treaty of 1783. This important subject will claim your early attention. The measure thus promptly taken by the British Government, without any communication with this Government, notwithstanding the declaration of our Ministers at Ghent that our right would not be affected by the silence of the treaty, indicates a spirit which excites equal surprise and regret—one which by no means corresponds with the amicable relations established between the two countries by that treaty, or with the spirit with which it has been executed by the United States.

As you are well acquainted with the solidity of our right to the fisheries in question, as well as to those on the Grand Bank, and elsewhere on the main ocean, to the limit of a marine league
64 only from the coast, (for the pretension to remove us twenty leagues is too absurd to be discussed), I shall not dilate on it, especially at this time. It is sufficient to observe here, that the right of the United States to take fish on the coast of Newfoundland, and on the coasts, bays, and creeks of all other of His Britannic Majesty's dominions in America, and to dry and cure fish in any of the unsettled bays, harbours, and creeks of Nova Scotia, Magdalen Islands, and Labrador—in short, that every right appertaining to the fisheries, which was secured by the treaty of 1783, stands now as unshaken and perfect as it then did, constituting a vital part of our political existence, and resting on the same solid foundation as our independence itself. In the act of dismemberment and partition, the rights of each party were distinctly defined. So much of territory and incidental rights were allotted to one, so much to the other; and as well might it be said, because our boundary had not been retraced in the late treaty, in every part, that certain portions of our territory had reverted to England, as that our right to fish, by whatever name secured, had experienced that fate. A liberty of unlimited duration,

thus secured, is as much a right as if it had been stipulated by any other term. Being to be enjoyed by one, adjoining the territory allotted by the partition to the other party, it seemed to be the appropriate term. I have made these remarks to show the solid ground on which this right is deemed to rest by this Government, relying on your thorough knowledge of the subject to illustrate and support it in the most suitable manner.

It can scarcely be presumed that the British Government, after the result of the late experiment, in the present state of Europe, and under its other engagements, can seriously contemplate a renewal of hostilities. But it often happens with nations, as well as with individuals, that a just estimate of its interests and duties is not an infallible criterion of its conduct. We ought to be prepared at every point to guard against such an event. You will be attentive to circumstances, and give us timely notice of any danger which may be menaced.

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No. 16.—1815, September 7: Letter from Lord Bathurst to Mr. Baker.

FOREIGN OFFICE, September 7, 1815.

SIR: Your several despatches to No. 25 inclusive have been received and laid before the Prince Regent.

The necessity of immediately dispatching this messenger with my preceding numbers prevents my replying to the various topics which your more recent communications embrace. I shall therefore confine myself to conveying to you the sentiments of His Majesty's Government on the one requiring the most immediate explanation with the Government of the United States, namely, the fisheries, premising the instructions I have to give to you on the subject, with informing you that the line which you have taken in the discussion on that point, as explained in your No. 24, has met with the approbation of His Majesty's Government.

You will take an early opportunity of assuring Mr. Monroe that, as, on the one hand, the British Government cannot acknowledge the right of the United States to use the British territory for the purpose connected with the fishery, and that their fishing vessels will be excluded from the bays, harbours, rivers, creeks, and inlets of all His Majesty's possessions: so, on the other hand, the British Government does not pretend to interfere with the fishery in which the subjects of the United States may be engaged, either on the Grand Bank of Newfoundland, the Gulf of St. Lawrence, or other places in the sea, without the jurisdiction of the maritime league from the coasts under the dominion of Great Britain.

Upon these principles, therefore, the case against which the American Government has remonstrated, if well founded, was not authorized by His Majesty's Government.

I am, &c.

(Signed)

BATHURST.

No. 17.—1815, September 19: *Extract from Letter from Mr. Adams to Mr. Monroe stating the Substance of a Conversation with Lord Bathurst.*

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Having formally renewed the claim for the restitution of the slaves carried away contrary to the engagements of the treaty of peace, or for payment of their value as the alternative, there were other objects which I deemed it necessary to present again to the consideration of this Government. In the first instance, it seemed advisable to open them by a verbal communication; and I requested of Lord Bathurst an interview, for which he appointed the 14th instant, when I
65 called at his office in Downing Street. I said that, having lately received despatches from you respecting several objects of some importance to the relations between the two countries, my first object in asking to see him had been to inquire whether he had received from Mr. Baker a communication of the correspondence between you and him relative to the surrender of Michilimackinac; to the proceedings of Colonel Nichols in the southern part of the United States; and to the warning given by the captain of the British armed vessel *Jaseur* to certain American fishing vessels to withdraw from the fishing grounds to the distance of sixty mile from the coast. He answered, that he had received all these papers from Mr. Baker about four days ago; that an answer with regard to the warning of the fishing vessels had immediately been sent; but, on the other subjects, there had not been time to examine the papers and prepare the answers.

I asked him if he could, without inconvenience, state the substance of the answer that had been sent. He said, certainly: it had been that as, on the one hand, Great Britain could not permit the vessels of the United States to fish within the creeks and close upon the shores of the British territories, so, on the other hand, it was by no means her intention to interrupt them in fishing anywhere in the open sea, or without the territorial jurisdiction, a marine league from the shore; and, therefore, that the warning given at the place stated, in the case referred to, was altogether unauthorised. I replied that the particular act of the British commander in this instance being disavowed, I trusted that the British Government, before adopting any final determination upon the subject, would estimate, in candour, and in that spirit of amity which my own Government was anxiously desirous of maintaining in our relations with this country, the considerations which I was instructed to present in support of the right of the people of the United States to fish on the whole coast of North America, which they have uniformly enjoyed from the first settlement of the country; that it was my intention to address, in the course of a few days, a letter to him on the subject. He said that they would give due attention to the letter that I should send him, but that Great Britain had explicitly manifested her intention concerning it; that this subject, as I doubtless knew, had excited a great deal of feeling in this country, perhaps much more than its importance deserved; but their own fishermen considered it as an excessive hardship to be supplanted by American fishermen, even upon the very shores of the British dominions. I said that those

whose sensibilities had been thus excited had probably not considered the question of right in the point of view in which it had been regarded by us; that they were the sensibilities of a partial and individual interest, stimulated by the passions of competition, and considering the right of the Americans as if it had been a privilege granted to them by the British Government. If this interest was to have weight in determining the policy of the Cabinet, there was another interest liable to be affected in the opposite manner, which would be entitled equally to consideration—the manufacturing interest. The question of right had not been discussed at the negotiation of Ghent. The British plenipotentiaries had given a notice that the British Government did not intend hereafter to grant to the people of the United States the right to fish, and to cure and dry fish within the exclusive British jurisdiction in America, without an equivalent, as it had been granted by the treaty of peace in 1783. The American plenipotentiaries had given notice, in return, that the American Government considered all the rights and liberties in and to the fisheries on the whole coast of North America as sufficiently secured by the possession of them, which had always been enjoyed previous to the revolution, and by the recognition of them in the treaty of peace in 1783; that they did not think any new stipulation necessary for a further confirmation of the right, no part of which did they consider as having been forfeited by the war. It was obvious that the treaty of peace of 1783 was not one of those ordinary treaties which, by the usages of nations, were held to be annulled by a subsequent war between the same parties; it was not simply a treaty of peace; it was a treaty of partition between two parts of one nation, agreeing thenceforth to be separated into two distinct sovereignties. The conditions upon which this was done constituted, essentially, the independence of the United States; and the preservation of all the fishing rights, which they had constantly enjoyed over the whole coast of North America, was among the most important of them. This was no concession, no grant, on the part of Great Britain, which could be annulled by a war. There had been, in the same treaty of 1783, a right recognised in British subjects to navigate the Mississippi.

This right the British plenipotentiaries at Ghent had considered as still a just claim on the part of Great Britain, notwithstanding the war that had intervened. The American plenipotentiaries, to remove all future discussion upon both points, had offered to agree to an article expressly confirming both the rights. In declining this, an offer had been made on the part of Great Britain of an article stipulating to negotiate in future for the renewal of both the rights, *for equivalents*, which was declined by the American plenipotentiaries, on the express ground that its effect would have been an implied admission that the rights had been annulled. There was, therefore, no article concerning them in the treaty, and the question as to the right was not discussed. I now stated the ground upon which the Government of the United States considered the right as subsisting and unimpaired. The treaty of 1783 was, in its essential nature, not liable to be annulled by a subsequent war. It acknowledged the United States as a sovereign and independent Power. It would be an absurdity, inconsistent with the acknowledgment itself, to suppose it liable to be forfeited by a war. The whole treaty of

Ghent did constantly refer to it as existing and in full force, nor was an intimation given that any further confirmation of it was supposed to be necessary. It would be for the British Government ultimately to determine how far this reasoning was to be admitted as correct. There were, also, considerations of policy and expediency, to which I hoped they would give suitable attention, before they should come to a final decision upon this point. I thought it my duty to suggest them, that they might not be overlooked. The subject was viewed by my countrymen as highly important, and I was anxious to omit no effort which might possibly have an influence in promoting friendly sentiments between the two nations, or in guarding

66 against the excitement of others. These fisheries afforded the means of subsistence to multitudes of people who were destitute of any other; they also afforded the means of remittance to Great Britain in payment for articles of her manufactures exported to America. It was well understood to be the policy of Great Britain that no unnecessary stimulus should be given to the manufactures in the United States, which would diminish the importation of those from Great Britain. But, by depriving the fishermen of the United States of this source of subsistence, the result must be to throw them back upon the country, and drive them to the resort of manufacturing for themselves; while, on the other hand, it would cut off the means of making remittances in payment for the manufactures of Great Britain.

I thought it best to urge every consideration which might influence a party having other views in that respect, to avoid coming to a collision upon it. I would even urge considerations of humanity. I would say that fisheries, the nature of which was to multiply the means of subsistence to mankind, were usually considered by civilised nations as under a sort of special sanction. It was a common practice to have them uninterrupted even in time of war. He knew, for instance, that the Dutch had been, for centuries, in the practice of fishing upon the coasts of this island, and that they were not interrupted in this occupation even in ordinary times of war. It was to be inferred from this, that, to interdict a fishery, which has been enjoyed for ages, far from being a usual act in the peaceable relations between nations, was an indication of animosity, transcending even the ordinary course of hostility in war. He said that no such disposition was entertained by the British Government; that to show the liberality which they had determined to exercise in this case, he would assure me that the instructions which he had given to the officers on that station had been, not even to interrupt the American fishermen who might have proceeded to those coasts, within the British jurisdiction, for the present year; to allow them to complete their fares, but to give them notice that this privilege could no longer be allowed by Great Britain, and that they must not return the next year. It was not so much the fishing, as the drying and curing on the shores, that had been followed by bad consequences. It happened that our fishermen, by their proximity, could get to the fishing stations sooner in the season than the British, who were obliged to go from Europe, and who, upon arriving there, found all the best fishing places and drying and curing places pre-occupied. This had often given rise to disputes and quarrels between them, which in some instances had proceeded even to blows. It had dis-

turbed the peace among the inhabitants on the shores; and, for several years before the war, the complaints to this Government had been so great and so frequent, that it had been impossible not to pay regard to them. I said that I had not heard of any such complaints before, but that, as to the disputes arising from the competition of the fishermen, a remedy could surely with ease be found for them, by suitable regulations of the Government; and with regard to the peace of the inhabitants, there could be little difficulty in securing it, as the liberty enjoyed by the American fishermen was limited to unsettled and uninhabited places, unless they could, in the others, obtain the consent and agreement of the inhabitants.

The answer which was so promptly sent to the complaint relative to the warning of the fishing vessels, by the captain of the *Jaseur*, will probably be communicated to you before you will receive this letter. You will see whether it is so precise, as to the limits within which they are determined to adhere to the exclusion of our fishing vessels, as Lord Bathurst's verbal statement of it to me, namely, to the extent of one marine league from their shores. Indeed, it is to the curing and drying upon the shore that they appear to have the strongest objection. But that, perhaps, is because they know that the immediate curing and drying of the fish, as soon as they are taken, is essential to the value, if not to the very prosecution of the fishery. I have no expectation that the arguments used by me either in support of our right, or as to the policy of Great Britain, upon this question, will have any weight here. Though satisfied of their validity myself, I am persuaded it will be upon the determination of the American Government and people to maintain the right that the continuance of its enjoyment will alone depend.

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No. 18.—1815, September 25: *Extract from Letter from Mr. Adams to Lord Bathurst (British Secretary of State).*

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In the conference with your Lordship, with which I was honoured on the 14th instant, I represent to you, conformably to the instructions which I had received from the Government of the United States, the proceedings of several British officers in America, and upon the American coast, marked with characters incompatible not only with those amicable relations which it is the earnest desire of the American Government to restore and to cultivate, but even with the condition of peace which had been restored between the two countries by the treaty of Ghent.

It was highly satisfactory to be informed that the conduct of Captain Lock, commander of the sloop of war *Jaseur*, in warning
67 American fishing vessels not to come within sixty miles of the coast of His Majesty's possessions in North America, was unauthorised, and that the instructions to the British officers on that station, far from warranting such a procedure, had directed them not even to molest the American fishing vessels which might be found pursuing that occupation during the present year. In offering a just tribute of acknowledgment to the fairness and liberality of these instructions issued from your Lordship's office, there only re-

mained the regret that the execution had been so different from them in spirit, so opposite to them in effect.

But, in disavowing the particular act of the officer who had presumed to forbid American fishing vessels from approaching within sixty miles of the American coast, and in assuring me that it had been the intention of this Government, and the instructions given by your Lordship, not even to deprive the American fishermen of any of their accustomed liberties during the present year, your Lordship did also express it as the intention of the British Government to exclude the fishing vessels of the United States, hereafter, from the liberty of fishing within one marine league of the shores of all the British territories in North America, and from that of drying and curing their fish on the unsettled parts of those territories, and, with the consent of the inhabitants, on those parts which have become settled since the peace of 1783.

I then expressed to your Lordship my earnest hope that this determination had not been irrevocably taken, and stated the instructions which I had received to present to the consideration of His Majesty's Government the grounds upon which the United States conceive those liberties to stand, and upon which they deem that such exclusion cannot be effected without an infraction of the rights of the American people.

In adverting to the origin of these liberties, it will be admitted, I presume, without question, that, from the time of the settlements in North America, which now constitute the United States, until their separation from Great Britain, and their establishment as distinct sovereignties, these liberties of fishing, and of drying and curing fish, had been enjoyed by them in common with the other subjects of the British Empire. In point of principle, they were pre-eminently entitled to the enjoyment; and, in point of fact, they had enjoyed more of them than any other portion of the Empire; their settlement of the neighbouring country having naturally led to the discovery and improvement of these fisheries, and their proximity to the places where they are prosecuted; and the necessities of their condition having led them to the discovery of the most advantageous fishing grounds, and given them facilities in the pursuit of their occupation in those regions which the remoter parts of the Empire could not possess. It might be added, that they had contributed their full share, and more than their share, in securing the conquest from France of the provinces on the coasts on which these fisheries were situated.

It was, doubtless, upon considerations such as these that, in the treaty of peace between His Majesty and the United States in 1783, an express stipulation was inserted, recognising the rights and liberties which had always been enjoyed by the people of the United States in these fisheries, and declaring that they should continue to enjoy the right of fishing on the Grand Bank, and other places of common jurisdiction, and have the liberty of fishing and of drying and curing their fish within the exclusive British jurisdiction on the North American coasts, to which they had been accustomed while themselves formed a part of the British nation. This stipulation was a part of that treaty by which His Majesty acknowledged the United States as free, sovereign, and independent States, and that he treated with them as such.

It cannot be necessary for me to prove, my Lord, that that treaty is not, in its general provisions, one of those which, by the common understanding and usage of civilised nations, is or can be considered as annulled by a subsequent war between the same parties. To suppose that it is, would imply the inconsistency and absurdity of a sovereign and independent State, liable to forfeit its right of sovereignty, by the act of exercising it on a declaration of war. But the very words of the treaty attest that the sovereignty and independence of the United States were not considered or understood as grants from His Majesty. They were taken and expressed as existing before the treaty was made, and as then only first formally recognised and acknowledged by Great Britain.

Precisely of the same nature were the rights and liberties in the fisheries to which I now refer. They were, in no respect, grants from the King of Great Britain to the United States; but the acknowledgment of them as rights and liberties enjoyed before the separation of the two countries, and which it was mutually agreed should continue to be enjoyed under the new relations which were to subsist between them, constituted the essence of the article concerning the fisheries. The very peculiarity of the stipulation is an evidence that it was not, on either side, understood or intended as a grant from one sovereign State to another. Had it been so understood, neither could the United States have claimed, nor would Great Britain have granted, gratuitously, any such concession. There was nothing, either in the state of things, or in the disposition of the parties, which could have led to such a stipulation, as on the ground of a grant, without an equivalent, by Great Britain.

Yet such is the ground upon which it appears to have been contemplated as resting by the British Government, when their plenipotentiaries at Ghent communicated to those of the United States their intentions as to the North American fisheries, viz: "That the British Government did not intend to grant to the United States, gratuitously, the privileges formerly granted by treaty to them, of fishing within the limits of the British sovereignty, and of using the shores of the British territories for purposes connected with the British fisheries."

These are the words in which the notice, given by them, is recorded in the protocol of conference of the 8th of August, 1814. To this notice the American plenipotentiaries first answered, on the 9th of August, that they had no instructions from their Government to negotiate upon the subject of the fisheries; and afterwards, in their note of 10th November, 1814, they expressed themselves in the following terms:

68 In answer to the declaration made by the British plenipotentiaries respecting the fisheries, the undersigned, referring to what passed in the conference of the 9th of August, can only state that they are not authorised to bring into discussion any of the rights or liberties which the United States have heretofore enjoyed in relation thereto. From their nature, and from the peculiar character of the treaty of 1783, by which they were recognised, no further stipulation has been deemed necessary by the Government of the United States to entitle them to the full enjoyment of all of them.

If the stipulation of the treaty of 1783 was one of the conditions by which His Majesty acknowledged the sovereignty and independence of the United States; if it was the mere recognition of rights

and liberties previously existing and enjoyed, it was neither a privilege gratuitously granted, nor liable to be forfeited by the mere existence of a subsequent war. If it was not forfeited by the war, neither could it be impaired by the declaration of Great Britain, that she did not intend to renew the grant. Where there had been no gratuitous concession, there could be none to renew; the rights and liberties of the United States could not be cancelled by the declaration of Great Britain's intentions. Nothing could abrogate them but the renunciation of them by the United States themselves.

Among the articles of that same treaty of 1783, there is one stipulating that the subjects and citizens of both nations shall enjoy, for ever, the right of navigating the River Mississippi, from its sources to the ocean. And although, at the period of the negotiations of Ghent, Great Britain possessed no territory upon that river, yet the British plenipotentiaries, in their first note, considered Great Britain as still entitled to claim the free navigation of it, without offering for it any equivalent. And, afterwards, when offering a boundary line, which would have abandoned every pretension even to any future possession on that river, they still claimed, not only its free navigation, but a right of access to it, from the British dominions in North America, through the territories of the United States. The American plenipotentiaries, to foreclose the danger of any subsequent misunderstanding and discussion upon either of these points, proposed an article recognising anew the liberties on both sides. In declining to accept it, the British plenipotentiaries proposed an article engaging to negotiate, in future, for the renewal of both, for equivalents to be mutually granted. This was refused by the American plenipotentiaries, on the avowed principle that its acceptance would imply the admission on the part of the United States that their liberties in the fisheries, recognised by the treaty of 1783, had been annulled, which they declared themselves in no manner authorised to concede.

Let it be supposed, my Lord, that the notice given by the British plenipotentiaries, in relation to the fisheries, had been in reference to another article of the same treaty; that Great Britain had declared she did not intend to grant again, gratuitously, the grant in a former treaty of peace, acknowledging the United States as free, sovereign, and independent States; or, that she did not intend to grant, gratuitously, the same boundary line which she had granted in the former treaty of peace: is it not obvious that the answer would have been that the United States needed no new acknowledgment of their independence, nor any new grant of a boundary line?—that, if their independence was to be forfeited, or their boundary line curtailed, it could only be by their own acts of renunciation, or of cession, and not by the declaration of the intentions of another Government? And, if this reasoning be just, with regard to the other articles of the treaty of 1783, upon what principle can Great Britain select one article, or a part of one article, and say, this particular stipulation is liable to forfeiture by war, or by the declaration of her will, while she admits the rest of the treaty to be permanent and irrevocable? In the negotiation of Ghent, Great Britain did propose several variations of the boundary line, but she never intimated that she considered the line of the treaty of 1783 as forfeited by the war, or that its variation could be effected by the mere declaration of her intentions. She perfectly understood that no alteration of

that line could be effected but by the express assent of the United States; and, when she finally determined to abide by the same line, neither the British nor the American plenipotentiaries conceived that any new confirmation of it was necessary. The treaty of Ghent, in every one of its essential articles, refers to that of 1783 as being still in full force. The object all its articles relative to the boundary, is to ascertain with more precision, and to carry into effect, the provisions of that prior compact. The treaty of 1783 is, by a tacit understanding between the parties, and without any positive stipulation, constantly referred to as the fundamental law of the relations between the two nations. Upon what ground, then, can Great Britain assume that one particular stipulation in that treaty is no longer binding upon her?

Upon this foundation, my Lord, the Government of the United States consider the people thereof as fully entitled, of right, to all the liberties in the North American fisheries which have always belonged to them; which, in the treaty of 1783, were, by Great Britain, recognised as belonging to them; and which they never have, by any act of theirs, consented to renounce. With these views, should Great Britain ultimately determine to deprive them of the enjoyment of these liberties by force, it is not for me to say whether, or for what length of time, they would submit to the bereavement of that which they would still hold to be their unquestionable right. It is my duty to hope that such measures will not be deemed necessary to be resorted to on the part of Great Britain; and to state that, if they should, they cannot impair the right of the people of the United States to the liberties in question, so long as no formal and express assent of theirs shall manifest their acquiescence in the privation.

In the interview with which your Lordship recently favoured me, I suggested several other considerations, with the hope of convincing your Lordship that, independent of the question of rigorous right, it would conduce to the substantial interests of Great Britain herself, as well as to the observance of those principles of benevolence and humanity which it is the highest glory of a great and powerful

69 nation to respect, to leave to the American fishermen the participation of those benefits which the bounty of nature has thus spread before them; which are so necessary to their comfort and subsistence; which they have constantly enjoyed hitherto; and which, far from operating as an injury to Great Britain, had the ultimate result of pouring into her lap a great portion of the profits of their hardy and laborious industry; that these fisheries afforded the means of subsistence to a numerous class of people in the United States, whose habit of life had been fashioned to no other occupation, and whose fortunes had allotted them no other possession; that to another, and, perhaps, equally numerous class of our citizens, they afforded the means of remittance and payment for the productions of British industry and ingenuity, imported from the manufactures of this United Kingdom; that, by the common and received usages among civilised nations, fishermen were among those classes of human society whose occupations, contributing to the general benefit and welfare of the species, were entitled to a more than ordinary share of protection; that it was usual to spare and exempt them even from the most exasperated conflicts of national hostility; that this nation had, for ages, permitted the fishermen of another country to frequent

and fish upon the coasts of this island, without interrupting them, even in times of ordinary war; that the resort of American fishermen to the barren, uninhabited, and for the great part, uninhabitable rocks on the coasts of Nova Scotia, the Gulf of St. Lawrence, and Labrador, to use them occasionally for the only purposes of utility of which they are susceptible, if it must, in its nature, subject British fishermen on the same coasts to the partial inconvenience of a fair competition, yet produces, in its result, advantages to other British interests equally entitled to the regard and fostering care of their Sovereign. By attributing to motives derived from such sources as these the recognition of these liberties by His Majesty's Government in the treaty of 1783, it would be traced to an origin certainly more conformable to the fact, and surely more honourable to Great Britain, than by ascribing it to the improvident grant of an unrequited privilege, or to a concession extorted from the humiliating compliance of necessity.

In repeating, with earnestness, all these suggestions, it is with the hope that from some, or all of them, His Majesty's Government will conclude the justice and expediency of leaving the North American fisheries in the state in which they have heretofore constantly existed, and the fishermen of the United States unmolested in the enjoyment of their liberties.

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No. 19.—1815, October 30: *Letter from Lord Bathurst to Mr. Adams.*

FOREIGN OFFICE, *October 30, 1815.*

The undersigned, one of His Majesty's Principal Secretaries of State, had the honour of receiving the letter of the Minister of the United States, dated the 25th ultimo, containing the grounds upon which the United States conceive themselves, at the present time, entitled to prosecute their fisheries within the limits of the British sovereignty, and to use British territories for purposes connected with the fisheries.

A pretension of this kind was certainly intimated on a former occasion, but in a manner so obscure that His Majesty's Government were not enabled even to conjecture the grounds upon which it could be supported.

His Majesty's Government have not failed to give to the argument contained in the letter of the 25th ultimo a candid and deliberate consideration; and, although they are compelled to resist the claim of the United States, when thus brought forward as a question of right, they feel every disposition to afford to the citizens of those States all the liberties and privileges connected with the fisheries which can consist with the just rights and interests of Great Britain, and secure His Majesty's subjects from those undue molestations in their fisheries which they have formerly experienced from citizens of the United States. The Minister of the United States appears, by his letter, to be well aware that Great Britain has always considered the liberty formerly enjoyed by the United States of fishing within British limits, and using British territory, as derived from the third article of the treaty of 1783, and from that alone; and that the claim

of an independent State to occupy and use at its discretion any portion of the territory of another, without compensation or corresponding indulgence, cannot rest on any other foundation than conventional stipulation. It is unnecessary to enquire into the motives which might have originally influenced Great Britain in conceding such liberties to the United States, or whether other articles of the treaty wherein these liberties are specified did, or did not, in fact, afford an equivalent for them, because all the stipulations profess to be founded on reciprocal advantages and mutual convenience. If the United States derived from that treaty privileges from which other independent nations not admitted by treaty were excluded, the duration of the privileges must depend on the duration of the instrument by which they were granted; and if the war abrogated the treaty, it determined the privileges. It has been urged, indeed, on the part of the United States, that the treaty of 1783 was of a peculiar character, and that, because it contained a recognition of American independence, it could not be abrogated by a subsequent war between the parties. To a position of this novel nature Great Britain cannot accede. She knows of no exception to the rule, that all treaties are put an end to by a subsequent war between the same parties:

70 she cannot, therefore, consent to give to her diplomatic relations with one State a different degree of permanency from that on which her connection with all other States depends. Nor can she consider any one State at liberty to assign to a treaty made with her such a peculiarity of character as shall make it, as to duration, an exception to all other treaties, in order to found, on a peculiarity thus assumed, an irrevocable title to all indulgences, which have all the features of temporary concessions.

The treaty of Ghent has been brought forward by the American Minister as supporting, by its reference to the boundary line of the United States, as fixed by the treaty of 1783, the opinion that the treaty of 1783 was not abrogated by the war. The undersigned, however, cannot observe in any one of its articles any express or implied reference to the treaty of 1783 as still in force. It will not be denied that the main object of the treaty of Ghent was the mutual restoration of all territory taken by either party from the other during the war. As a necessary consequence of such a stipulation, each party reverted to their boundaries as before the war, without reference to the title by which these possessions were acquired, or to the mode in which their boundaries had been previously fixed. In point of fact, the United States had before acquired possession of territories asserted to depend on other titles than those which Great Britain could confer. The treaty of Ghent, indeed, adverted, as a fact of possession, to certain boundaries of the United States which were specified in the treaty of 1783; but surely it will not be contended that therefore the treaty of 1783 was not considered at an end.

It is justly stated by the American Minister that the United States did not need a new grant of the boundary line. The war did not arise out of a contested boundary; and Great Britain, therefore, by the act of treating with the United States, recognised that nation in its former dimensions, excepting so far as the *jus belli* had interfered with them; and it was the object of the treaty of Ghent to cede such rights to territory as the *jus belli* had conferred.

Still less does the free navigation of the Mississippi, as demanded by the British negotiators at Ghent, in any manner express or imply the non-abrogation of the treaty of 1783 by the subsequent war. It was brought forward by them as one of many advantages which they were desirous of securing to Great Britain; and if in the first instance demanded without equivalent, it left it open to the negotiators of the United States to claim for their Government, in the course of their conferences, a corresponding benefit. The American Minister will recollect that propositions of this nature were at one time under discussion, and that they were only abandoned at the time that Great Britain relinquished her demand to the navigation of the Mississippi. If, then, the demand on the part of Great Britain can be supposed to have given any weight to the present argument of the United States, the abandonment of that demand must have effectually removed it.

It is by no means unusual for treaties containing recognitions and acknowledgments of title, in the nature of perpetual obligation, to contain, likewise, grants of privileges liable to revocation. The treaty of 1783, like many others, contained provisions of different characters—some in their own nature irrevocable, and others of a temporary nature. If it be thence inferred that, because some advantages specified in that treaty would not be put an end to by the war, therefore all the other advantages were intended to be equally permanent, it must first be shown that the advantages themselves are of the same, or at least of a similar character; for the character of one advantage recognised or conceded by treaty can have no connection with the character of another, though conceded by the same instrument, unless it arises out of a strict and necessary connection between the advantages themselves. But what necessary connection can there be between a right to independence and a liberty to fish within British jurisdiction, or to use British territory? Liberties within British limits are as capable of being exercised by a dependent, as by an independent State, and cannot, therefore, be the necessary consequence of independence.

The independence of a State is that which cannot be correctly said to be granted by a treaty, but to be acknowledged by one. In the treaty of 1783, the independence of the United States was certainly acknowledged, not merely by the consent to make the treaty, but by the previous consent to enter into the provisional articles executed in November, 1782. The independence might have been acknowledged, without either the treaty or the provisional articles; but, by whatever mode acknowledged, the acknowledgment is, in its own nature, irrevocable. A power of revoking, or even of modifying it, would be destructive of the thing itself; and, therefore, all such power is necessarily renounced when the acknowledgment is made. The war could not put an end to it, for the reason justly assigned by the American Minister, because a nation could not forfeit its sovereignty by the act of exercising it; and for the further reason, that Great Britain, when she declared war on her part against the United States, gave them, by that very act, a new recognition of their independence.

The nature of the liberty to fish within British limits, or to use British territory, is essentially different from the right to independence, in all that may reasonably be supposed to regard its intended

duration. The grant of this liberty has all the aspect of a policy temporary and experimental, depending on the use that might be made of it, on the condition of the islands and places where it was to be exercised, and the more general conveniences or inconveniences, in a military, naval, or commercial point of view, resulting from the access of an independent nation to such islands and places.

When, therefore, Great Britain, admitting the independence of the United States, denies their right to the liberties for which they now contend, it is not that she selects from the treaty, articles, or parts of articles, and says, at her own will, this stipulation is liable to forfeiture by war, and that it is irrevocable; but the principle of her reasoning is, that such distinctions arise out of the provisions themselves, and are founded on the very nature of the grants. But the rights acknowledged by the treaty of 1783 are not only distinguishable from the liberties conceded by the same treaty, in the foundation

71 upon which they stand, but they are carefully distinguished in the treaty of 1783 itself. The undersigned begs to call the attention of the American Minister to the wording of the first and third articles, to which he has often referred, for the foundation of his arguments. In the first article, Great Britain acknowledges an independence already expressly recognised by the Powers of Europe and by herself, in her consent to enter into provisional articles of November 1782. In the third article, Great Britain acknowledges the *right* of the United States to take fish on the banks of Newfoundland and other places, from which Great Britain has no right to exclude an independent nation. But they are to have the *liberty* to cure and dry them in certain unsettled places within His Majesty's territory. If these liberties, thus granted, were to be as perpetual and indefeasible as the rights previously recognised, it is difficult to conceive that the plenipotentiaries of the United States would have admitted a variation of language so adapted to produce a different impression; and, above all, that they should have admitted so strange a restriction of a perpetual and indefeasible right as that with which the article concludes, which leaves a right so practical and so beneficial as this is admitted to be, dependent on the will of British subjects, in their character of inhabitants, proprietors, or possessors of the soil, to prohibit its exercise altogether.

It is surely obvious that the word *right* is, throughout the treaty, used as applicable to what the United States were to enjoy, in virtue of a recognised independence; and the word *liberty* to what they were to enjoy, as concessions strictly dependent on the treaty itself.

The right of the United States has been asserted upon other arguments, which appear to the undersigned not altogether consistent with those that had been previously advanced. It has been argued by the Minister of the United States that the treaty of 1783 did not confer upon the United States the liberty of fishing within British jurisdiction, and using British territory, but merely recognised a right which they previously had; and it has been thence inferred that the recognition of this right renders it as perpetual as that of their independence.

If the treaty of 1783 did not confer the liberties in question, the undersigned cannot understand why, in their support, the point should have been so much pressed, that the treaty is in force notwithstanding the subsequent war. If, as stated by the American Minister,

the time of the settlement of North America was the origin of the liberties of the United States in respect to the fisheries, and their independence, as recognised in 1783, was, as further argued by him, the mere recognition of rights and liberties previously existing, (which must have been in virtue of their independence), it would seem to follow that their independence was recognised from the time of the settlement of North America—for no other period can be assigned. The undersigned is totally unable to collect when the American Minister considers the independence of his country to have commenced; yet this is a point of no small importance, if other rights are to be represented as coeval with it, or dependent on it.

As to the origin of these privileges, in point of fact, the undersigned is ready to admit that, so long as the United States constituted a part of the dominions of His Majesty, the inhabitants had the enjoyment of them, as they had of other political and commercial advantages, in common with His Majesty's subjects. But they had, at the same time, in common with His Majesty's other subjects, duties to perform; and when the United States, by their separation from Great Britain, became released from the duties, they became excluded also from the advantages of British subjects. They cannot, therefore, now claim, otherwise than by treaty, the exercise of privileges belonging to them as British subjects, unless they are prepared to admit, on the part of Great Britain, the exercise of the rights which she enjoyed previous to the separation.

If it be contended, on the part of the United States, that, in consequence of having been once a part of the British dominions, they are now entitled, as of right, to all the privileges which they enjoyed as British subjects, in addition to those which they have as an independent people, the undersigned cannot too strongly protest against such a doctrine; and it must become doubly necessary for Great Britain to hesitate in conceding the privileges which are now the subject of discussion, lest, by such a concession, she should be supposed to countenance a principle not less novel than alarming.

But, though Great Britain can never admit the claim of the United States to enjoy those liberties, with respect to the fisheries, as matter of right, she is by no means insensible to some of those considerations with which the letter of the American Minister concludes.

Although His Majesty's Government cannot admit that the claim of the American fishermen to fish within British jurisdiction, *and* to use the British territory for purposes connected with their fishery, is analogous to the indulgence which has been granted to enemy's subjects engaged in fishing on the high seas, for the purpose of conveying fresh fish to market, yet they do feel that the enjoyment of the liberties, formerly used by the inhabitants of the United States, may be very conducive to their national and individual prosperity, though they should be placed under some modifications; and this feeling operates most forcibly in favour of concession. But Great Britain can only offer the concession in a way which shall effectually protect her own subjects from such obstructions to their lawful enterprises as they too frequently experienced immediately previous to the late war, and which are, from their very nature, calculated to produce collision and disunion between the two States.

It was not of fair competition that His Majesty's Government had reason to complain, but of the preoccupation of British harbours and

creeks, in North America, by the fishing vessels of the United States, and the forcible exclusion of British vessels from places where the fishery might be most advantageously conducted. They had, likewise, reason to complain of the clandestine introduction of prohibited goods into the British colonies by American vessels ostensibly engaged in the fishing trade, to the great injury of the British revenue.

The undersigned has felt it incumbent on him thus generally to notice these obstructions, in the hope that the attention of the Government of the United States will be directed to the subject; and that they may be induced, amicably and cordially, to co-operate with His Majesty's Government in devising such regulations as shall prevent the recurrence of similar inconveniences.

His Majesty's Government are willing to enter into negotiations with the Government of the United States for the modified renewal of the liberties in question; and they doubt not that an arrangement may be made, satisfactory to both countries, and tending to confirm the amity now so happily subsisting between them.

The undersigned avails himself of this opportunity of renewing to Mr. Adams the assurances of his high consideration.

BATHURST.

No. 20.—1816, January 22: *Letter from Mr. Adams to Viscount Castlereagh.*

13 CRAVEN STREET, January 22, 1816.

The undersigned, Envoy Extraordinary and Minister Plenipotentiary from the United States of America, has received, and communicated to the Government of the United States, the answer of Lord Bathurst to a letter which he had the honour of addressing to his Lordship on the 25th September last, representing the grounds upon which the American Government consider the people of the United States entitled to all the rights and liberties in and connected with the fisheries on the coasts of North America, which had been enjoyed by them previously to the American revolution, and which, by the third article of the treaty of peace of 1783, were recognised by Great Britain as rights and liberties belonging to them. The reply to Lord Bathurst's note has been delayed by circumstances which it is unnecessary to detail. It is for the Government of the United States alone to decide upon the proposal of a negotiation upon the subject. That they will at all times be ready to agree upon arrangements which may obviate and prevent the recurrence of those inconveniences stated to have resulted from the exercise by the people of the United States of these rights and liberties, is not to be doubted; but as Lord Bathurst appears to have understood some of the observations in the letter of the undersigned as importing inferences not intended by him, and as some of his Lordship's remarks particularly require a reply, it is presumed that, since Lord Castlereagh's return, it will, with propriety, be addressed to him.

It had been stated, in the letter to Lord Bathurst, that the treaty of peace of 1783 between Great Britain and the United States was of a peculiar nature, and bore in that nature a character of permanency,

not subject, like many of the ordinary contracts between independent nations, to abrogation by a subsequent war between the same parties. His Lordship not only considers this as a position of a novel nature, to which Great Britain cannot accede, but as claiming for the diplomatic relations of the United States with her a different degree of permanency from that on which her connections with all other States depend. He denies the right of *any one State* to assign to a treaty made with her such a peculiarity of character as to make it in duration an exception to all other treaties, in order to found on a peculiarity thus assumed an irrevocable title to all indulgences which (he alleges) have all the features of temporary concessions; and he adds, in unqualified terms, that "Great Britain *knows of no exception* to the rule that all treaties are *put an end to* by a subsequent war between the same parties."

The undersigned explicitly disavows every pretence of claiming, for the diplomatic relations between the United States and Great Britain, a degree of permanency different from that of the same relations between either of the parties and all other Powers. He disclaims all pretence of assigning to any treaty between the two nations any peculiarity not founded in the nature of the treaty itself. But he submits to the candour of His Majesty's Government whether the treaty of 1783 was not, from the very nature of its subject-matter, and from the relations previously existing between the parties to it, peculiar? whether it was a treaty which could have been made between Great Britain and any other nation? and, if not, whether the whole scope and objects of its stipulations were not expressly intended to constitute a new and *permanent* state of diplomatic relations between the two countries, which would not, and could not, be annulled by the mere fact of a subsequent war between them? And he makes this appeal with the more confidence, because another part of Lord Bathurst's note admits that treaties often contain recognitions and acknowledgments in the nature of perpetual obligation, and because it implicitly admits that the whole treaty of 1783 is of this character, with the exception of the article concerning the navigation of the Mississippi, and a small part of the article concerning the fisheries.

The position that "Great Britain *knows of no exception* to the rule that all treaties are *put an end to* by a subsequent war between the same parties," appears to the undersigned not only novel, but unwarranted by any of the received authorities upon the laws of nations; unsanctioned by the practice and usages of sovereign States; suited, in its tendency, to multiply the incitements to war, and to weaken the ties of peace between independent nations; and not easily reconciled with the admission that treaties not unusually contain, together with articles of a temporary character, liable to revocation, recognitions and acknowledgments *in the nature of perpetual obligation*.

A recognition or acknowledgment of title, stipulated by convention, is as much a part of the treaty as any other article; and
 73 if all treaties are abrogated by war, the recognitions and acknowledgments contained in them must necessarily be null and void, as much as any other part of the treaty.

If there be no exception to the rule that war puts an end to all treaties between the parties to it, what can be the purpose or meaning of those articles which, in almost all treaties of commerce, are provided expressly for the contingency of war, and which, during the

peace, are without operation? On this point, the undersigned would refer Lord Castlereagh to the tenth article of the treaty of 1794 between the United States and Great Britain, where it is thus stipulated: "Neither the debts due from individuals of the one nation to the individuals of the other, nor shares, nor moneys, which they may have in the public funds, or in the public or private banks, shall ever, *in any event of war*, or national differences, be sequestered or confiscated." If war puts an end to all treaties, what could the parties to this engagement intend by making it formally an article of the treaty? According to the principle laid down, excluding all exception, by Lord Bathurst's note, the moment a war broke out between the two countries this stipulation became a dead letter, and either State might have sequestered or confiscated those specified properties, without any violation of compact between the nations.

The undersigned believes that there are many exceptions to the rule by which the treaties between nations are mutually considered as terminated by the intervention of a war; that these exceptions extend to all engagements contracted with the understanding that they are to operate equally in war and peace, or exclusively during war; to all engagements by which the parties superadd the sanction of a formal compact to principles dictated by the eternal laws of morality and humanity; and, finally, to all engagements which, according to the expressions of Lord Bathurst's note, are *in the nature of perpetual obligation*. To the first and second of these classes may be referred the tenth article of the treaty of 1794, and all treaties or articles of treaties stipulating the abolition of the slave trade. The treaty of peace of 1783 belongs to the third.

The reasoning of Lord Bathurst's note seems to confine this perpetuity of obligation to *recognitions* and acknowledgments of title, and to consider its perpetual nature as resulting from the subject-matter of the contract, and not from the engagement of the contractor. While Great Britain leaves the United States unmolested in the enjoyment of all the advantages, rights, and liberties stipulated in their behalf in the treaty of 1783, it is immaterial to them whether she founds her conduct upon the mere fact that the United States are in possession of such rights, or whether she is governed by good faith and respect for her own engagements. But if she contests any one of them, it is to her engagements only that the United States can appeal as the rule for settling the question of right. If this appeal be rejected, it ceases to be a discussion of right; and this observation applies as strongly to the recognition of independence, and to the boundary line in the treaty of 1783, as to the fisheries. It is truly observed by Lord Bathurst, that in that treaty the independence of the United States was not granted, but acknowledged. He adds, that it might have been acknowledged without any treaty, and that the acknowledgment, in whatever mode made, would have been irrevocable. But the independence of the United States was precisely the question upon which a previous war between them and Great Britain had been waged. Other nations might acknowledge their independence without a treaty, because they had no right, or claim of right, to contest it; but this acknowledgment, to be binding upon Great Britain, could have been made only by treaty, because it included the dissolution of one social compact between the parties, as well as the formation of another. Peace could exist between the

two nations only by the mutual pledge of faith to the new social relations established between them; and hence it was that the stipulations of that treaty were in the nature of perpetual obligation, and not liable to be forfeited by a subsequent war, or by any declaration of the will of either party without the assent of the other.

In this view, it certainly was supposed by the undersigned that Great Britain considered her *obligation* to hold and treat with the United States as a Sovereign and independent Power as derived *only* from the preliminary articles of 1782, as converted into the definitive treaty of 1783. The boundary line could obviously rest upon no other foundation. The boundaries were neither recognitions nor acknowledgments of title. They could have been fixed and settled only by treaty, and it is to the treaty alone that both parties have always referred in all discussions concerning them. Lord Bathurst's note denies that there is in any one of the articles of the treaty of Ghent any express or implied reference to the treaty of 1783 as still in force. It says that, by the stipulation for a mutual restoration of territory, each party necessarily "reverted to their boundaries as before the war, without reference to the title by which their possessions were acquired, or to the mode in which their boundaries had been previously fixed."

There are four several articles of the treaty of Ghent, in every one of which the treaty of 1783 is not only named, but its stipulations form the basis of the new engagements between the parties for carrying its provisions into execution. These articles are the fourth, fifth, sixth, and seventh. The undersigned refers particularly to the fourth article, where the boundaries described are not adverted to without reference to the title by which they were acquired; but where the *stipulation* of the treaty of 1783 is expressly assigned as the basis of the claims, both of the United States and of Great Britain, to the islands mentioned in the article.

The words with which the article begins are, "*Whereas it was stipulated* by the second article in the treaty of peace of one thousand seven hundred and eighty-three, between His Britannic Majesty and the United States of America, that the boundary of the United States should comprehend all islands," &c.

It proceeds to describe the boundaries as there stipulated; then alleges the claim of the United States to certain islands, as founded upon one part of the stipulation, and the claim of Great Britain as derived from another part of the stipulation; and agrees upon the appointment of two commissioners "to decide to which of the
74 two contracting parties the islands belong, *in conformity with the true intent of the said treaty of peace of 1783.*" The same expressions are repeated in the fifth, sixth, and seventh articles; and the undersigned is unable to conceive by what construction of language one of the parties to those articles can allege that, at the time when they were signed, the treaty of 1783 was, or could be, considered at an end.

When, in the letter of the undersigned to Lord Bathurst, the treaty of 1783 was stated to be a compact of a peculiar character, importing in its own nature a permanence not liable to be annulled by the fact of a subsequent war between the parties, the recognition of the sovereignty of the United States and the boundary line were adduced as illustrations to support the principle; the language of the above-

mentioned articles in the treaty of Ghent, and the claim brought forward by Great Britain, at the negotiation of it, for the free navigation of the Mississippi, were alleged as proofs that Great Britain herself so considered it, excepting with regard to a small part of the single article relative to the fisheries; and the right of Great Britain was denied thus to select one particular stipulation in such a treaty, and declare it to have been abrogated by the war. The answer of Lord Bathurst denies that Great Britain has made such a selection, and affirms that the whole treaty of 1783 was annulled by the late war. It admits, however, that the recognition of independence and the boundaries was in the nature of perpetual obligation; and that, with the single exception of the liberties in and connected with the fisheries within British jurisdiction on the coasts of North America, the United States are entitled to all the benefits of all the stipulations in their favour contained in the treaty of 1783, although the stipulations themselves are supposed to be annulled. The fishing liberties within British jurisdiction alone are considered as a temporary grant, liable not only to abrogation by war, but, as it would seem from the tenor of the argument, revocable at the pleasure of Great Britain, whenever she might consider the revocation suitable to her interest. The note affirms that "the liberty to fish within British limits, or to use British territory, is essentially different from the right to independence in all that can reasonably be supposed to regard its intended duration; that the grant of this liberty has all the aspect of a policy, *temporary and experimental*, depending on the use that might be made of it, on the condition of the islands and places where it was to be exercised, and the more general conveniences or inconveniences, in a military, naval, or commercial point of view, resulting from the access of an independent nation to such islands and places."

The undersigned is induced, on this occasion, to repeat his Lordship's own words, because, on a careful and deliberate review of the article in question, he is unable to discover in it a single expression indicating, even in the most distant manner, a policy, temporary or experimental, or having the remotest connection with military, naval, or commercial conveniences or inconveniences to Great Britain. He has not been inattentive to the variation in the terms, by which the enjoyment of the fisheries on the main ocean, the common possession of both nations, and the same enjoyment within a small portion of the special jurisdiction of Great Britain, are stipulated in the article, and recognised as belonging to the people of the United States. He considers the term *right* as importing an advantage to be enjoyed in a place of common jurisdiction, and the term *liberty* as referring to the same advantage, incidentally leading to the borders of a special jurisdiction. But, evidently, neither of them imports any limitation of time. Both were expressions no less familiar to the understandings than dear to the hearts of both the nations parties to the treaty. The undersigned is persuaded it will be readily admitted that, wherever the English language is the mother tongue, the term *liberty*, far from including in itself either limitation of time or precariousness of tenure, is essentially as permanent as that of *right*, and can, with justice, be understood only as a modification of the same thing; and as no limitation of time is implied in the term itself, so there is none expressed in any part of the article to which it belongs. The restric-

tion at the close of the article is itself a confirmation of the permanency which the undersigned contends belongs to every part of the article. The intention was, that the people of the United States should continue to enjoy all the benefits of the fisheries which they had enjoyed theretofore, and, with the exception of drying and curing fish on the Island of Newfoundland, all that *British* subjects should enjoy thereafter. Among them, was the liberty of drying and curing fish on the shores, then uninhabited, adjoining certain bays, harbours, and creeks. But, when those shores should become settled, and thereby become private and individual property, it was obvious that the liberty of drying and curing fish upon them must be conciliated with the proprietary rights of the owners of the soil. The same restriction would apply to British fishermen; and it was precisely because no grant of a new right was intended, but merely the continuance of what had been previously enjoyed, that the restriction must have been assented to on the part of the United States. But, upon the common and equitable rule of construction for treaties, the expression of one restriction implies the exclusion of all others not expressed; and thus the very limitation which looks forward to the time when the unsettled deserts should become inhabited, to modify the enjoyment of the same liberty conformably to the change of circumstances, corroborates the conclusion that the whole purport of the compact was permanent and not temporary—not experimental, but definitive.

That the term *right* was used as applicable to what the United States were to enjoy in virtue of a recognised independence, and the word *liberty* to what they were to enjoy as *concessions* strictly dependent on the treaty itself, the undersigned not only cannot admit, but considers as a construction altogether unfounded. If the United States would have been entitled, *in virtue of a recognised independence*, to enjoy the fisheries to which the word *rights* is applied, no article upon the subject would have been required in the treaty. Whatever their right might have been, Great Britain would not have felt herself bound, without a specific article to that effect, to acknowledge it as included among the appendages to their independence. Had she not acknowledged it, the United States must have been reduced to the alternative of resigning it, or of maintaining it by

75 force; the result of which must have been *war*—the very state from which the treaty was to redeem the parties. That Great Britain would not have acknowledged these rights as belonging to the United States in virtue of their independence, is evident; for, in the cession of Nova Scotia by France to Great Britain, in the twelfth article of the treaty of Utrecht, it was expressly stipulated that, as a consequence of that cession, French subjects should be thenceforth “excluded from all kind of fishing in the said seas, bays, and other places on the coasts of Nova Scotia; that is to say, on those which lie towards the east, within thirty leagues, beginning from the island commonly called Sable, inclusively, and thence stretching along towards the southwest.” The same exclusion was repeated, with some slight variation, in the treaty of peace of 1763; and, in the eighteenth article of the same treaty, Spain explicitly renounced all pretensions to the right of fishing “in the neighbourhood of the Island of Newfoundland.” It was not, therefore, as a necessary result of their independence that Great Britain recognised the *right*

of the people of the United States to fish on the banks of Newfoundland, in the "Gulf of St. Lawrence," and at all other places in the sea where "the inhabitants of both countries used, at any time theretofore, to fish." She recognised it, by a special stipulation, as a right which they had theretofore enjoyed as a part of the British nation, and which, as an independent nation, they were to continue to enjoy *unmolested*; and it is well known that, so far from considering it as recognised by virtue of her acknowledgment of independence, her objections to admitting it at all formed one of the most prominent difficulties in the negotiation of the peace of 1783. It was not asserted by the undersigned, as Lord Bathurst's note appears to suppose, that either the right or the liberty of the people of the United States in these fisheries was *indefeasible*. It was maintained that, after the recognition of them by Great Britain, in the treaty of 1783, neither the right nor the liberty could be forfeited by the United States, but by their own consent: that no act or declaration of Great Britain alone could divest the United States of them; and that no exclusion of them from the enjoyment of either could be valid, unless expressly stipulated by themselves, as was done by France in the treaty of Utrecht, and by France and Spain in the peace of 1763.

The undersigned is apprehensive, from the earnestness with which Lord Bathurst's note argues to refute inferences which he disclaims, from the principles asserted in his letter to his Lordship, that he has not expressed his meaning in terms sufficiently clear. He affirmed that, previous to the independence of the United States, their people, as British subjects, had enjoyed all the rights and liberties in the fisheries, which form the subject of the present discussion; and that, when the separation of the two parts of the nation was consummated, by a mutual compact, the treaty of peace defined the rights and liberties which, by the stipulation of both parties, the United States, in their new character, were to enjoy. By the acknowledgment of the independence of the United States, Great Britain bound herself to treat them, thenceforward, as a nation possessed of all the prerogatives and attributes of sovereign power. The people of the United States were, thenceforward, neither bound in allegiance to the sovereign of Great Britain, nor entitled to his protection, in the enjoyment of any of their rights, as his subjects. Their rights and their duties, as members of a State, were defined and regulated by their own constitutions and forms of government. But there were certain rights and liberties which had been enjoyed by both parts of the nation, while subjects of the same Sovereign, which it was mutually agreed they should continue to enjoy *unmolested*; and, among them, were the rights and liberties in these fisheries. The fisheries on the Banks of Newfoundland, as well in the open seas as in the neighbouring bays, gulfs, and along the coasts of Nova Scotia and Labrador, were, by the dispensations and the laws of nature, in substance, only different parts of one fishery. Those of the open sea were enjoyed not as a common and universal right of all nations; since the exclusion from them of France and Spain, in whole or in part, had been expressly stipulated by those nations, and no other nation had, in fact, participated in them. It was, with some exceptions, an exclusive possession of the British nation; and in the treaty of separation it was agreed that the rights and liberties in them should continue to be enjoyed by that part of the nation which constituted the United

States; that it should not be a several, but, as between Great Britain and the United States, a common fishery. It was necessary, for the enjoyment of this fishery, to exercise it in conformity to the habits of the species of game of which it consisted. The places frequented by the fish were those to which the fishermen were obliged to resort, and these occasionally brought them to the borders of the British territorial jurisdiction. It was also necessary, for the prosecution of a part of this fishery, that the fish, when caught, should be immediately cured and dried, which could only be done on the rocks or shores adjoining the places where they were caught; the access to these rocks and shores, for those purposes, was secured to the people of the United States, as incidental and necessary to the enjoyment of the fishery; it was little more than an access to naked rocks and desolate sands; but it was as permanently secured as the right to the fishery itself. No limitation was assigned of time. Provision was made for the proprietary rights which might at a distant and future period arise by the settlement of places then uninhabited; but no other limitation was expressed or indicated by the terms of the treaty, and no other can, either from the letter or spirit of the article, be inferred.

Far, then, from claiming the general rights and privileges belonging to British subjects within the British dominions, as resulting from the treaty of peace of 1783, while, at the same time, asserting their exemption from the duties of a British allegiance, the article in question is itself a proof that the people of the United States have renounced all such claims. Could they have pretended generally to the privileges of British subjects, such an article as that relating to the fisheries would have been absurd. There was in the treaty of 1783 no express renunciation of their rights to the protection of a British Sovereign. This renunciation they had made by their declaration of independence on the 4th July, 1776; and it was implied in their acceptance of the counter-renunciation of sovereignty in the treaty of 1783. It was precisely because they might have lost their portion of this joint national property, to the acquisition of which they had contributed more than their share, unless a formal article of the

76 treaty should secure it to them, that the article was introduced.

By the British municipal laws, which were the laws of both nations, the property of a fishery is not necessarily in the proprietor of the soil where it is situated. The soil may belong to one individual, and the fishery to another. The right to the soil may be exclusive, while the fishery may be free, or held in common. And thus, while in the partition of the national possessions in North America, stipulated by the treaty of 1783, the jurisdiction over the shores washed by the waters where this fishery was placed was reserved to Great Britain, the fisheries themselves, and the accommodations essential to their prosecution, were, by mutual compact, agreed to be continued in common.

In submitting these reflections to the consideration of His Majesty's Government, the undersigned is duly sensible to the amicable and conciliatory sentiments and dispositions towards the United States manifested at the conclusion of Lord Bathurst's note, which will be met by reciprocal and corresponding sentiments and dispositions on the part of the American Government. It will be highly satisfactory to them to be assured that the conduciveness of the object to the national and individual prosperity of the inhabitants of the United

States operates with His Majesty's Government as a forcible motive to concession. Undoubtedly, the participation in the liberties of which their right is now maintained is far more important to the interests of the people of the United States than the exclusive enjoyment of them can be to the interests of Great Britain. The real, general, and ultimate interests of both the nations on this object, he is fully convinced, are the same. The collision of particular interests which heretofore may have produced altercations between the fishermen of the two nations, and the clandestine introduction of prohibited goods by means of American fishing vessels, may be obviated by arrangements duly concerned between the two Governments. That of the United States, he is persuaded, will readily co-operate in any measure to secure those ends compatible with the enjoyment by the people of the United States of the liberties to which they consider their title as unimpaired, inasmuch as it has never been renounced by themselves.

The undersigned prays Lord Castlereagh to accept the renewed assurance of his high consideration.

JOHN QUINCY ADAMS.

Right. Hon. Lord Viscount CASTLEREAGH,
His Majesty's Principal Secretary of State for Foreign Affairs.

No. 21.—1816, February 8: *Extract from Letter from Mr. Adams (at London) to United States Secretary of State.*

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In relation to the fisheries, little was said; he told me that he had, the evening before, read my note to him concerning them; that the British Government would adhere to their principle respecting the treaty, and to the exclusive rights of their territorial jurisdiction; but that they had no wish to prevent us from fishing, and would readily enter into a negotiation for an arrangement on this subject.

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No. 22.—1816, August 13: *Extract from Letter from Mr. Monroe (Department of State) to Mr. Adams.*

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On the other subject * Mr. Bagot offered to secure to us the right in question on the Labrador shore, between Mount Joli and the Bay of Esquimaux, near the entrance of the Strait of Belleisle. It was necessary for me to seek detailed information of the value of this accommodation from those possessing it at Marblehead and elsewhere, which I did; the result of which was, that it would be more for our advantage to commence at the last-mentioned point, and to extend the right, eastward, through the Strait of Belleisle, as far along the Labrador coast as possible. To this he objected; offering,

then, an alternative on the shore of the Island of Newfoundland, to commence at Cape Ray, and extend, east, to the Ramea Islands. Of the value of this coast I am likewise ignorant. The negotiation must, therefore, be again suspended until I obtain the information requisite to enable me to act in it.

It is probable that the arrangement of these two interests will again rest with you. The advantage of it, as you are already authorised to treat on other important subjects, is obvious.

At the commencement of our conferences, Mr. Bagot informed me of an order which had been issued by Admiral Griffith to the British cruisers, to remove our fishing vessels from the coasts of those provinces, which he would endeavour to have revoked pending the
77 negotiation. His attempt succeeded. I shall endeavour to have this revocation extended, so as to afford the accommodation desired until the negotiation is concluded. All the information which has been, or may be, obtained on this subject shall be transmitted to you.

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No. 23.—1816, November 27: Letter from Mr. Bagot (British Minister at Washington) to Mr. Monroe (United States Secretary of State).

WASHINGTON, November 27, 1816.

SIR: In the conversation which I had with you a few days ago, upon the subject of the negotiation into which the British Government is willing to enter, for the purpose of affording to the citizens of the United States such accommodation for their fishery, within the British jurisdiction, as may be consistent with the proper administration of His Majesty's dominions, you appeared to apprehend that neither of the propositions which I had had the honour to make to you upon this subject would be considered as affording in a sufficient degree the advantages which were deemed requisite.

In order that I may not fail to make the exact nature of these propositions clearly understood, and that I may fully explain the considerations by which they have been suggested, it may perhaps be desirable that I should bring under one view the substance of what I have already had the honour of stating to you in the several conferences which we have held upon this business.

It is not necessary for me to advert to the discussion which has taken place between Earl Bathurst and Mr. Adams. In the correspondence which has passed between them, you will have already seen, in the notes of the former, a full exposition of the grounds upon which the liberty of drying and fishing within the British limits, as granted to the citizens of the United States by the treaty of 1783, was considered to have ceased with the war, and not to have been revived by the late treaty of peace.

You will also have seen therein detailed the serious considerations affecting not only the prosperity of the British fishery, but the general interests of the British dominions, in matters of revenue as well as government, which made it incumbent upon His Majesty's Government to oppose the renewal of so extensive and injurious a concession, within the British sovereignty, to a foreign State, founded

upon no principle of reciprocity or adequate compensation whatever. It has not been thought necessary to furnish me with additional argument upon this point. I therefore confine myself, upon the present occasion, to a brief repetition of what I have already, at different periods, had the honour to submit to your consideration upon the subject of an arrangement by which it is hoped practically to reconcile the different views of our respective Governments.

It will be in your recollection that, early in the month of July last, I had the honour to acquaint you that I had received instructions from my Government to assure you that, although it had been felt necessary to resist the claim which had been advanced by Mr. Adams, the determination had not been taken in any unfriendly feeling towards America, or with any illiberal wish to deprive her subjects of adequate means of engaging in the fisheries; but that, on the contrary, many of the considerations which had been urged by Mr. Adams, on behalf of the American citizens formerly engaged in this occupation, had operated so forcibly in favour of granting to them such a concession as might be consistent with the just rights and interests of Great Britain, that I had been furnished with full powers from His Royal Highness the Prince Regent to conclude an arrangement upon the subject, which it was hoped might at once offer to the United States a pledge of His Royal Highness's goodwill, and afford to them a reasonable participation of those benefits of which they had formerly the enjoyment.

It being the object of the American Government, that, in addition to the right of fishery, as declared by the first branch of the fourth article of the treaty of 1783 permanently to belong to the citizens of the United States, they should also enjoy the privilege of having an adequate accommodation, both in point of harbours and drying ground, on the unsettled coasts within the British sovereignty, I had the honour to propose to you that that part of the southern coast of Labrador which extends from Mount Joli, opposite the eastern end of the Island of Anticosti, in the Gulf of St. Lawrence, to the bay and isles Esquimaux, near the western entrance of the Straits of Belleisle, should be allotted for this purpose; it being distinctly agreed that the fishermen should confine themselves to the unsettled parts of the coast, and that all pretensions to fish or dry within the maritime limits, or on any other of the coasts of British North America, should be abandoned.

Upon learning from you, some weeks afterwards, that, from the information which you had received upon the subject of this coast, you were apprehensive that it would not afford, in a sufficient degree, the advantages required, I did not delay to acquaint you that I was authorised to offer another portion of coast, which it was certainly not so convenient to the British Government to assign, but which they would nevertheless be willing to assign, and which, from its natural and local advantages, could not fail to afford every accommodation of which the American fishermen could stand in need. I had then the honour to propose to you as an alternative, that, under similar conditions, they should be admitted to that portion of the southern coast of Newfoundland which extends from Cape Ray eastward to the Ramea Islands, or to about the longitude of 57° west of Greenwich.

The advantages of this portion of coast are accurately known to the British Government; and, in consenting to assign it to the uses of the American fishermen, it was certainly conceived that an accommodation was afforded as ample as it was possible to concede, without abandoning that control within the entire of His Majesty's own harbours and coasts which the essential interests of His Majesty's dominions required. That it should entirely satisfy the wishes of those who have for many years enjoyed, without restraint, the privilege of using for similar purposes all the unsettled coasts of Nova Scotia and Labrador, is not to be expected; but, in estimating the value of the proposal, the American Government will not fail to recollect that it is offered without any equivalent, and notwithstanding the footing upon which the navigation of the Mississippi has been left by the treaty of Ghent, and the recent regulations by which the subjects of His Majesty have been deprived of the privileges, which they so long enjoyed, of trading with the Indian nations within the territory of the United States.

I have the honor to be, &c.

CHARLES BAGOT.

No. 24.—1816, *December 30: Letter from Mr. Monroe to Mr. Bagot.*

DEPARTMENT OF STATE, *December 30, 1816.*

SIR: I have had the honour to receive your letter of the 27th November, and to submit it to the consideration of the President.

In providing for the accommodation of the citizens of the United States engaged in the fisheries on the coast of His Britannic Majesty's colonies, on conditions advantageous to both parties, I concur in the sentiment that it is desirable to avoid a discussion of their respective rights, and to proceed, in a spirit of conciliation, to examine what arrangement will be adequate to the object. The discussion which has already taken place between our Governments has, it is presumed, placed the claim of each party in a just light. I shall, therefore, make no remark on that part of your note which relates to the right of the parties, other than by stating that this Government entered into this negotiation on the equal ground of neither claiming nor making any concession in that respect.

You have made two propositions, the acceptance of either of which must be attended with the relinquishment of all other claims on the part of the United States, founded on the first branch of the fourth article of the treaty of 1783. In the first, you offer the use of the territory on the Labrador coast, lying between Mount Joli and the Bay of Esquimaux, near the entrance of the Strait of Belleisle; and, in the second, of such part of the southern coast of the Island of Newfoundland as lies between Cape Ray and the Ramea Islands.

I have made every inquiry that circumstances have permitted, respecting both these coasts, and find that neither would afford to the citizens of the United States the essential accommodation which is desired; neither having been much frequented by them heretofore, nor likely to be in future. I am compelled, therefore, to decline both propositions.

I regret that it has not been in my power to give an earlier answer to your note; you will, however, have the goodness to impute the

delay to a reluctance to decline any proposition which you had made, by the order of your Government, for the arrangement of an interest of such high importance to both nations, and to the difficulty of obtaining all the information necessary to guide this Government in the decision.

I have the honor to be, &c.

JAMES MONROE.

The Right Hon. CHARLES BAGOT.

No. 25.—1816, *December 31: Letter from Mr. Bagot to Mr. Monroe.*

WASHINGTON, *December 31, 1816.*

SIR: I have had the honour to receive your letter of yesterday's date, acquainting me that neither of the propositions which I had submitted to your consideration, upon the subject of providing for the citizens of the United States engaged in the fisheries some adequate accommodation for their pursuit upon the coast of His Majesty's territories, having been found to afford the essential conveniences which are desired, you are compelled to decline them.

The object of His Majesty's Government, in framing these propositions, was to endeavour to assign to the American fishermen, in the prosecution of their employment, as large a participation of the conveniences afforded by the neighbouring coasts of His Majesty's settlements as might be reconcileable with the just rights and interests of His Majesty's own subjects, and the due administration of His Majesty's dominions; and it was earnestly hoped that either one or the other of them would have been found to afford, in a sufficient degree, the accommodation which was required.

The wish of His Royal Highness the Prince Regent to extend to the citizens of the United States every advantage which, for the purposes in view, can be derived from the use of His Majesty's coasts, has no other limit than that which is necessarily prescribed by a regard to the important considerations to which I have adverted. His Royal Highness is willing to make the utmost concession which these considerations will admit; and, in proof of the sincerity of this disposition, I have received His Royal Highness's instructions to acquaint you that if, upon examination of the local circumstances of the coasts, which I have had the honour to propose, the American Government should be of opinion that neither of them, taken separately, would afford, in a satisfactory degree, the conveniences which are deemed requisite, His Royal Highness will be willing that the citizens of the United States should have the full benefit of both of them, and that, under the conditions already stated, they should be admitted to each of the shores which I have had the honour to point out.

In consenting to assign to their use so large a portion of His Majesty's coasts, His Royal Highness is persuaded that he affords an unquestionable testimony of his earnest endeavour to meet, as far as is possible, the wishes of the American Government, and practically to accomplish, in the amplest manner, the objects which they have in view. The free access to each of these tracts cannot fail to offer every variety of convenience which the American fishermen can require in the different branches of their occupation; and it will be

observed that an objection which might possibly have been felt to the acceptance of either of the propositions, when separately taken, is wholly removed by the offer of them conjointly; as, from whatever quarter the wind may blow, the American vessels engaged in the fishery will always have the advantage of a safe port under their lee.

His Royal Highness conceives that it is not in His Royal Highness's power to make a larger concession than that which is now proposed, without injury to the essential rights of his Majesty's dominions, and some of the chief interests of His Majesty's own subjects. But it will be a source of sincere satisfaction to His Royal Highness if, in the arrangement which I have the honour to submit, the citizens of the United States shall find, as His Royal Highness confidently believes that they will find, ample means of continuing to pursue their occupation with the convenience and advantage which they desire.

I have the honor to be, with the highest consideration, Sir, &c.

CHARLES BAGOT.

No. 26.—1817, *January 7: Letter from Mr. Monroe to Mr. Bagot.*

DEPARTMENT OF STATE, *January 7, 1817.*

SIR: I have had the honour to receive your letter of the 31st of December, proposing an accommodation of the difference between our Governments relative to the fisheries, comprised in the first branch of the fourth article of the treaty of 1783, by the allotment of both the coasts comprised in your former propositions.

Having stated, in my letter of the 30th of December, that, according to the best information which I had been able to obtain, neither of those coasts had been much frequented by our fishermen, or was likely to be so in future, I am led to believe that they would not, when taken conjointly, as proposed in your last letter, afford the accommodation which is so important to them, and which it is very satisfactory to find it is the desire of your Government that they should possess. From the disposition manifested by your Government, which corresponds with that of the United States, a strong hope is entertained that further enquiry into the subject will enable His Royal Highness the Prince Regent to ascertain that an arrangement, on a scale more accommodating to the expectation of the United States, will not be inconsistent with the interest of Great Britain.

In the meantime, this Government will persevere in its measures for obtaining such further information as will enable it to meet yours in the conciliatory views which are cherished on both sides.

I have the honor to be, &c.

JAMES MONROE.

The Right Hon. CHARLES BAGOT.

No. 27.—1817, *May 7: Extract from Letter from Lord Castlereagh (Foreign Office) to Mr. Adams.*

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The undersigned, His Majesty's Principal Secretary of State for Foreign Affairs, in reply to Mr. Adams's note of the 21st ultimo,

80 has the honour to acquaint him that, as soon as the proposition which Mr. Bagot was authorised, in July last, to make to the Government of the United States, for arranging the manner in which American citizens might be permitted to carry on the fisheries within the British limits, had been by them declined, viz: in the month of February, the same was immediately notified by His Majesty's Minister in America to the British admiral commanding at Halifax; the effect of which notification was to revive the orders which Mr. Bagot had taken upon himself to suspend, in the expectation that the discussions in which he was then employed with the American Government would have led to a satisfactory issue.

These discussions having failed of success, and the orders above alluded to being consequently now in full force, the British Government cannot but feel some reluctance again to suspend them, without being in possession of more precise grounds for expecting an adjustment. Persuaded, however, from the official communication received from Mr. Adams, that it is not only the sincere desire of the President of the United States to come to an amicable arrangement, but also that he, being already in possession of the views of Great Britain, is now led to entertain a strong expectation that a settlement which shall reconcile the interests of both parties may, without any material delay, be effectuated, the Prince Regent, under these impressions, is willing to give to the American Government this additional proof of his earnest wish that the negotiation should proceed, under circumstances the most favourable to a speedy and amicable conclusion, by acceding to the application of the Government of the United States, as brought forward by Mr. Adams. Instructions will, accordingly, be expedited to the naval commanders on the American station to suspend the execution of the said orders during the approaching season. Ample opportunity will thus be afforded for coming to an amicable arrangement, more particularly as it appears that the American Secretary, in February last, had it in contemplation to offer, for the consideration of the British Government, some specific proposition on the subject, which Mr. Bagot did not then feel himself authorised to take, *ad referendum*, but which he has since been instructed to receive, and transmit for the opinion of his court.

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No. 28.—1817, August 4: Letter from Mr. Rush (United States Acting Secretary of State) to Mr. Bagot.

DEPARTMENT OF STATE, August 4, 1817.

SIR: It becomes my duty to address you upon a subject of deep interest to all those citizens of this country who are concerned in the fisheries.

By representations made to this department, it appears that, at the commencement of the present fishing season, twenty sail of fishing vessels, of from twenty-five to forty-five tons burden, belonging to ports of the United States, were fitted out and sailed for the purpose of fishing on the western bank. That, while on their way, a number of them were compelled, by a storm, to put into a harbour at

Ragged Island, near Shelburne Light-house. That, while here, they were boarded by an officer of the Customs, who demanded and received light-money from them, notwithstanding the circumstances of compulsion and distress under which they had entered the port. That they afterwards proceeded to the bank, where, after remaining many weeks, they completed their fares of fish, and commenced their return to the United States. That, meeting with another severe storm upon their return, they were again forced to seek shelter in a British port, a few leagues to the westward of Halifax. That in this port they were captured by an armed barge, dispatched from the British sloop of war *Dee*, Captain Chambers, and the next morning ordered for Halifax, where they all arrived on the 9th of June. That the unfortunate crews have been exposed to peculiar inconveniences and hardships; and that those who desired to return to their homes were refused passports towards facilitating that end, from the proper officers, to whom they made application.

For further particulars connected with the above facts, I have the honour to enclose you an extract of a letter to this department from the collector of Boston, dated June the 30th. It will be seen that it is not a case involving unsettled questions between the two countries in relation to the fisheries, but which it is so confidently hoped are in a train of satisfactory and amicable arrangement. It is, on the other hand, distinctly said that the boats, far from taking a fish in any waters claimed as British waters, took them all at the distance of many leagues from the coast; while the other alleged facts would seem to forbid the imputation of their having entered a British harbour from any other than a lawful and necessary motive.

Should the facts as represented prove to be well founded, the President feels persuaded that your Government will not fail to take such measures, as well towards redressing the evil complained of, in the present instance, as towards preventing the recurrence of one of the like nature, as are due to justice and the harmony and good understanding which so happily subsist between the two nations.

I pray you, Sir, to accept, &c.

RICHARD RUSH.

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- 81 No. 29.—1818, May 21: *Extract from Letter from Mr. Adams (United States Secretary of State) to Mr. Rush (United States Minister at London).*

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The other law to which I have called your attention is an act concerning navigation, passed on the 18th and published in the *National Intelligencer* of the 21st of April. It meets the British prohibitive colonial system by direct and countervailing prohibition, to commence from and after the 30th of September next. The vote upon its passage in the Senate, where it originated, was all but unanimous, and in the House of Representatives the opposition to it amounted only to fifteen or sixteen votes.

Although no formal communication of this law to the British Government will be necessary, it may naturally be expected that it will be noticed in your occasional conversations with Lord Castle-

reagh. He will doubtless remember, and may be reminded of, the repeated efforts made by this Government to render it unnecessary by an amicable arrangement, which should place on an equitable footing of reciprocity the intercourse between the United States and the British colonies; he will remember the repeated warnings given, that to this result it must come, unless some relaxation of the British prohibitions should take place; and his own equally repeated admissions, that the exercise of the prohibitive right on the part of the United States would be altogether just, and would give no dissatisfaction whatever to Great Britain.

You are, nevertheless, authorized to assure him that the President assented to this measure with great reluctance, because, however just in itself it may be, its tendencies cannot but be of an irritating character to the interests which it will immediately affect, and because his earnest desire is to remove causes of irritation, and to multiply those of a conciliatory nature between the two countries. Such has manifestly been, on both sides, the effect of the equalising and reciprocal provisions of the convention of July, 1815; and such, he has no doubt, would be the effect of the extension of its principles to the commercial intercourse between the United States and the British colonies in the West Indies and on this continent; and you are authorised again to repeat the offer of treating for a fair and equitable arrangement of this interest. A further inducement for making this offer may be stated in the expediency of looking forward, without further delay, to the expiration of the convention of 1815, which has now little more than one year to remain in force. It is important that the commercial part of the community, both here and in Great Britain, should have timely notice of the state in which the relations between the two countries are to stand after the termination of that convention. And, as there are other objects of moment to be adjusted, the President desires you to propose an immediate general negotiation of a commercial treaty, to embrace the continuance, for a further term of — years, of the convention; and also, the other subjects in discussion between the two Governments, namely—the question concerning the slaves, that relating to the fisheries, the boundary line from the Lake of the Woods, and the Columbia River settlement. The President prefers taking this course to that of submitting to commissioners, at least immediately, questions upon which he thinks it probable the two Governments may thus, by a shorter process, come to a mutual understanding between themselves.

If, upon making this proposal, the British Government agree to this negotiation, the President proposes that Mr. Gallatin and you should be authorised, jointly, as plenipotentiaries, to conclude the treaty, which it is very desirable may be concluded in season to arrive here by the commencement of the next session of Congress, which is to be on the third Monday in November. Instructions will be transmitted immediately to Mr. Gallatin, to hold himself in readiness to repair to London, upon receiving notice from you, should plenipotentiaries be appointed to treat with you; and, besides the instructions which formed the basis of the existing convention, and others already in your possession, further documents will be forwarded to you as soon as possible, which may assist you in the management of the negotiation.

We entertain hopes that this measure may result in a new treaty, which will remove most, if not all, of the causes of dissension between us and Great Britain. The satisfaction with which we have observed the avowal of the most *liberal* commercial principles by Lord Castlereagh in Parliament has already been noticed in my last letter. The opening, if not of all, at least of a great portion, of the ports of South America to the commerce of the world, which, under every possible course of events, must be now considered as irrevocable; and the Bill which we perceive was before Parliament for establishing free ports in the British American colonies, all tend to convince us that Great Britain must see that a relaxation from her colonial restrictions has become the unequivocal dictate of her own interest.

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82 No. 30.—1818, July 25: *Extract from Letter from Mr. Rush (at London) to the Secretary of State, stating a conversation between himself and Lord Castlereagh.*

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I entered next upon the subject of the commercial relations between the two countries. Remarking upon the change produced in them by the Prohibitory Act of the last session of Congress, now soon to commence its operation, I observed that I had it in charge to say that the President had yielded his assent to that Act with reluctance; for that, however just, its tendencies might be of an irritating nature to the individual interests that it would affect on both sides, whilst it was his constant desire to give efficacy to measures mutually more beneficial and conciliatory. It was, therefore, that I was once more authorised and instructed to propose to this Government the negotiation of a general treaty of commerce. That the President had, besides, agreed that there should be comprehended in the negotiation other matters heretofore desired to be treated of by this Government, as well as points in which the Government of the United States took a particular interest; being, in the whole, 1. The question respecting the slaves carried off from the United States, in contravention, as alleged, of the treaty of Ghent. 2. The question of title to the settlement at the mouth of Columbia River. 3. The question of the northwestern boundary line, from the Lake of the Woods; and 4. That of the fisheries. Upon these topics, the President, I added, preferred treating in a direct way in the first instance, in the hope that the two Governments might arrive at a just understanding, without resorting to commissioners; and that, if this Government was prepared to go into all of them, including, especially, a general treaty of commerce, another plenipotentiary had been contingently appointed on the part of the United States, to meet with me any two that might be designated on the part of Great Britain.

His Lordship asked what he was to understand by a general treaty of commerce. I replied, a treaty that should lay open, not a temporary or precarious, but a permanent intercourse with their West India islands and North American colonies to the shipping of the United States, as often before proposed, but which, after the recent refusals, it might seem almost unnecessary again to bring into view,

were it not that other objects of interest to both nations were now associated with it in a way to clothe the proposition with a new aspect.

He answered that the British Government would certainly be willing to enter upon a negotiation on the commercial relations of the two countries, but that he had no authority to say that the colonial system could be essentially altered; broken down it could not be. I said, that if it was not to be departed from, or in no further degree than the four articles had imported, as those articles had already been rejected, it did not appear to me that any advantage would be likely to arise from going into the negotiation. He replied that he was not prepared to answer definitely upon all or any of the points, but would lay them before the Cabinet, and let me know the result. He professed earnestly, in the course of the conversation, the desire which this Government had to see the commerce of the two countries stand upon the best footing of intercourse, the stake to each being so great, and promising, with the growth of the United States, to be so much greater.

In the event of a negotiation, upon the grounds I had explained, not being opened, he asked if I could inform him what the intentions of my Government were relative to the commercial intercourse between the two countries, it being, for obvious reasons, desirable soon to know. Here I did not hesitate to announce that, in such an event, which I still hoped would not be the case, it was willing simply to renew the existing convention of 1815, thus keeping this instrument distinct from all other questions of a commercial nature, if the British Government preferred it. This communication, I thought, he received with evident satisfaction. He remarked that it would rescue the commercial relations from all danger of a chasm, and made known, in immediate reply, the readiness of his Government to acquiesce in such a course.

On the 22d I received a note from him requesting to see me again at the Foreign Office on the 23d. I was there accordingly. Mr. Robinson, who is now a member of the Cabinet, as well as president of the Board of Trade, was present. It was the first occasion upon which any third person had been associated with Lord Castlereagh at any of our official interviews.

His Lordship commenced by saying that he had laid my proposals before the Cabinet, and that it had been agreed to enter upon the general negotiation; that is, one which should embrace all the points I had stated. In relation to the great commercial question, he begged I would understand that the British Government did not pledge itself beforehand to a departure from its colonial system in a degree beyond what it had already offered; but that it sincerely was desirous to make the attempt, and unequivocally wished to bring the whole commercial relations of the two countries into view, willing to hope, though abstaining from promises, that some modification of that system, mutually beneficial, might be the result of frank and full discussions renewed at the present juncture. I replied that I knew my Government would hear this determination with great satisfaction; that it would cordially join in the hope that the new effort might be productive of advantage to both countries, and strengthen the ties of good intercourse that should unite them.

83 I now informed him that Mr. Gallatin, the present Minister from the United States at Paris, would take part in the negotiation, and come over to London as soon as it would be convenient to say that plenipotentiaries would be appointed on the part of Great Britain. He said, the sooner the better; and that Mr. Robinson and Mr. Goulburn would be named to treat with us. His Lordship said that he himself would be obliged to set out for the continent to attend the European congress, by the 20th or 25th of next month, but that the negotiation could go on in his absence. He intimated a wish, however, that it might open, if practicable, before he went away. I answered that all the necessary powers and instructions from our Government had not yet reached us, but that we were in daily expectation of them.

He next asked whether, in order to guard against all possible delays that might be incident to the general negotiation, which was to embrace so many points, I was prepared to agree at once to a renewal of the convention of 1815 for a term of years to be agreed on, declaring that the British Government was ready, at any moment, to concur in such agreement.

I answered, without reserve, that I was already in possession of a full power to this effect, which, independently of other objects, might be carried into execution.

I wrote yesterday to Mr. Gallatin to apprise him of the necessity of coming over, the contingency which was to bring him having happened. From the answer I have received to my letter to him of the 2d of this month, I think it probable that he will be here in three weeks, or sooner; so that, if our full powers arrive, the negotiation may be opened before Lord Castlereagh's departure. Should Mr. Gallatin concur, we will make the renewal of the convention for eight, ten, or twelve years, our first act. This I hope the President will approve. The reasons that operate with me are, 1. It will not only provide against delays, but all uncertainties in the result, of the possibility of which we are forewarned simultaneously with the desire expressed to enter the field of negotiation. It is not only important that there should be no chasm in the commercial relations between the two countries, but equally so that our merchants should have timely notice that there will be none. 2. Every inquiry that I have made among merchants from the United States, with whom I have been able to confer in this city, has produced the most unequivocal opinions that this convention is working well for us, which entirely falls in with the communications I have received from the department. 3. Taking this for the fact, it seems naturally to follow that it is our part to consent to the renewal the moment Britain says she will, lest the day should go by. On this head I will just state that I have heard, through a respectable source, that there are already some British ship-owners in Liverpool who talk of petitioning their Government against its renewal. Lastly, my power to renew seems to me, from your despatch of the 30th of May, to be complete; or will its exercise thwart, in any degree, our prospects of a more enlarged treaty under the general negotiation.

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No. 31.—1818, July 28: *Extract from Letter from Mr. Adams, United States Secretary of State, to Messrs. Gallatin and Rush.*^a

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In the expectation that the Government of Great Britain have accepted the proposal which Mr. Rush was instructed to make, for negotiating a treaty of commerce, embracing the continuance of the convention of 3d July, 1815, for an additional term of years, and including other objects of interest to the two nations, I have now the honour of transmitting to you the President's instructions to you for the conduct of the negotiation.

With regard to the commercial convention of the 3d July, 1815, you have already been informed that the President is willing that it should be continued without alteration for a further term of eight or ten years. We had flattered ourselves, from the liberal sentiments expressed by Lord Castlereagh in Parliament, and from various other indications, that the British Cabinet would have been now prepared to extend the principles of the convention to our commercial intercourse with their colonies in the West Indies and North America; but, from the report of two conferences between Mr. Rush and Lord Castlereagh, since received, it appears that our anticipations had been too sanguine, and that, with regard to our admission into their colonies, they still cling to the system of exclusive colonial monopoly.

Our Navigation Act, passed at the last session of Congress, is well calculated to bring this system to a test by which it has not hitherto been tried; and if the experiment must be made complete, so that the event shall prove to demonstration which of the two countries can best stand this opposition of counter-exclusions, the United States are prepared to abide by the result. Still, we should prefer to remove them at once, if for no other reason than that it would have a tendency to promote good humour between the two countries. We wish you to urge this argument upon the British Cabinet; to remind them of the principles avowed by Lord Castlereagh in Parliament, to which I have before referred, and of their precise bearing upon this question. It may also be proper to suggest that, while Great Britain is pressing upon Spain the abandonment of her commercial monopoly throughout the continent of South

84 America, her recommendation must necessarily gain great additional weight by setting the example with her own colonies, while at the same time her own interest in her monopoly must be reduced to an object too trifling for national consideration, when the Spanish colonies shall be open to the commerce of the world. Finally it may be observed that the Free Port Act passed at the late session of Parliament goes already so far towards the abandonment of their system, that it can scarcely be perceived why they should adhere to the remnant of it any longer. Other arguments may occur to your own reflections and result from your thorough knowledge of the subject; you will urge them with earnestness, though giving it always to be understood that we shall acquiesce in their ultimate determination.

Whenever this subject has been presented to the British Cabinet, since the peace, their only objection to the proposals and arguments

^a Messrs. Gallatin and Rush represented the United States and Messrs. Robinson and Goulburn represented the United Kingdom in negotiations at London.

of the United States has been, that their system has been long established. Lord Castlereagh has invariably acknowledged his own doubts whether it was wise, or really advantageous to Great Britain, but placed the determination to preserve it upon the single ground of its having long existed. Whatever weight there is in this reasoning, it would bear in favour of all those other exclusions which he congratulated Parliament and the country at having been abolished, as much as in support of this. It is the argument of all existing abuse against reformation—of mere fact against reason and justice. The commercial intercourse between the United States and the West Indies is founded upon mutual wants and upon mutual convenience; upon their relative geographical position; upon the nature of their respective productions; upon the necessities of the climate; and upon the convulsions of nature. When the British Ministry say, against all this our ancestors established a system, and therefore we must maintain it; we may reply, if your ancestors established a system in defiance of the laws of nature, it is your interest and your duty to abolish it. But who can overlook or be blind to the changes of circumstances since the establishment of the system; to the irresistible consequences of the establishment and growth of the United States as an independent Power; to the expulsion of the French from St. Domingo; to the revolution in progress in the South American provinces? Every system established upon a condition of things essentially transient and temporary must be accommodated to the changes produced by time.

Besides the Free Port Act, a printed copy of which has now been received from Mr. Rush, and which, we find, is limited to ports specially to be appointed by the Crown, in the Provinces of Nova Scotia and New Brunswick, we have seen in the public journals a Bill for permitting a certain trade between the British West Indies and *any colony or possession in the West Indies, or on the continent of America, under the dominion of any foreign European Sovereign or State.* This measure appears intended to counteract the effects of our late Navigation Act, and gives further manifestation of the adherence of the British Government to their colonial exclusions. It is the President's desire that nothing should be omitted which can have the tendency to convince them that a change would promote the best interests of both countries, as well as the harmony between them. Should your efforts prove ineffectual, we can only wait the result of the counteracting measures to which we have resorted, or which may be found necessary hereafter.

In carrying the convention of the 3d July, 1815, into execution, the British Government have sanctioned the practice, with regard to some of the foreign tonnage duties, first, to levy them as if the convention were not in force; and then, upon petition of the persons interested, to have them returned. If this practice cannot be given up altogether, it will be necessary that some regulation should be adopted, by which the extra duties shall be returned of course, and without putting the parties to the trouble, expense, and delay of obtaining it by petition. At present, unless the petition is presented, the duties are not returned. It happens sometimes that masters of vessels pay the duties, without knowing that they are entitled to have them returned; in which case, they are lost to them or their owners. It will be proper, therefore, to require the adoption of some

general regulation; in virtue of which, it shall be made the duty of the officers of the customs to repay the extra duties in all cases in which they shall have been levied, without exposing the individual to lose his right by his own ignorance, or by the negligence or infidelity of his consignee.

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5. Fisheries.

The proceedings, deliberations, and communications upon this subject, which took place at the negotiation of Ghent, will be fresh in the remembrance of Mr. Gallatin. Mr. Rush possesses copies of the correspondence with the British Government relating to it after the conclusion of the peace, and of that which has passed here between Mr. Bagot and this Government. Copies of several letters received by Members of Congress during the late session, from the parts of the country most deeply interested in the fisheries, are now transmitted.

The president authorises you to agree to an article whereby the United States will desist from the liberty of fishing, and curing and drying fish, within the British jurisdiction *generally*, upon condition that it shall be secured as a permanent right, not liable to be impaired by any future war, from Cape Ray to the Ramea Islands, and from Mount Joli, on the Labrador coast, through the strait of Belleisle, indefinitely north, along the coast; the right to extend as well to curing and drying the fish as to fishing.

By the decree of the judge of the vice-admiralty court at Halifax, on the 29th of August last, in the case of several American fishing vessels which had been captured and sent into that port, a copy of which is also now transmitted to you, it appears that all those captures have been *illegal*. An appeal from this decree was entered by the captors to the appellate court in England, and the owners of the captured vessels were obliged to give bonds to stand the issue of the appeal.

Mr. Rush was instructed to employ suitable counsel for these cases if the appeals should be entered, and, as we have been informed by him, has accordingly done so. If you do not succeed in agreeing upon an article on this subject, it will be desirable that the question *upon the right* should be solemnly argued before the Lords of Appeals, and that counsel of the first eminence should be employed in it. Judge Wallace agreed with the advocate general that the late war completely dissolved every right of the people of the United States acquired by the treaty of 1783. But it does not appear that this question had been argued before him, and the contrary opinion is not to be surrendered on the part of the United States upon the *dictum* of a vice-admiralty court. Besides this, we claim the rights in question not *as acquired* by the treaty of 1783, but as having always before enjoyed them, and as only recognised as belonging to us by that treaty, and therefore never to be divested from us but by our own consent. Judge Wallace, however, explicitly says that he does not see how he can condemn these vessels without an *Act of Parliament*; and whoever knows anything of the English constitution must see that on this point he is unquestionably right. He says, indeed, something about an order in council, but it is very clear that would not answer. It is a question of forfeiture for a violated *territorial* jurisdiction; which forfeiture can be incurred not by the law

of nations, but only by the *law of the land*. There is obviously no such law.

The argument which has been so long and so ably maintained by Mr. Reeves, that the rights of antenati Americans, as British subjects, even within the kingdom of Great Britain, have never been divested from them, because there has been no Act of Parliament to declare it, applies in its fullest force to this case; and, connected with the article in the treaty of 1783, by which this particular right was recognised, confirmed, and placed out of the reach of an Act of Parliament, corroborates the argument in our favour. How far it may be proper and advisable to use these suggestions in your negotiation, must be left to your sound discretion; but they are thrown out with the hope that you will pursue the investigation of the important questions of British law involved in this interest, and that every possible advantage may be taken of them, preparatory for the trial before the Lords of Appeals, if the case should ultimately come to their decision. The British Government may be well assured that not a particle of these rights will be finally yielded by the United States without a struggle, which will cost Great Britain more than the worth of the prize.

These are the subjects to which the President is willing that your negotiation should be confined. With regard to the others of a general nature, and relating to the respective rights of the two nations in times of maritime war, you are authorised to treat of them, and to conclude concerning them, conformably to the instructions already in possession of Mr. Rush; or, if the difficulty of agreeing upon the principles should continue as great as it has been hitherto, you may omit them altogether.

You will not fail to transmit, by duplicates, the result of your conferences at as early a period as may be found practicable.

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No. 32.—1818, August 24: *Extract from Instructions from Viscount Castlereagh (at London) to Messrs. Robinson and Goulburn.*

FOREIGN OFFICE, August 24, 1818.

The accompanying papers will bring the present state of the fishery question under your view. I refer you to the proceedings at Ghent for those arguments upon which the British plenipotentiaries maintained, as I conceive unanswerably, that the second branch of the IIIrd Article of the treaty of 1783 had expired with the war. The negative of this proposition was certainly contended, but very feebly, by the American plenipotentiaries, which is proved almost to the extent of an admission of the principles contended for on the part of this Government by their tendering an article in which the same privileges were, by a fresh stipulation, to be again secured to the subjects of the United States upon an equivalent offered on their part.

The subsequent correspondence will show the nature of the claim put forward by the American Government soon after the peace. The orders issued to the British officers on the Halifax station to resist any encroachment on the rights of this country, and, finally, the friendly offer of a specified accommodation for the convenience of the American fishery which Mr. Bagot was authorised to tender to the Government of the United States. You will see by that Min-

ister's correspondence that he successively tendered the two propositions with which he was charged, to which proposals the American Government, desiring to offer a counter-proposition, Mr. Bagot did not conceive himself authorised to negotiate, but only to make a specific offer of accommodation. He therefore declined to receive the American counter-projet, notifying to the admiral on the Halifax station that nothing had occurred in negotiation at Washington which should interfere with the execution of the instructions of which he was in possession.

You will particularly advert to the note presented soon after by Mr. Adams in London, with my answer. You will see, upon the assurance of that Minister, that his Government was prepared to offer a proposition which they persuaded themselves (being then in possession of the views of the British Government upon this question) would lead to an early and satisfactory understanding on the point of the fisheries between the two States; that, upon this representation and at his express solicitation, the execution of the orders issued for the protection of our fisheries were suspended for that season; and that Mr. Bagot was directed to receive and transmit the proposition alluded to for the consideration of the Prince Regent's Government.

Notwithstanding this assurance, no specific proposition whatever has hitherto been received from the United States. Various excuses, it is true, have been made for this delay, but the British Government is not the less entitled to complain that the expectation given has not yet been fulfilled, which has obliged them, in order to avoid collision, to suspend for another season the operation of these orders.

The American Government having, however, now expressly proposed to include this subject in the intended negotiation, I cannot entertain a doubt that you will be put without delay in possession of the extent of accommodation which they desire to receive from Great Britain on this point. Indeed, the American plenipotentiaries, in the conversation we held with them, stated that, although they were not actually in possession of the projet, they were assured it would be sent to them by the first packet. You will, therefore, take the earliest opportunity of representing to them the disappointment which this Government has been subjected to on this important question, and make them feel that it has become indispensable for you to insist that the discussions on this point shall be proceeded in with the least practicable delay. The proposal of the United States on this subject, so soon as received, you will take *ad referendum* and submit for the consideration of your Government.

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No. 33.—1818, September: Letter from Messrs. Robinson and Goulburn to Viscount Castlereagh.

No. 3.

BOARD OF TRADE Sept. .

MY LORD We have the honour to report to your Lordship, that we had yesterday agreeably to appointment, a further conference with the commissioners of the United States.

It commenced by our expressing a hope, that they would now be prepared to put us in possession, of the views of their Government

with respect to a limited participation in the fisheries, and the direct trade with the British colonies; and we stated our anxiety to receive them, in order that no time might be lost in entering upon this part of our discussions, and as a necessary preliminary to our offering any projet in the subject of impressment.

The American commissioners stated in reply, that they had now received those instructions from the United States, the absence of which had alone induced them to defer entering into those questions, proceeded to offer the projet of articles, which will be found inserted in the protocol of this day's conference and of which we have the honour to enclose copies. They took the opportunity of stating in some detail, the nature of the propositions themselves, and the reasons by which their Government had been influenced in submitting them for consideration. With respect to the fisheries they observed, that in consideration of the different opinions known to be entertained by the Governments of the two countries, as to the right of the United States to a participation in the fisheries within the British jurisdiction, and to the use for those purposes of British territory, they had been induced to forego a statement of their views of this right in the article which they had proposed; but they desired to be understood, as in no degree abandoning the ground upon which the right to the fishery had been claimed by the Government of the United States, and only waiving discussion of it, upon the principle that, that right was not to be limited in any way, which should exclude the United States from a fair participation in the advantages of the fishery: They added that while they could not but regard the propositions made to the Government of the United States by Mr. Bagot as altogether inadmissible, inasmuch as they restricted the American fishing to a line of coast so limited, as to exclude them from this fair participation, they had nevertheless been anxious in securing to themselves, an adequate extent of coast, to guard against the inconveniences which they understood to constitute the leading objection, to the unlimited exercise of their fishing. With this view they had contented themselves with requiring a further extent of coast, in those very quarters which Great Britain had pointed out, because it appeared to them that the very small population established in that quarter, and the unfitness of the soil for cultivation rendered it improbable that any conduct of the American fishermen in that quarter could either give rise to disputes with the inhabitants, or to injuries to the revenue.

They further observed that as the treaty of 1783, did not give the United States any right to dry or cure fish on the shores of Newfoundland and as they were uncertain whether the offer made by Mr. Bagot, was meant to include such a concession, they had deemed it absolutely necessary in abandoning this privilege as far as regarded other parts of His Majesty's territories, to stipulate distinctly for its enjoyment in Newfoundland, and also to require the continuance of a similar concession on the Magdalen Islands; some situation in the Gulf of St. Lawrence in which fish might be cured and dried being essential to the carrying on the fishery at all on the coast of Labrador.

87 They concluded their observations on the subject of the fishery, by adverting to that part of the proposed article, in which the right to fish within the limits prescribed, is conveyed per-

manently to the United States, and stated that as they conceived themselves to be abandoning a right to all these advantages, conferred by the article of the treaty of 1783, it appeared to the Govt. of the United States no less necessary, than just, that the fishery which they were henceforth to enjoy, should be distinctly admitted as permanent, and as not depending upon the duration of the treaty, in which the stipulation was contained—

With respect to the colonial trade it appears to us only necessary to communicate to your Lordship, that while they admitted the importance of the trade to the United States (attended as they stated themselves to believe, with corresponding advantages to Great Britain) they stated their willingness rather to forgo entering into any arrangement on this subject, than depart from the principle upon which the projet of their present article was framed, namely that however limited that trade might be, it should within those limits be equally open to America and to Great Britain—They further stated that they could not consent to put the intercourse between Bermuda Turk's Island Nova Scotia and New Brunswick and the United States upon a different footing from that upon which the West India trade (properly so called) should ultimately stand. In reply to an observation made by us, that so far as regarded the trade between Bermuda, Turks Island and Nova Scotia and the United States, the effect of the article as explained by them, would be to place Great Britain on a worse footing than she stood at present; they frankly stated that, that was certainly their intention, and that there could be no doubt, that the restrictive system applied by the recent law of the United States to the trade between the United States and the British West Indies, would be applied in a future session, to that carried on with Bermuda Turk's Island & Halifax, it being as they stated, the policy of the American Government to counteract by these means the system adopted by Great Britain of defeating, through the medium of those ports of entrepot, the general prohibitions of the United States against the West India intercourse.

The American commissioners closed their observations by submitting projets of articles upon some other points, which they were desirous of offering as subjects of discussion, with a view to their eventually forming parts of the proposed convention. Copies of these articles are inclosed for your Lordship's information.

We declined entering at the time into any discussion of the propositions they had brought forward, till we should have had an opportunity of considering the articles themselves as necessarily containing a more precise view of their intentions than could be conveyed by any previous verbal explanation.

The American commissioners then requested a communication on our part of the proposition with respect to impressment, which we had before stated to be contingent on the production by them of the articles which had never been delivered to us. In acceding to their wish and delivering to them the projet of a convention which will be found in the protocol of the conference, we thought it, our duty to call their attention among other circumstances to that of His Majesty's Government having waived the introduction of any stipulation, which should require the crews of vessels met with on the high seas to be mustered. In doing so it was impossible for us to avoid impressing upon them the strong feeling which has always, and so

justly prevailed in this country with respect to the right of impressment as essential to our national security, and the jealousy with which a stipulation to forbear its exercise under whatever limitations could not fail to be regarded. We trusted therefore that in the determination of this Government, to forbear insisting upon one of those stipulations, which they had originally thought a necessary check upon abuse, the American commissioners would discover the best additional proof of their disposition, to make every practicable sacrifice to maintain the present state of our friendly relations with the United States, and to cement that perfect cordiality which was considered essential to the interests and happiness of both.

We should not do justice to the American commissioners, if we forbore to bear testimony to their acceptance of the proposition with respect to impressment, in the spirit with which it was offered, and to their expression that the bonds of union between the two countries might by every means be cemented and confirmed.

The conference concluded with their submitting to us two classes of propositions, which appeared to them as in some degree connected with the question of impressment, the one (marked from A to G) relating to maritime and neutral rights, and the other (marked from H to K) comprising some general regulations which as connected with commerce, appeared to them not unfit to be introduced into a commercial convention.

We have the honour to be my Lord with the greatest respect your Lordship's most obedient humble servants.

J. ROBINSON.

HENRY GOULBURN.

P. S. The American plenipotentiaries also submitted an article respecting the captured slaves which your Lordship will find inclosed—

88 No. 34.—1818, September 17: *Extract from Protocol of Third Conference held between the American and British Plenipotentiaries at Whitehall.*

Present: Mr. Gallatin, Mr. Rush, Mr. Robinson, Mr. Goulburn.

The conference fixed for the 4th instant having been adjourned by mutual consent, it was held this day.

The protocol of the preceding conference was agreed upon and signed.

The American plenipotentiaries, after some previous explanation of the nature of the propositions which they were about to make, submitted the five annexed articles, (A, B, C, and D,) upon the fisheries, the boundary line, the West India intercourse, that of Nova Scotia and New Brunswick, and the captured slaves. The two first articles they stated to be drawn as permanent; and they accompanied that respecting the fisheries with the annexed explanatory memorandum. (E.)

The British plenipotentiaries submitted the annexed projet of articles respecting the impressment of seamen, (F;) and they expressed their conviction that a consideration of these articles would, under all

the circumstances of difficulty with which the question is involved, satisfy the American plenipotentiaries of the sincere and earnest disposition of the British Government to go every practicable length in a joint effort to remove all existing causes of difference, and to connect the two countries in the firmest ties of harmony and good understanding.

The American plenipotentiaries declared that they received the proposition entirely in the same spirit; and then brought forward the annexed articles, (G,) relating to other maritime points, which, at the former conference, they had announced their intention of producing.

They also submitted three other articles, as annexed, respecting wrecks, &c. (H.)

It was agreed to meet on Friday, the 25th instant.

ALBERT GALLATIN,
RICHARD RUSH,
FREDERICK JOHN ROBINSON,
HENRY GOULBURN.

ARTICLE A.

Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof to take, dry, and cure fish on certain coasts, bays, harbours, and creeks of His Britannic Majesty's dominions in America: it is agreed between the high contracting parties that the inhabitants of the said United States shall continue to enjoy unmolested, for ever, the liberty to take fish, of every kind, on that part of the southern coast of Newfoundland which extends from Cape Ray to the Ramea Islands, and the western and northern coast of Newfoundland, from the said Cape Ray to Quirpon Island, on the Magdalen Islands; and also on the coasts, bays, harbours, and creeks from Mount Joli, on the southern coast of Labrador, to and through the straits of Belleisle, and thence, northwardly, indefinitely, along the coast; and that the American fishermen shall also have liberty for ever to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland here above described, of the Magdalen Islands, and of Labrador, as here above described; but so soon as the same, or either of them, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground; and the United States hereby renounce any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, and harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits: *Provided, however*, that the American fishermen shall be admitted to enter such bays and harbours for the purpose only of obtaining shelter, wood, water, and bait, but under such restrictions as may be necessary to prevent their drying or curing fish therein, or in any other manner abusing the privilege hereby reserved to them.

* * * * *

E.

Explanatory Memorandum.

The American plenipotentiaries presented for consideration an article on the subject of certain fisheries. They stated, at the same time, that as the United States considered the liberty of taking, drying, and curing fish, secured to them by the treaty of peace of 1783, as being unimpaired, and still in full force for the whole extent of the fisheries in question, whilst Great Britain considered that liberty as having been abrogated by war; and as, by the article now proposed, the United States offered to desist from their claim to
 89 a certain portion of the said fisheries, that offer was made with the understanding that the article now proposed, or any other on the same subject which might be agreed on, should be considered as permanent, and, like one for fixing boundaries between the territories of the two parties, not to be abrogated by the mere fact of a war between them; or that, if vacated by any event whatever, the rights of both parties should revive and be in full force, as if such an article had not been agreed to.

No. 35.—1818, October 6: *Protocol of the Fifth Conference held between the American and British Plenipotentiaries at Whitehall.*

Present: Mr. Gallatin, Mr. Rush, Mr. Robinson, Mr. Goulburn.

The protocol of the preceding conference was agreed upon and signed.

The British plenipotentiaries gave in the five annexed articles, on the fisheries, the boundary, the Mississippi, the intercourse between Nova Scotia and the United States, and the captured slaves. (A, B, C, D, E.)

It was agreed to meet again on the 9th instant.

ALBERT GALLATIN,
 RICHARD RUSH,
 FREDERICK JOHN ROBINSON,
 HENRY GOULBURN.

ARTICLE A.

It is agreed that the inhabitants of the United States shall have liberty to take fish, of every kind, on that part of the western coast of Newfoundland which extends from Cape Ray to the Quirpon Islands, and on that part of the southern and eastern coasts of Labrador which extends from Mount Joli to Huntingdon Island; and it is further agreed that the fishermen of the United States shall have liberty to dry and cure fish in any of the unsettled bays, harbours, and creeks of the said south and east coasts of Labrador, so long as the same shall remain unsettled; but as soon as the same, or any part of them, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground.

And it is further agreed that nothing contained in this article shall be construed to give to the inhabitants of the United States any liberty to take fish within the rivers of His Britannic Majesty's territories, as above described; and it is agreed, on the part of the United States, that the fishermen of the United States resorting to the mouths of such rivers shall not obstruct the navigation thereof, nor wilfully injure nor destroy the fish within the same, either by setting nets across the mouths of such rivers, or by any other means whatever.

His Britannic Majesty further agrees that the vessels of the United States, *bona fide* engaged in such fishery, shall have liberty to enter the bays and harbours of any of His Britannic Majesty's dominions in North America, for the purpose of shelter, or of repairing damages therein, and of purchasing wood and obtaining water, and for no other purpose; and all vessels so resorting to the said bays and harbours shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein.

It is further well understood that the liberty of taking, drying, and curing fish, granted in the preceding part of this article, shall not be construed to extend to any privilege of carrying on trade with any of His Britannic Majesty's subjects residing within the limits hereinbefore assigned for the use of the fishermen of the United States, for any of the purposes aforesaid.

And in order the more effectually to guard against smuggling, it shall not be lawful for the vessels of the United States, engaged in the said fishery, to have on board any goods, wares, or merchandise whatever, except such as may be necessary for the prosecution of the fishery, or the support of the fishermen whilst engaged therein, or in the prosecution of their voyages to and from the said fishing grounds. And any vessel of the United States which shall contravene this regulation may be seized, condemned, and confiscated, together with her cargo.

ARTICLE B.

It is agreed that a line drawn from the most northwestern point of the Lake of the Woods along the forty-ninth parallel of latitude, or, if the said point shall not be in the forty-ninth parallel of north latitude, then that a line drawn due north or south, as the case may be, until it shall intersect the said parallel of north latitude, and from the point of such intersection, due west, along and with the said parallel, shall be the line of demarcation between the territories of His Britannic Majesty and those of the United States; and that the said line shall form the southern boundary of the said territories of His Britannic Majesty, and the northern boundary of the territories of the United States, from the said Lake of the Woods to the Stony Mountains; and, in order to prevent any disputes as to the territorial rights of either of the contracting parties on the Northwest Coast of America, or anywhere to the westward of the Stony Mountains, it is agreed that so much of the said country as lies between the forty-fifth and forty-ninth parallels of latitude, together with its harbours, bays, and creeks, and the navigation of all rivers within the same, shall be free and open to the subjects and citizens of the two States, respectively, for the purpose of trade and commerce; it being well understood that, although, by virtue of this arrangement, the two

high contracting parties agree not to exercise as against each any other sovereign or territorial authority within the above-mentioned country lying between the forty-fifth and forty-ninth parallels of latitude, this agreement is not to be construed to the prejudice of any claim to which either of the two high contracting parties may have to any territorial authority in any part of the country lying within the said limits: nor shall it be taken to affect the claim of any other Power or State to any part of the said country; the only object of the two high contracting parties being to prevent disputes and differences between themselves.

ARTICLE C.

It is further agreed that the subjects of His Britannic Majesty shall have and enjoy the free navigation of the River Mississippi from its source to the ocean, and shall at all times have free access from such place as may be selected for that purpose, in His Britannic Majesty's territories, to the River Mississippi, with their goods, wares, and merchandise, the importation of which into the United States shall not be entirely prohibited, on the payment of the same duties as would be payable on the importation of the same article into the Atlantic ports of the United States.

ARTICLE D.

British vessels shall have liberty to export, from any of the ports of the United States to which any foreign vessels are permitted to come, to the ports of Halifax, in His Britannic Majesty's province of Nova Scotia; to the port of St. John's, in His Britannic Majesty's province of New Brunswick, and to any other port within the said provinces of Nova Scotia or New Brunswick, to which vessels of any other foreign nation shall be admitted, the following articles, being of the growth, produce, or manufacture of the United States, viz: scantling, planks, staves, heading-boards, shingles, hoops, horses, neat cattle, sheep, hogs, poultry, or live stock of any sort, bread, biscuit, flour, pease, beans, potatoes, wheat, rice oats, barley, or grain of any sort, pitch, tar, turpentine, fruits, seeds, and tobacco.

And vessels of the United States shall in like manner, have liberty to import from any of the aforesaid ports of the United States into any of the aforesaid ports within the said provinces of Nova Scotia and New Brunswick, the above-mentioned articles, being of the growth, produce, or manufacture of the United States.

British vessels shall also have liberty to import from any of the aforesaid ports within the provinces of Nova Scotia and New Brunswick, into any of the aforesaid ports of the United States, gypsum and grindstones, or any other articles, being of the growth, produce, or manufacture of the said provinces, and, also, any produce or manufacture of any part of His Britannic Majesty's dominions, the importation of which into the United States shall not be entirely prohibited.

And vessels of the United States shall have liberty to import from the said provinces to the said United States, slates, gypsum, and grindstones, or any other article, being of the growth, produce, or manufacture of any part of His Britannic Majesty's dominions, the importation of which into the United States from any other place shall not be entirely prohibited.

The vessels of either of the two parties employed in the trade provided for by this article shall be admitted in the ports of the other party, as above mentioned, without paying any other or higher duties or charges than those payable in the same ports by the vessels of such other party. The same duties shall also be paid, respectively, in the dominions of both parties, on the importation and on the exportation of the articles which may be imported or exported, by virtue of this article; and the same bounties shall also be allowed on the exportation thereof, whether such importation or exportation shall be in vessels of the United States or in British vessels.

ARTICLE E.

Whereas it was agreed by the first article of the treaty of Ghent, that "all territory, places, and possessions whatsoever, taken by either party from the other during the war, or which may be taken after the signing of this treaty, excepting only the islands hereinafter mentioned, shall be restored without delay, and without causing any destruction, or carrying away any of the artillery, or other public property, originally captured in the said forts or places, and which shall remain therein upon the exchange of the ratifications of this treaty, or any slaves or other private property;" and whereas doubts have arisen whether certain slaves, originally captured in certain forts and places belonging to the United States, and removed therefrom, but remaining within the territories of the United States, or on board the ships of His Britannic Majesty, lying within the harbours of the United States at the time of the exchange of the ratifications of the said treaty, are to extend under the above-recited provisions of the said treaty, the high contracting parties do hereby agree to refer the said doubts to some friendly Sovereign or State, to be named for that purpose; and the high contracting parties engage to consider the decision of such friendly Sovereign or State to be final and conclusive on all the matters so referred.

91 No. 36.—1818, October 7: *Extract from Remarks on Articles from Messrs. Gallatin and Rush to Messrs. Robinson and Goulburn.*

LONDON, October 7, 1818.

Mr. Gallatin and Mr. Rush present their compliments to Mr. Robinson and Mr. Goulburn, and beg leave to send them the enclosed paper, containing some remarks on the articles handed to them at the conference yesterday. They are to be considered as unofficial, according to the intimation given yesterday, when they were promised, and have been drawn up merely under the hope that, by possessing the British plenipotentiaries of some of the views of the American plenipotentiaries before the next meeting on the 9th, the progress of the negotiation may be accelerated.

Fisheries.

The American plenipotentiaries are not authorised by their instructions to assent to any article on that subject which shall not

secure to the inhabitants of the United States the liberty of taking fish of every kind on the southern coast of Newfoundland, from Cape Ray to the Ramea Islands, and on the coasts, bays, harbours, and creeks from Mount Joli, on the southern coast of Labrador, to and through the Straits of Belleisle, and thence northwardly, indefinitely, along the coast; and also, the liberty of drying and curing fish in any of the unsettled bays, harbours, and creeks of Labrador and of the southern coast of Newfoundland, as above described; with the proviso respecting such of the said bays, harbours, and creeks as may be settled.

The liberty of taking fish within rivers is not asked. A positive clause to except them is unnecessary, unless it be intended to comprehend under that name waters which might otherwise be considered as bays or creeks. Whatever extent of fishing-ground may be secured to American fishermen, the American plenipotentiaries are not prepared to accept it on a tenure or on conditions different from those on which the whole has heretofore been held. Their instructions did not anticipate that any new terms or restrictions would be annexed, as none were suggested in the proposals made by Mr. Bagot to the American Government. The clauses forbidding the spreading of nets, and making vessels liable to confiscation in case any articles not wanted for carrying on the fishery should be found on board, are of that description, and would expose the fishermen to endless vexations.

Mississippi.

The American plenipotentiaries are not authorised to agree to any condition that would bring the British in contact with the Mississippi. The right to the navigation of that river could only be derived from the treaty of 1783; and, if viewed as a matter of compromise, that right is much less valuable and important than the portion of the fisheries which the United States would lose by the agreement, even on the terms proposed by them.

Boundary.

That portion of the article which relates to the country west of the Stony Mountains cannot be agreed to in its present shape. The American plenipotentiaries cannot consent to throw in a common stock that part only of the country to which the United States deny the claim of Great Britain, and which lies within the same latitudes as their own territories east of the Stony Mountains; thus, also, implying the exclusion of their citizens from the trade on the northwest coast of America (north of 49°), which they have enjoyed without interruption for a number of years, and as early as the British.

Nor are they authorised to agree to expressions implying a renunciation of territorial sovereignty, although perfectly disposed not to insist on an extension of the line of demarcation to that country. They will propose either that the whole of the article relating to that subject, and immediately following the words "to the Stony Mountains," should be omitted, inserting, in lieu thereof, a proviso similar to what had on former occasions been agreed to, viz: "But nothing in the present article shall be construed to extend to the northwest coast of America, or to territories belonging to or claimed

by either party on the continent of America westward of the Stony Mountains;” or, that the proposed article should be amended in the manner stated in the enclosed copy.

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92 No. 37.—1818, *October 9: Protocol of the Sixth Conference held between the American and British Plenipotentiaries at Whitehall.*

Present: Mr. Gallatin, Mr. Rush, Mr. Robinson.

The American plenipotentiaries declared that they could not agree to the article upon the fisheries brought forward by the British plenipotentiaries at the preceding conference, nor to that respecting the navigation of the Mississippi, nor to any article that would bring the British in contact with that river.

They also stated that they could not take into consideration the article respecting the intercourse with Nova Scotia and New Brunswick, unconnected with the subject of the British West Indies.

They presented several amendments (A, B) to the articles respecting the boundary line and slaves carried away, proposed at the last conference by the British plenipotentiaries.

It was agreed to meet again on Tuesday, the 13th instant.

ALBERT GALLATIN,
RICHARD RUSH,
FREDERICK JOHN ROBINSON.

No. 38.—1818, *October 10: Extract from letter from Mr. Robinson (Board of Trade) to Viscount Castlereagh.*

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I then proceeded to state to them that upon the fishery article, we were not disposed to insist upon the exclusion of those points, the introduction of which they had at our last conference represented to be a *sine qua non*: and after some discussion it was also agreed on our part not to insist upon the two provisions contained in our proposed article respecting the fishing in rivers and smuggling, to which they felt very considerable objections, and which did not appear to me to be of such importance as to require to be urged in a way that might prevent an arrangement upon the fisheries taking place. There still however remains a point undecided upon this question which involves considerations of great moment—

They represent it to be an indispensable condition on their part that the article respecting the fisheries should be not only permanent in the ordinary sense of conventional stipulations which are limited by no precise time, but permanent in such a way as not to be abrogated by any future war. They have therefore introduced the words “for ever” into the article itself; and they accompanied the proposition of it (as your Lordship will see by referring to our despatch No. —) with a memorandum explanatory of the view in which they offered, and were ready to sign an article on this subject. Our intention had been to meet this memorandum with a counter declara-

tion on our part, by which we might avoid being bound by their construction: but they stated to me explicitly, that the presentation of such a declaration would be fatal to the arrangement of the article; that they had endeavoured to frame their memorandum in such a way as to leave us the utmost possible latitude in construing it. This led to a discussion of considerable length in which I argued that the adoption of their view of the subject would involve the British Government in an admission of the very point upon which the two Governments had already been at variance in this matter, viz: that a war did not ex necessitate rei abrogate stipulations of that sort: and that in fact it never could be binding "for ever" because it would necessarily be competent to us to refuse to make peace, unless they would consent to a non-renewal of the stipulation. One of the American plenipotentiaries did not deny the accuracy of my view of the question, but admitted that in his opinion the point was one of very little consequence to them. He added however that their instructions were peremptory on the subject. The principal ground upon which they represented their instructions to be built, was this; that if the arrangement were not to be permanent to all intents and purposes, and in spite of the contingency of a future war, it would necessarily be considered as a positive concession on our part, without which the late war would then be deemed as having deprived them of an important advantage of which they had not secured the renewal at the peace. Finding their instructions on this point to be so peremptory, I took the point ad referendum rather than break off at once upon it.

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P.S. Although from Mr. Goulburn's absence I am not yet enabled to send to your Lordship, a detailed account of what passed at our preceding conference (the fifth) on the 6th of October, I think it right to enclose for your information, copies of four articles which we then produced as contreprojets to articles upon similar points, previously submitted by the American plenipotentiaries.

93 No. 39.—1818, October 13: *Extract from Protocol of the Seventh Conference held between the American and British Plenipotentiaries at Whitehall.*

Present: Mr. Gallatin, Mr. Rush, Mr. Robinson, Mr. Goulburn.

The British plenipotentiaries acquiesced in the amendment proposed at the preceding conference by the American plenipotentiaries, in the article respecting captured slaves, except as far as related to the insertion in the article of the name of any particular Power.

They brought forward new articles (A, B, C, D, E) respecting the fisheries, the boundary, impressment, and maritime points, and accompanied the articles D with the annexed memorandum E. They agreed to the omission of the article respecting the Mississippi.

It was agreed to meet again on Monday, the 19th instant.

ALBERT GALLATIN,
RICHARD RUSH,
FREDERICK JOHN ROBINSON,
HENRY GOULBURN.

ARTICLE A.

Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof to take, dry, and cure fish on certain coasts, bays, harbours, and creeks of His Britannic Majesty's dominions in America: it is agreed between the high contracting parties that the inhabitants of the said United States shall have, forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Ramea Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours and creeks, from Mount Joli, on the southern coast of Labrador, to and through the Straits of Belleisle, and thence, northwardly, indefinitely, along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company; and that the American fishermen shall also have liberty, forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland, hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce, forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America, not included within the above-mentioned limits: *Provided, however*, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter, and of repairing damages therein, of purchasing wood and obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

ARTICLE B.

It is agreed that a line drawn from the most northwestern point of the Lake of the Woods, along the forty-ninth parallel of north latitude, or, if the said point shall not be in the forty-ninth parallel of north latitude, then, that a line drawn from the said point due north or south, as the case may be, until the said line shall intersect the said parallel of north latitude, and from the point of such intersection, due west, along and with the said parallel, shall be the line of demarcation between the territories of His Britannic Majesty and those of the United States; and that the said line shall form the southern boundary of the said territories of His Britannic Majesty, and the northern boundary of the territories of the United States, from the Lake of the Woods to the Stony Mountains. But nothing in the preceding part of this article shall be construed to extend to the northwest coast of America, or to territories belonging to, or claimed by, either party, on the continent of America westward of the Stony Mountains; and any such country as may be claimed by

either party westward of the Stony Mountains, shall, together with its harbours, bays, and creeks, and the navigation of all rivers within the same, be free and open to the vessels, subjects, or citizens of the two Powers, respectively, for the purposes of trade and commerce. It being well understood that nothing contained in this article shall be taken to affect the claims of any other Power or State to any part of the said country; the only object of the two high contracting parties being to prevent disputes and differences between themselves.

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94 No. 40.—1818, October 20: *Extracts from Letter from Messrs. Gallatin and Rush (at London) to the Secretary of State.*

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We have the honour to transmit a convention which we concluded this day with the British plenipotentiaries.

Lord Castlereagh having expressed a wish that the negotiations might be opened before his departure for Aix-la-Chapelle, Mr. Gallatin left Paris as soon as he had received our full powers, and arrived here on the 16th of August. Our joint instructions contained in your despatch of the 28th of July did not, however, reach us till the 3d of September. We had long conversations with Lord Castlereagh at his country seat, on the 22d and 23d of August, but could not, owing to our instructions not having arrived, discuss with him the questions of the fisheries and of the West India intercourse. He left London on the 1st of September. The official conferences had begun on the 27th of August, and, for the progress of the negotiation, we beg leave to refer to the enclosed copies of the protocol, and documents annexed to it, and of two unofficial notes sent by us to the British plenipotentiaries. We will add some observations on the several objects embraced by the convention.

1. *Fisheries.*

We succeeded in securing, besides the rights of taking and curing fish within the limits designated by our instructions, as a *sine qua non*, the liberty of fishing on the coasts of the Magdalen Islands, and of the western coast of Newfoundland, and the privilege of entering for shelter, wood, and water, in all the British harbours of North America. Both were suggested as important to our fishermen, in the communications on that subject which were transmitted to us with our instructions. To the exception of the exclusive rights of the Hudson's Bay Company we did not object, as it was virtually implied in the treaty of 1783, and we had never, any more than the British subjects, enjoyed any right there; the charter of that company having been granted in the year 1670. The exception applies only to the coasts and their harbours, and does not affect the right of fishing in Hudson's Bay beyond three miles from the shores, a right which could not exclusively belong to, or be granted by, any nation.

The most difficult part of the negotiation related to the permanence of the right. To obtain the insertion in the body of the convention of a provision declaring expressly that that right should not be abrogated by war, was impracticable. All that could be done was to ex-

press the article in such manner as would not render the right liable to be thus abrogated. The words "for ever" were inserted for that purpose, and we also made the declaration annexed to the protocol of the third conference, the principal object of which was to provide in any event for the revival of all our prior rights. The insertion of the words "for ever" was strenuously resisted. The British plenipotentiaries urged that, in case of war, the only effect of those words being omitted, or of the article being considered as abrogated, would be the necessity of inserting in the treaty of peace a new article renewing the present one; and that, after all that had passed, it would certainly be deemed expedient to do it, in whatever manner the condition was now expressed. We declared that we would not agree to any article on the subject, unless the words were preserved, or in case they should enter on the protocol a declaration impairing their effect.

It will also be perceived that we insisted on the clause by which the United States renounce their right to the fisheries relinquished by the convention, that clause having been omitted in the first British counter-projet. We insisted on it with the view—1st. Of preventing any implication that the fisheries secured to us were a new grant, and of placing the permanence of the rights secured and of those renounced precisely on the same footing. 2d. Of its being expressly stated that our renunciation extended only to the distance of three miles from the coasts. This last point was the more important, as, with the exception of the fishery in open boats within certain harbours, it appeared, from the communications above mentioned, that the fishing-ground, on the whole coast of Nova Scotia, is more than three miles from the shores; whilst, on the contrary, it is almost universally close to the shore on the coasts of Labrador. It is in that point of view that the privilege of entering the ports for shelter is useful, and it is hoped that, with that provision, a considerable portion of the actual fisheries on that coast (of Nova Scotia) will, notwithstanding the renunciation, be preserved.

2. *Boundary line.*

This being definitively fixed at the forty-ninth degree of north latitude, from the Lake of the Woods to the Stony Mountains, it is unnecessary to repeat the arguments which were urged on that subject. The attempt was again made to connect with it an article, securing to the British access to the Mississippi, and the right to its navigation. We declared, and entered the declaration in the protocol, that we could not agree to the article, nor to any that would bring the British in contact with that river. The British plenipotentiaries hav-

ing, by the protocol of the seventh conference, agreed to the
95 omission of the article, that point is also definitely settled.

And it may be observed, with reference to the treaty of 1783, that, if the United States have not secured to themselves the whole of the fisheries heretofore enjoyed within the jurisdiction of Great Britain, they have obtained the liberty of curing fish on a part of the southern coast of Newfoundland, and the abandonment of an inconvenient privilege within their own territory.

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5. *Commercial Intercourse.*

The subject of the intercourse with the West Indies was fully discussed, and, not thinking ourselves authorised to accede to the last proposals of the British plenipotentiaries, which are annexed to the protocol of the eighth conference, an entry was made that we had taken them *ad referendum* to our Government. The negotiation being kept open, in that respect, we agreed, in conformity with our instructions, to an article continuing in force for ten years the commercial convention of 1815. It was fully understood, on both sides, that if no agreement should be ultimately concluded with respect to the colonial intercourse, no ground of complaint would arise on account of any restrictive measures whatever that the United States might adopt on that subject; and we stated, expressly, that such measures would, in all probability, be extended to the intercourse with Bermuda and with the British northern colonies; that, if the direct trade with the West Indies was not allowed, the United States would not be disposed to suffer it to be carried on through any other intermediate British port.

It appeared evident to us, both from our instructions and from the Act of Congress, that a perfect reciprocity and equality must be the basis, as well as a *sine qua non*, of any arrangement of the intercourse with the West Indies. And we understood this basis to embrace the following objects:

1. British vessels to be permitted to import from the British West Indies into the United States, and to export from the United States to the British West Indies, only such articles of the produce of the said West Indies and of the United States, respectively, as American vessels should be permitted to export from and to import into the British West Indies.

2. The duties on the vessels and on the cargoes to be reciprocally the same, whether the vessels were American or British.

3. The duties on the importation of American produce into the British West Indies not to be higher when the produce was imported directly from the United States than when imported in a circuitous manner; with a reciprocal condition for the importation of West India produce into the United States.

4. The intercourse in British vessels to be allowed only with such West India ports as would be opened to the American vessels.

5. The British vessels allowed to carry on that trade to be only of the same description with the American vessels admitted in the British West Indies.

To that basis, as thus stated, the British plenipotentiaries acceded. But when the further details of the proposed arrangement were taken into consideration, several important points occurred which had not been contemplated in our instructions, and on which we were not sufficiently acquainted with the intentions of our Government.

The basis of reciprocity once established, was it proper to agree to a direct intercourse, limited, on both sides, to certain articles of the produce either of the United States or of the West Indies? And if such limitation was admissible, to what extent? And what articles might we consent to except?

If the direct intercourse was thus limited to certain articles, would an indirect intercourse be admissible, between the United States and

Bermuda, Nova Scotia, New Brunswick, embracing articles of West India produce, or of the produce of the United States, destined for the West Indies, other than were admitted to be imported or exported in a direct manner?

As the British Government would retain the power of laying duties on the produce of the United States imported into the West Indies, and would not lay any on similar articles imported therein from any part of the British dominions, ought we to assent, without any condition or exception, to the clause annexed to the first article formerly proposed by that Government, and by which no higher duties should be laid, respectively, on the produce of either country, than on similar articles imported from any other *foreign* country?

We thought it safer to err on our own side of the question, and to ask for more than perhaps under all circumstances we expected to obtain, rather than to limit our demands to less than might be intended by our Government. The articles which we proposed at the third conference were drawn with that view; and the British plenipotentiaries immediately stated that they were inadmissible, and amounted to a much greater departure from the colonial policy of Great Britain than she was prepared to allow. They did not enter into any abstract defence of that policy, but they strongly urged the impossibility of breaking down, at once, a system still favoured by public opinion, and supported by various interests which could not be disregarded. The fish and lumber of the northern colonies, the salted provisions, and even the flour of Ireland, the shipping interests, and that of non-residing West India planters, were all alluded to. Having once admitted the basis of perfect reciprocity with respect to the direct intercourse, they thought that the United States ought, for the present, to be satisfied with an arrangement which would admit a considerable number of articles to be carried directly; that they should not insist on the exclusion, in the intercourse with Halifax, St. John's, and Bermuda, of those articles which might not be included in the list of those admitted in the direct inter-
 96 course with the West Indies; and that we ought not to object to the natural right of Great Britain to lay protecting duties in favour of the produce of her own possessions.

We admitted that the last principle, as an abstract proposition, was unexceptionable, but observed, that the practical effect of the condition on which they insisted was altogether partial. Since they persevered in making a distinction between the intercourse with England and that with her colonies, and even between that with her northern American colonies and that with the West Indies, the United States must, in a commercial view, consider them as so many distinct countries. As no other foreign country could supply the West Indies with the articles which were the produce of the United States, a condition which would prevent Great Britain from laying higher duties on that produce than on similar articles the produce of other foreign countries, was nugatory, and to us perfectly useless. There was, in that respect, no competition but with the produce of the British possessions. We found in that condition, no compensation for the restriction which it would impose on the United States to lay no higher duties on the colonial produce of the British possessions than on that of other countries. The propriety of limiting the number of articles to be carried directly, would in a great measure

depend on the list which might be proposed. To extend it to other articles, in the circuitous intercourse through Halifax and Bermuda, would give to the British the exclusive carriage of those articles from those ports to the West Indies, and *vice versa*, and be inconsistent with the avowed object of the United States—that of an equal participation in the navigation necessary for the transportation of the articles of which their trade with the West Indies, as allowed by Great Britain, actually consisted. Yet we were disposed to pay due regard to the various considerations which had been presented by Great Britain, and to listen to any specific proposals she might be prepared to make. No part of the articles we had offered was, with the exception of the basis of perfect reciprocity, to be considered as an ultimatum. We would, however, say that we could not assent to any article which did not admit, on the one hand, naval stores and the whole of our lumber, and, on the other, salt, molasses, and, besides rum, a limited quantity of sugar and coffee, amongst the articles of the direct trade.

With respect to duties, after having suggested without success that a maximum of those intended for the protection of the produce of the British dominions might be agreed on, we stated that there were at least two provisions which could not be objected to, viz: that the United States should remain at liberty to lay higher duties on the colonial produce of the British possessions than on that of those countries where we were or might be received on better terms than in the British West Indies; and that the condition which would preclude generally such higher duties being laid should not apply to the West India articles not admitted to be exported directly therefrom in American vessels to the United States.

The result of several free conversations was, that, as it was altogether improbable that we could, at this time, come to a definitive arrangement, the British plenipotentiaries should offer an article with the intention of its being referred to our Government.

It will be perceived by this, that they admit the principle of reciprocity; that they make no exception with respect to the description of vessels; that, giving up the article formerly proposed for Turk's Island, they also admit that vessels employed in the trade may touch from one port to another, and that to the list of articles formerly proposed are added naval stores, shingles, and staves, and a more general description of provisions. They continue to except altogether, on the one hand, sugar and coffee, and, on the other, salted fish and provisions, and every other species of lumber but shingles and staves. The only essential difference between this list of articles and that proposed for the intercourse with Bermuda and the northern colonies consists, as far as relates to the produce of the United States, in the lumber not admitted in the direct intercourse; for salted fish and provisions are equally excluded from both: but it is proposed that not only sugar and coffee, but also all articles of the produce or manufacture of any of the British dominions, should be admitted through that indirect channel into the United States. We stated, when we received the article, that it ought to embrace only American products, and that the proposal was certainly inadmissible so far as related to East India articles.

With respect to the ports they offer in the West Indies, they are the same with those proposed by us, with the exception of St. Chris-

topher's, St. Lucia, Demarra, Esequibo, and Berbice. The three last had been at first intended to be included, but were ultimately omitted by the British plenipotentiaries, for reasons connected, as they said, with their engagements with Holland.

We cannot state what may be considered as an ultimatum in that proposal. We are, however, induced to believe that they will persevere in excluding sugar and some species of lumber from the direct, and salted fish and provisions from both the direct and indirect intercourse; that they will insist on having some articles admitted in that indirect, which shall be excluded from the direct intercourse; and that they will be tenacious on being placed on the footing of the most favoured nation. They will also certainly insist that vessels from Great Britain may touch at any port in the United States, and take cargoes for the West Indies of such articles as may be admitted in the direct trade. Without such provision, (which would be made reciprocal, although only nominally so), it is supposed here, that, considering our proximity, to admit our vessels to a participation on an equal footing in the trade between the United States and the West Indies, would, in fact, give the latter the whole navigation connected with that trade. It must, at the same time, be observed, that the proposal being intended for reference, and not for immediate discussion, the British plenipotentiaries may have been cautious not to go too far. Upon the whole, we hope that, if our negotiation does not pave the way for a definitive arrangement, it will at least have served to make our Government better acquainted with the dispositions of this, and may afford some assistance with respect to the further proceedings which may be thought expedient.

97 It having been ascertained that the British Government would not assent to any article on the subject of the intercourse by land and inland navigation with Canada, which would substantially differ from that already twice rejected, and that they would not even agree to a provision securing to us the right of taking our produce in our own boats or vessels down the St. Lawrence as far as Montreal, and down the River Chambly as far as the River St. Lawrence, we thought it altogether unnecessary to make any proposal on that subject, on which, indeed, we were not particularly instructed.

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No. 41.—1818, November 6: *Extract from Letter from Mr. Albert Gallatin to Mr. J. Q. Adams.*

No. 87. PARIS, 6th November, 1818.

SIR,—Anxious from public considerations to return to Paris as soon as possible, I left London on the 22d ult. The convention had been signed on the 20th, and the time left to write our joint despatches was so short that, although I hope nothing material was omitted, it may be useful to add some further details and observations. On the subject of the fisheries, the abstract question of our right had been so ably discussed in your two notes to the British Government that we had nothing to add to that branch of the argument. We could only, and we did it with some effect, demonstrate that, with respect at least

to territorial rights, Great Britain herself had not heretofore considered them as abrogated by the mere fact of an intervening war. Thus, Tobago, ceded by her to France by the treaty of 1783, taken during the ensuing war, and restored by the treaty of Amiens, had again been retaken by Great Britain during the last war. She was in actual possession when the treaty of 1814 took place, and if the treaties of 1783 and of Amiens were abrogated by the last war, the cession of that island by France had become null, and a retrocession was useless. Yet Great Britain did not reason in that manner, and did not consider her right good without a formal cession from France, which she accordingly obtained by the last treaty of Paris. Thus, neither the treaty of 1763 generally, nor the cession of Canada to Great Britain particularly, having been renewed by the treaty of Amiens, if the treaty of 1763 was abrogated by subsequent wars she now held Canada by right of possession only, and the original right of France had revived. We applied those principles to fisheries which, independent of the special circumstances of our treaty of peace of 1783, were always considered as partaking in their nature of territorial rights. It is, however, true, although it was not quoted against us, that it had been deemed necessary to renew in every subsequent treaty the right of fishing on part of the coast of Newfoundland originally reserved to the French. Although our arguments were not answered, it appeared to me that two considerations operated strongly against the admission of our right. That right of taking and drying fish in harbours within the exclusive jurisdiction of Great Britain, particularly on coasts now inhabited, was extremely obnoxious to her, and was considered as what the French civilians call a servitude. And personal pride seems also to have been deeply committed, not perhaps the less because the argument had not been very ably conducted on their part. I am satisfied that we could have obtained additional fishing-ground in exchange of the words "forever." I am perfectly sensible of the motives which induced Government to wish that the portion of fisheries preserved should be secured against the contingency of a future war. But it seems to me that no treaty stipulation can effectually provide for this. The fate of the fisheries in that case will depend on the result of the war. If they beat us (which God forbid), they will certainly try to deprive us of our fisheries on their own coasts. If we beat them, we will preserve them and probably acquire the country itself.

Yet I will not conceal that this subject caused me more anxiety than any other branch of the negotiations, and that, after having participated in the treaty of Ghent, it was a matter of regret to be obliged to sign an agreement which left the United States in any respect in a worse situation than before the war. It is true that we might have defeated the whole object by insisting that the words "not liable to be impaired by any future war" should be inserted in the article. But this course did not appear justifiable. It was impossible, after a counter-projet formed on compromise had been once offered, that the United States could by negotiations alone be reinstated in their enjoyment of the fisheries to their full extent; and if a compromise was to take place, the present time and the terms proposed appeared more eligible than the chance of future contingencies. I became perfectly satisfied that no reliance could be placed on legal remedies;

that no court in England would give to the treaty of 1783 a construction different from that adopted by their Government, and that if an Act of Parliament was wanted, it would be obtained in a week's time and without opposition. If the subject was not arranged, immediate collision must ensue, and, Great Britain proceeding under legal forms to condemn our vessels, no resource remained for us but to acquiesce or commence hostilities. With much reluctance I yielded to those considerations, rendered more powerful by our critical situation with Spain, and used my best endeavours to make the compromise on the most advantageous terms that could be obtained. After a thorough examination of the communications on the subject which you transmitted to us, I think that substantially we have lost very little, if anything; and I only wish that it had been practicable to give to the agreement the form of an exchange in direct terms; that is to say, that we give fishing rights in certain quarters in consideration of the right of curing fish on a part of Newfoundland and of the abandonment of the British claim to the navigation of the Mississippi. This, however, could not be done in a positive manner, the British plenipotentiaries disclaiming any right to that navigation, and objecting, therefore, to a renunciation of what they did not claim. The article which they proposed on this last subject was only, as they said, an equivalent for what they pretended to concede in agreeing that the boundary west of the Lake of the Woods should be fixed at the 49th degree of north latitude.

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No. 42.—1819, June 14: *Extract from Letter from Mr. Rush, Envoy, &c., at London, to Mr. Adams, Secretary of State.*

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I was honoured, on the 8th instant, with your despatch No. 17, of the 7th of May.

On the 9th I addressed a note to Lord Castlereagh, to request an interview, that I might proceed to lay before this Government, without losing any time, the determinations to which the President had come on the important subject of the commercial intercourse between the United States and the West Indies. His Lordship appointed yesterday for me to wait upon him.

I commenced with calling to mind the point at which the discussions had left off upon this branch of the negotiation last autumn, and gave a new assurance of the President's earnest desire to see this trade opened upon a footing of entire and liberal reciprocity, rather than stand any longer upon the conflict of arbitrary laws. In this spirit I was instructed to offer a projet, which had been carefully drawn up upon the basis of a compromise between the pretensions of the two parties, and which, indeed, would be found to fall in so entirely with the propositions of Great Britain, in some respects, and to make such an approximation to them in others, that a hope was cherished of its proving acceptable.

That, in particular, it would be found to adopt the description of naval stores and of lumber, as articles to be exported from the United States, upon which the British plenipotentiaries had themselves insisted—confining the former to pitch, tar, and turpentine, and the latter to staves, headings, and shingles, contrary to the more enlarged signification which it had been the desire of the American plenipotentiaries to give to them; that it acquiesced, also, in the exclusion of all salted provisions, including the important article of fish; that it, moreover, came wholly into the British views in consenting to the exclusion of sugar and coffee as articles to be imported into the United States from the British West Indies; it being understood that the above traffic was to be opened upon equal terms, in all respects, to American and British vessels.

In return for such an accommodation to the colonial views of Great Britain, the project asked, on the other hand, that the list of articles exportable from the United States to the West Indies should be the same as to Bermuda and to the British North American colonies; that the articles exportable to the United States should be confined to such as were of the growth, produce, or manufacture of the above islands or colonies; and that the same duties, and no more, should be payable on importations from the United States into the West Indies, whether the articles were brought directly or indirectly, as on similar articles imported into the West Indies from any foreign country, or from any of the British colonies.

With this outline of its contents, I handed a copy of the projet which came enclosed in your despatch to his Lordship. The discussions between the plenipotentiaries of the two Governments having recently been so ample on the matters which it embraces, I thought that nothing was likely to be gained by my leaving room for the possible hope that any of its essential provisions would be departed from. Accordingly, I deemed it best to say with candour, in the first instance, that, as it was offered, so was it to be taken; for that my present instructions would admit of no deviations, unless on points verbal, or otherwise immaterial. I shall bear in mind that the parts within crotchets may be omitted. His Lordship received it with an assurance that a full and candid consideration would be given to it. The pressure of parliamentary business might, he said, delay an attention to it for some weeks, but that, at as early a day as was practicable, it would be taken up. I replied that I believed that the great object would be attained on our side if a decision were communicated to me in full time to be made known to the President before the next session of Congress. Should our propositions prove acceptable, I was empowered, I added, to make them supplementary to the convention of the 20th of October, subject always to the ratification of the Senate. I here closed, having endeavoured, in the course of my remarks, to convey to his Lordship's mind those general reasonings applicable to our propositions which are unfolded in your despatch, and to which I shall again advert on future occasions, should it become necessary. The confidential report of the 19th of February, by the Committee of Foreign Relations in the Senate, was safely received under cover of your despatch.

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99 No. 43.—1819, June 21: *Letter from Lord Bathurst (British Colonial Secretary) to Sir C. Hamilton (Governor of Newfoundland).*

DOWNING STREET 21st June 1819.

Governor Sir C. HAMILTON Bart.,

SIR, In my despatch of the 8th April I had the honour of transmitting to you a convention which had been entered into between His Majesty and the United States of America part of which refers to the taking and curing of fish by the citizens of the United States on the coasts of certain of His Majesty's possessions in North America. I have now to enclose you a copy of an Act to give effect to that convention which has since received the royal assent and of an order in council which His Royal Highness has been pleased to issue in the name and on the behalf of His Majesty. As the inhabitants of the United States will undoubtedly proceed without delay to exercise the privilege granted to them under that convention His Royal Highness has commanded me to call your special attention to some points upon which it is probable that in regulating your conduct under the convention you may desire to receive instructions.

You will in the first place observe that the privilege granted to the citizens of the United States is one purely of fishery and of drying and curing fish within the limits severally specified in the convention. It is the pleasure of His Royal Highness that this privilege as limited by the convention should be fully and freely enjoyed by them without any hindrance or interference. But you will at the same time remark that all attempts to carry on trade or to introduce articles for sale or barter into His Majesty's possessions under the pretence of exercising the rights conferred by the convention is in every respect at variance with its stipulations. You will therefore promulgate as publicly as possible the nature of the indulgence which you are under the convention instructed to allow to them, and in case any of the inhabitants of the United States should be found attempting to carry on a trade not authorised by the convention you will in the first instance warn them of the illegality of such a proceeding and in the event of their being afterwards engaged in it you will not hesitate to adopt with respect to them the same means of control and the same punishments and forfeitures as would be legally applicable in the trade of any other foreign nation possessing no privilege of fishery whatever.

With respect to the fishery which the citizens of the United States are authorised to carry on upon the coast of Labrador you will take care that it be carried on by them within the specified limits in the same manner as previous to the late war with the United States, taking every precaution however against that introduction of contraband articles into Newfoundland or His Majesty's possessions in North America to which it was previous to the war notoriously perverted.

The right of drying and curing in the southern part of the coast of Newfoundland stands in some degree upon a different footing. It is a new privilege conferred for the first time by this convention and it is more limited than that assigned to them on the coast of Labrador inasmuch as the inhabitants of the United States have no

privilege even with the consent of the settlers of drying and curing in any bay harbour or creek of Newfoundland which may have been settled previous to the signature of the convention, while a fair construction of the treaty leaves open to them in Labrador every harbour not settled previous to the peace of 1783. I am aware that some difficulty may arise in deciding the extent to which a settlement in any bay, harbour or creek is necessary to constitute an exclusion of American fishermen under the convention.

It is obvious from the terms of the convention that a single settlement in a bay harbour or creek is not in itself a sufficient ground for such an exclusion but on the other hand it is equally clear that if the settlements in any particular bay harbour or creek be so numerous as to leave but little interval between the British establishments already formed the American fishermen can have no fair ground for occupying any part of such bay harbour or creek and you will so regulate your proceeding in this respect as while you give the inhabitants of the United States on the one hand every facility for curing and drying their fish on the specified part of the coast of Newfoundland you afford on the other to His Majesty's subjects every reasonable protection against an unfair interference and intrusion inconsistent with the spirit of the treaty.

You will take care also that the inhabitants of the United States do not become settlers in the colony and that they do not make such establishments as may interfere with the future settlement of the land on which they may be made. The intention of the treaty being merely that they should dry in His Majesty's territory for the purpose of curing their fish in common with British fishermen and not that they should remain permanently established within His Majesty's dominions to the prejudice of His Majesty's subjects.

You will also give such directions as may be necessary for securing to the American fishermen the privileges of entering the harbours of Newfoundland for the purpose of shelter and of repairing damages therein, of purchasing wood and of obtaining water but for no other purpose whatever, and I must on this point also direct your particular attention to the necessity of exercising great vigilance in order to prevent the abuse of these privileges in any manner whatever and more especially for the purpose of carrying on an unauthorised fishery or an illegal trade.

100 With respect to any difficulties which may arise in carrying the convention into effect His Royal Highness relies entirely upon your discretion for adopting the most conciliatory line of conduct towards the inhabitants of the United States giving to them on all occasions the full benefits of a liberal construction of the treaty but always guarding against any invasion by them of the privileges exclusively reserved to His Majesty's subjects.

If any difficulties should occur you will communicate them to me with every necessary detail and I will not fail to take the earliest opportunity of submitting them to the Prince Regent for His Royal Highness's further consideration.

I have the honour to be &c

BATHURST.

No. 44.—1819, September 17: *Extract from Letter from Mr. Rush (at London) to the Secretary of State.*

* * * * *

Lord Castlereagh came to town on the 15th instant, and granted me an interview yesterday on the business of the West Indian trade.

Holding in his hands the proposals I had submitted, his Lordship premised that he thought it would perhaps be best for him to answer them in the same general way that the British articles, submitted through my predecessor in 1817, had been answered; that is, not in any formal manner, but merely by a word of conversation with me. I said that I was sure that the form of the answer would make no difference; its transmission to my Government, in whatever mode his Lordship might be pleased to convey it to me, would doubtless effect every substantial purpose.

In the answer there was no hesitation. Our proposals, he said, were not of a nature to form the basis of any agreement between the two countries. They would effect an entire subversion of the British colonial system; from this system they were not prepared to depart. Their colonies were, in many respects, burdensome, and even liable to involve the country in wars. Garrisons, and other establishments, were constantly maintained in them, at a heavy charge. In return, it was just that they should be encumbered with regulations, the operation of which might help to meet, in part, the expenses which they created. The great principle of these regulations was known to be the reservation of an exclusive right to the benefit of all their trade—a principle, of which the free ports Acts had, it was true, produced some relaxation; but it had never been the intention of this Government to do anything more than offer to us a participation in these Acts. Some modifications of them would have been acquiesced in, suggested by local causes, and an anxious desire that our two countries might come to an understanding on this part of their intercourse. But to break down the system was no part of their plan. Our proposals, therefore, could not be accepted. Such were his remarks.

I observed, that to break down the system was not our aim. All that we desired was, that the trade, as far as it was gone into at all, should be open to the vessels of both nations upon precisely equal terms. If the system fell by such an arrangement, it was an incident, and only showed how difficult it seemed to render its long continuance consistent with a proper measure of commercial justice towards us.

So broad and unequivocal was his Lordship's refusal, that it seemed almost superfluous to ask him to be more particular; yet, perceiving in me a wish to be made acquainted rather more specially with the objections, he said that he would not scruple to mention them without, however, entering into details, for which he was not prepared, and which had been amply unfolded on both sides during the negotiation this time twelvemonth. The objections were threefold. First, we asked an enumeration, by name, of all the ports in the West Indies that we desired should be open to our vessels; secondly, that the trade between the United States and the British colonies on the continent of America, and with Bermuda, should be confined within the same limits as that between the United States and the

West India islands direct; and, thirdly, we asked that the duties on articles imported from the United States into the islands in American ships, should be no higher than on the same articles when imported in British ships from the United States, or from any other country, without saying *foreign* country. These three provisions, particularly the second and third, would form insurmountable obstacles to the conclusion of any convention which should purport to embrace them.

I contented myself with replies as general. The communications from the joint mission last year, as well as some separate ones from this legation after it was over, will have informed the President how fully the views of our Government, on the injustice of this system, in all its past effects upon us, have heretofore been stated. On this occasion I remarked, as to the first objection, that it was plain that, if the ports were not specially named, the privilege of admission to them would, at any time, be revocable whenever Great Britain thought fit to exclude from them any other foreign vessels. It would be, in short, a privilege with nothing positive or certain in its character. As to the second, I said that, should an indirect trade be opened with the islands in any greater extent than the direct trade, nothing was more clear than that the greater part, or the whole, would soon be made to flow in the channel of the former, to the manifest advantage of British bottoms. On the third objection, I

101 said that an explanatory remark or two was all that I should add (it would be but repetition) to what had often been urged before. That we should deny to Great Britain the common right of protecting the industry of a part of her own dominions, by laying discriminating duties in its favour, might be thought, at first blush, to wear an appearance not defensible; but it would be found, on a moment's examination, to be strictly so. The system built up by Britain must be looked at altogether. It was in itself so inverted and artificial, that principles not disputed in the abstract ceased to be just when applied to it. Though one and all of these colonies were, indeed, of her dominion, yet were they made to stand, with respect to us, in the light of separate and independent countries. This was the keystone of the colonial doctrine. Why should we not, in turn, adopt and apply it to Great Britain? If we stipulated not to impose upon articles imported into the United States from the British West Indies any higher duties than upon the same articles coming from any other foreign country, a similar provision by Great Britain, to impose on articles exported from the United States to her islands no higher duties than on the same articles when brought from any other *foreign* country, would obviously be one of but nominal reciprocity; since, after *her own* dominions on the continent of America, there was no other place whence such exportations to her islands would ever be made. Thus it was that this third provision, combined with the two others, became necessary to enable the United States, whilst prosecuting a trade with the British West Indies, to place their navigation upon a footing, not of verbal merely, but of real equality. It was the latter alone that could lay the foundations of a compact between the two nations that could ever be satisfactory or lasting.

His lordship did not hold to such views, and the conversation was not prolonged. It is proper for me to add, that he requested it to be

understood that, whilst our proposals were declined, it was altogether in a friendly spirit, and that no complaint would be made, as had frequently been intimated, at our resorting to any just and rightful regulations of our own which we might deem necessary to meet theirs, in relation to these islands. I rejoined, that I thought it probable that some such regulations would, before long, in addition to those existing, be adopted.

Having earnestly endeavoured to fulfil all my instructions, in their full spirit of anxiety for a different result upon this subject, my duty appears now to have arrived at its close.

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No. 45.—1820, May 27: *Extract from Letter from Mr. Adams (Secretary of State) to Mr. Rush (Envoy, &c., at London).*

DEPARTMENT OF STATE, May 27, 1820.

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I have the honour of transmitting, herewith, a copy of the laws passed at the last session of Congress, which closed on the 15th instant, among which you will find one, page 116, entitled "An Act supplementary to an Act concerning Navigation," which has an important bearing upon our commercial relations with Great Britain.

The subject to which that Act relates has so recently and so fully been discussed between the two Governments, that it may be superfluous, though it cannot be unseasonable, to assure the British Cabinet, as you are authorised to do, that it was adopted with a spirit in nowise unfriendly to Great Britain; and that, if at any time the disposition should be felt there to meet this country by arrangements founded on principles of reciprocity, it will be met, on the part of the United States, with an earnest wish to substitute a system of the most liberal intercourse, instead of that of counter-prohibitions, which this Act has only rendered complete.

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No. 46.—1822, October 10: *Extract from Reprint of Letter from Mr. Rush (at London) to Mr. Gallatin (at Paris).*

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I have said that it does not appear that England has ever yielded up any exclusive rights to any part of the island.† Perhaps to this assertion there is an exception, and, as far as I have yet examined the treaties between England and France, but a single one. The exception will be found in the "treaty of peace, good correspondence, and neutrality in America," between the two nations, of November 16, 1686. By the 5th article of this treaty it is provided, "that both Kings shall enjoy all the rights &c they are now possessed of in America," France in point of fact holding settlements and possessions in Newfoundland at that time. By the 6th article it is stipulated "that the subjects of neither shall trade, fish &c *within the precincts of the other*, and if any ship be found so doing it shall be confiscated." Now, I deduce from this treaty an argument of some weight in favour of our position. It is seen that when

England intended to pass, and France to be put in possession of, an exclusive right, proper words are employed to that effect. The island, by the operation of the clauses cited, was placed in a certain state of division between the two countries, the right of each being made exclusive. Where shall we find any words of equivalent import and strength in the treaty or declaration of 1783? It may be proper to remark, that although this treaty of 1686 was binding upon England, it was complained of by English subjects as derogatory to the statute of 15. Charles 2nd, ch. 16, as that statute has prescribed several regulations relating to the mode of carrying on the fishery, to be observed in any of the harbours of Newfoundland. We may gather hence how jealous was the English feeling as to all positive grants of *exclusive* rights to any other nation, and how necessary express words must have been accounted to pass such rights.

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[Rush quotes from a "Report of the Lords of the Committee of Privy Council for trade on the subject of the Newfoundland fishery," dated the 17th March, 1786, and then says:]

I think that the whole tenor of these extracts leads to the conclusion for which we contend. They show that however England may have been inclined, for her own purposes or as matter of * * * accommodation to France, to withdraw her subjects from the western coast, she has never lost her right to resort there, in any manner that can bar us. *The committee are decidedly of opinion, that by the words of the treaty, your Majesty continues to be sole Sovereign of the Island of Newfoundland.* This is our argument. It is that upon which foreign nations will stand, and we in particular, under our convention with England of 1818. * * *

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[He refers to the statute 28 Geo. III, cap. 35: "An Act to enable His Majesty to make such regulations as may be necessary to prevent the inconvenience which might arise from the competition of His Majesty's subjects and those of the Most Christian King in carrying on the fishery on the coasts of the Island of Newfoundland."]

No. 47.—1823, January 22: Letter from Mr. Gallatin (United States Minister at Paris) to Viscount de Chateaubriand.

PARIS January 22. 1823.

SIR, Authentic information has been received by the Government of the United States that several of their fishing vessels were in the years 1820 and 1821, ordered away from their fishing stations on the western coast of Newfoundland, within the limits secured to them by the convention with Great Britain of October 20. 1818, by armed vessels of France, and upon the threat of seizure. I have not yet been informed whether the same proceeding was repeated in the year 1822.

The President of the United States has no doubt that the commanders of those armed vessels did not correctly understand their orders, and has instructed me to make this representation to His

Majesty's Government, and to request that those orders may be rectified for the future. I beg leave to call your Excellency's early attention to that subject, and have the honour to enclose a copy of the article of the convention above mentioned which relates to the fisheries.

I request your Excellency to accept &c &c.

(Signed)

ALBERT GALLATIN.

No. 48.—1823, *February 28: Letter from Viscount de Chateaubriand to Mr. Gallatin.*

PARIS le 28. fevrier 1823.

MONSIEUR, Vous m'avez adressé avec la lettre que vous m'avez fait l'honneur de m'écrire le 22. janvier, le premier article d'une convention conclue le 20. octobre 1818, entre les États Unis et la Grande Bretagne. Cet article stipule que les habitants des États Unis auront, en commun avec les sujets de Sa Majesté britannique, le droit de prendre, sécher, et conserver le poisson sur une partie des côtes de Terre Neuve, et sur celles des Iles Madeleines et du Labrador.

L'objet de la communication que vous m'avez faite étant d'obtenir que les pêcheurs américains ne soient point troublés par les vaisseaux armés de la France, dans les limites que leur ont été garanties par cette convention, je crois devoir examiner avec vous, Monsieur, quelles ont été les conventions qui avaient été antérieurement faites entre la France et les États Unis, sur l'exercice du droit de pêche dans les mêmes parages.

Les États Unis s'étaient engagés par l'article 10 du traité conclu entre eux et la France le 6. février 1778, à ne jamais troubler les sujets du Roi Très Chrétien dans la jouissance et l'exercice du droit de pêche sur les bancs de Terre Neuve, non plus que dans la jouissance indéfinie et exclusive qui leur appartenait sur la partie des côtes de cette île désignée dans le traité d'Utrecht.

Une disposition analogue fut insérée dans la convention conclue le 30. septembre 1800 entre les deux Puissances, et l'article 27 déclare qu'aucune des deux nations ne viendra participer aux pêcheries de l'autre sur ses côtes, ni la troubler dans l'exercice des droits qu'elle a maintenant, ou qu'elle pourrait acquérir sur les côtes de Terre Neuve, dans le Golfe St. Laurent, où partout ailleurs sur les côtes d'Amérique au nord des États Unis.

Avant que ce dernier traité fût conclu entre la France et les États Unis, la France jouissait du droit de pêche et de sécherie sur les côtes septentrionales et occidentales de Terre Neuve, dans les limites successivement déterminées par ses traités avec l'Angleterre, savoir: par l'article 13 du traité d'Utrecht de 1713, par l'article 5 du traité de 1763, et par l'article 5 du traité de 1783. Les États Unis après avoir reconnu le droit de la France, et après avoir déclaré dans l'article 10 du traité conclu avec elle en 1778, qu'ils ne la troubleraient jamais dans sa jouissance indéfinie et exclusive, ne pouvait modifier que de concert avec elle leurs premiers engagements sur ce point. La convention qu'ils ont conclue en 1818 avec l'Angleterre n'a pas changé leurs rapports avec la France; et lorsqu'ils ont obtenu de

l'Angleterre la liberté de pêcher sur une partie des côtes de Terre Neuve, ils n'ont pu acquérir en effet, qu'une liberté nécessairement limitée par leurs propres engagements envers la France, et par la déclaration qu'ils avaient faite de ne pas la troubler dans l'exercice de ses droits, déclaration renouvelée dans la convention conclue en 1800 entre les États Unis et la France.

La durée de cette convention n'était, il est vrai, que de 8 années; et après ce terme elle a cessé d'être en vigueur. Mais les anciens droits qu'elle avait reconnus ne pourraient pas se trouver détruits, parceque le temps de son exécution était expiré; car ces droits existaient antérieurement: ils n'étaient pas l'effet d'une concession de la part des États Unis; et l'article 10 du traité de 1778, où ces droits avaient déjà été rappelés, ne faisait qu'en constater l'authenticité, puisqu'il reconnaissait que la jouissance indéfinie et exclusive de la pêche sur une partie des côtes de Terre Neuve appartenait à la France conformément au véritable sens des traités d'Utrecht et de Paris.

La question étant ramenée à ce point, je dois, Monsieur, considérer dans le nouvel article dont vous m'avez donné communication deux parties très distinctes.

La France n'a aucune observation à faire contre l'exercice du droit de pêche et de sécherie des Américains sur la côte méridionale de Terre Neuve. Elle même n'a jamais joui du droit de pêche sur ce point; et elle ne peut avoir rien à revendiquer.

Quant à la jouissance de la pêche sur la côte occidentale, les États Unis s'étaient engagés envers la France dès l'année 1778 à ne jamais la troubler dans l'exercice de ce droit. Ils avaient même déclaré à cette époque, qu'ils regarderaient la jouissance de la France comme indéfinie et exclusive. Tant que cet engagement subsiste, il doit être respecté; il doit être la base des instructions données par l'un et l'autre Gouvernement à leurs pêcheurs, et aux commandants de leurs stations maritimes; et un tel engagement ne pourrait être modifié que de concert entre les deux Puissances.

Je vous prie, Monsieur, de vouloir bien faire part à votre Gouvernement de la communication que j'ai l'honneur de vous faire en réponse à la note que vous m'avez adressée. Cette communication le portera sans doute à donner des ordres pour prévenir les difficultés auxquelles pourrait donner lieu quelque méprise sur l'application des traités.

Agréez, Monsieur, les assurances &c &c

(Signé)

CHATEAUBRIAND.

No. 49.—1823, March 14: *Letter from Mr. Gallatin to Viscount de Chateaubriand.*

PARIS, March 14. 1823.

SIR, I had the honour to receive your Excellency's letter of the 28th of February in answer to mine of the 22nd of January, on the subject of the fisheries on the western coast of the Island of Newfoundland.

The right claimed by the United States on that part of the coast, does not embrace that of drying and curing fish on shore, which is there enjoyed by France to the exclusion of the Americans; but they

contend for the liberty to take fish of every kind on the said coast from Cape Ray to the Quirpon Islands, though not to the exclusion of the French who have also the same right there. The United States therefore only insist that the right thus enjoyed by France, that of taking fish on the portion of the coast above mentioned, is not exclusive.

Your Excellency has appealed in support of the exclusive right claimed by France to treaties and conventions between her and the United States which are no longer in force, and seems to argue as if the engagement contracted by one of those was nevertheless still obligatory on America. It is at the same time asserted that this exclusive right, being derived from prior treaties, existed before those made between the two countries. This appears to me the true and only question which can possibly be a subject of discussion. But how it can be maintained that the United States are still bound
 104 either by the 10th article of the treaty of 1778, or by the 27th article of the convention of 1800; that a treaty which is no longer in force is still in part binding on one of the parties, is not easily understood.

It was agreed by the 10th article of the treaty of 1778, "that the United States, their citizens, and inhabitants should never disturb the subjects of the Most Christian King, in the enjoyment and exercise of the right of fishing on the banks of Newfoundland, nor in the indefinite and exclusive right which belonged to them on that part of the coast of that island which is designated by the treaty of Utrecht, nor in the rights relative to all and each of the isles belonging to H.M.C. Majesty; the whole conformable to the true sense of the treaties of Utrecht and Paris."

It must in the first place be observed that the part of the coast of Newfoundland which was designated by the treaty of Utrecht, was on the eastern and not on the western side of that island, that it extended from Cape Bonavista to the Quirpon Islands, and that it did not embrace any portion whatever of the western coast from the Quirpon Islands to Cape Ray which is now in question. The article having no reference to any right of fishing which might thereafter be acquired on any other part of Newfoundland by France, either by exchange or otherwise, the obligation then contracted by the United States does not apply to the western coast.

Supposing however, for the sake of argument, that the condition might by implication be considered as having after the treaty of Paris of 1783 become applicable to the coast in question, still the engagement could have had no longer duration than the treaty of 1778, of which it made part. The United States and France had not it in their power by that treaty to alter the true sense and meaning of that of Utrecht contracted between France and Great Britain. All they could do was to agree that the United States should be bound to give it the construction desired by France. Whether considered as making an alteration in her favour, or what from the whole tenor of the article is very doubtful, as declaratory of what, in the opinion of both parties, was the true intention of antecedent treaties, the obligation on the United States to abide by that engagement, or by that opinion, ceased to be binding on them the moment that the treaty of 1778 was abrogated.

It is not presumed that your Excellency means to contend that that treaty is itself yet in force. Without referring to antecedent facts or to the subsequent uniform conduct of both Governments, the 2nd article of the convention of 1800, and the modification inserted in its ratification, by which the parties expressly renounced all pretensions which might be derived from former treaties, are sufficient to remove every doubt on that question. The 27th article of that convention affords an additional proof, if any was wanting, that the parties considered the 10. article of the treaty of 1778 as making no exception, and as being no more binding than any other part of that treaty; since it would have been unnecessary, had it been still in force, to insert that provision in the convention. And relating to the same subject, that 27. article has at all events superseded the 10. article of the treaty of 1778 even supposing what it is impossible to establish, that this had survived all the other conditions of that treaty.

Recurring then to the stipulations of 1800, it will be seen that the United States were no longer willing to renew that by which they had engaged in 1778 to consider as the exclusive right of France to fish on any part of the coast of Newfoundland. The provisions of the 27th article are in the following words:

Neither party will intermeddle (in the French copy "*ne viendra participer*") in the fisheries of the other on its coasts, nor disturb the other in the exercise of the rights which it now holds or may acquire on the coast of Newfoundland, in the Gulf of St. Lawrence, or elsewhere on the American coast northward of the United States. But the whale and seal fisheries shall be free to both in every quarter of the world.

Not only the word "exclusive" is not to be found in the part of the article which relates to Newfoundland, but it is evident from the tenor of the whole, that it was not intended by either party to recognise any such exclusive right in that quarter. There is an express distinction made between the coasts of each country, and those of Newfoundland and elsewhere. When speaking of the first, both parties respectively engage not to intermeddle with, not to participate in the fisheries of the other. Instead of this they only agree not to disturb each other in their rights on the coast of Newfoundland, clearly intimating that to participate was not to disturb; since had it been otherwise, the expressions "not to intermeddle," "not to participate," would have been preserved, and made applicable to the fisheries on that coast, as well as to those on the coast of each country. It would indeed be preposterous to suppose that the United States, by agreeing not to disturb France in the exercise of the rights which she might acquire anywhere on the coast of Newfoundland in the Gulf of St. Lawrence or elsewhere on the American coast northward of the United States, engaged not to participate in such fisheries, and to consider as exclusive the rights which might be acquired by France; since this would have been tantamount to a renunciation on their part of nearly the whole of the fisheries they then enjoyed, and to which they had an indisputable right. But the article makes no distinction whatever between the rights then held and those which might be thereafter acquired by France. If these therefore could not be exclusive, neither those she then held were recognised as such by the article.

I have alluded to those stipulations only as connected with those of 1778 to which they had been substituted. They have as well as

the convention in which they were inserted and all the preceding treaties between France and the United States, ceased to be in force. Nothing remains of the obligations formerly contracted by both countries on the subject of the fisheries; and the question recurs which is stated in part of your Excellency's letter, whether independent of any such former stipulations, and by virtue of any treaty antecedent to the right of the United States to take fish on the western coast of Newfoundland, France had there an exclusive right.

That it was not viewed as such by either the United States or 105 Great Britain is sufficiently evident from the article in the convention of 1818, of which I had the honour to enclose a copy to your Excellency. And after a most attentive perusal of the treaties alluded to, I have been unable to discover on what ground the presumed exclusive right was founded. It would be premature to enter into that discussion at this time, and until the special treaty stipulations and arguments by which the claim is intended to be supported shall have been communicated, whenever it may suit your Excellency's convenience to make that communication, the considerations which may be urged by France will receive all the attention to which they are so justly entitled, and be discussed in the most amicable temper. But the United States cannot in the meanwhile, and until the question shall have been settled, order or advise their citizens to abstain from what they must until then consider as their just right, the liberty to participate in common with the French, and without disturbing them, in the fisheries on the western coast of Newfoundland, which particularly in their connection with those of the coast of Labrador are of primary importance to them. It is therefore, my duty to renew my remonstrances against the proceedings of His Majesty's armed ships in that quarter, and to call again your Excellency's most earnest attention to the subject.

Whatever may be the extent of the rights of France on that coast, whether exclusive or not, they are only those of taking and drying fish. The sovereignty of the Island of Newfoundland, on which she had till then possessions, was expressly ceded by the treaty of Utrecht to Great Britain, subject to no other reservation whatever but that of fishing as above mentioned, on part of the coast. The jurisdiction and all the other rights of sovereignty remained with and belonged to Great Britain and not to France. She has not therefore that of doing herself on that coast, what may be termed summary justice, by seizing or driving away vessels of another nation, even if these should in her opinion infringe her rights. Such acts of authority which may be lawful when performed within the acknowledged jurisdiction, become acts of aggression when committed either on the high seas, or anywhere else without the jurisdiction of the Power that permits them. No Government has more strenuously contended for that principle than that of France: none has been more justly tenacious of the rights of her merchant ships, or has more efficaciously protected them and their flag against any supposed aggression of that nature. I may therefore appeal with confidence to your Excellency, when, reserving entire the right to the indemnities which may be justly claimed for the injuries already sustained on that account, I beg leave to request that positive and immediate orders may be given to the officers of His Majesty's navy, that the fishermen of the United

States shall not be disturbed hereafter, nor until an amicable arrangement shall have been made on that subject.

I request your Excellency to accept &c &c &c

(Signed) ALBERT GALLATIN

No. 50.—1823, April 2: *Letter from Mr. Gallatin to Viscount de Chateaubriand.*

PARIS, April 2, 1823.

SIR, The last despatches received from my Government contain renewed and special instructions reminding me that the fishing season for the present year is rapidly approaching, and that the proceedings of the commanders of French armed vessels, in driving the American fishermen from a coast the sovereignty of which belongs to another Power, and over which France has no jurisdiction, are an aggression which cannot, after having been taken into serious consideration, be again renewed under the sanction of His Majesty's Government.

Having already anticipated these instructions, I can only call your Excellency's attention to my letter of the 14th of March, and respect the favour of an answer which I may be enabled to transmit to my Government.

I request your Excellency to accept &c &c

(Signed) ALBERT GALLATIN.

No. 51.—1823, April 5: *Letter from Viscount de Chateaubriand to Mr. Gallatin.*

PARIS le 5. avril 1823.

MONSIEUR, L'objet de la lettre que vous m'avez fait l'honneur de m'adresser le 14. mars, sur les pêcheries de Terre Neuve, a été d'abord d'établir qu'en vertu de l'article 13 du traité d'Utrecht qui assure nos droits de pêche sur les côtes de cette île, aucune partie de ces droits ne pouvait s'appliquer à la côte occidentale. Il serait peut-être permis, Monsieur, d'attribuer cette observation à l'inexactitude des cartes que vous auriez consultées; et je pense que des renseignements plus précis auront pu changer sur ce point votre opinion.

106 Vous ne regardez plus, Monsieur, comme des actes obligatoires les traités conclus en 1778 et en 1800 entre la France et les États Unis; et les stipulations qui s'y trouvent sur le droit de pêche vous paraissent dès lors ne plus avoir de vigueur aujourd'hui. Veuillez observer, Monsieur, que je n'ai point révoqué en doute votre observation générale sur la durée temporaire de l'un et l'autre traité. Je me suis borné à remarquer que les stipulations de celui de 1778 qui étaient relatives au droit de pêche appartenant à la France, n'étaient point une concession faite à la France par les États Unis; mais qu'elles n'étaient de leur part que la déclaration et la reconnaissance d'un droit antérieur; et que ce droit, nécessairement indépendant des traités où on le rappelait, ne pouvait point tomber en désuétude avec eux. J'ai dû conclure de la même observation que ce droit subsistait

encore depuis que les traités n'existaient plus, et j'ai ajouté que le Gouvernement des États Unis qui l'avait reconnu par deux traités successifs, n'avait eu depuis cette époque, aucun motif pour le révoquer en doute. Je vous ai enfin prié d'observer que jusqu'à ce que cet ordre de choses eût été modifié par un arrangement entre les deux Puissances, il devait être considéré comme toujours subsistant, et qu'il était à désirer que le Gouvernement fédéral prit des mesures pour éviter sur l'exercice de ce droit tout conflit de juridiction.

La réponse que vous m'avez fait l'honneur de m'adresser ne me paraît point détruire les observations que je vous avais faites le 22. janvier. J'ai recommandé depuis quelque temps au chargé d'affaires de France près le Gouvernement fédéral d'entrer avec lui en explication sur cet objet : je lui en écris encore ; et je dois me persuader, Monsieur, que les démarches qu'il est chargé de faire, parviendront, à écarter les malentendus et les inconvénients que vous paraissez craindre dans les lettres que vous m'avez fait l'honneur de m'adresser. Le Gouvernement français désire lui-même qu'ils soient évités ; et dans cette vue, il cherchera volontiers toutes les voies de conciliation qui pourront s'accorder avec l'exercice de ses droits.

Agrez Monsieur, les assurances &c &c &c

(Signé)

CHATEAUBRIAND

No. 52.—1823, April 15: *Letter from Mr. Gallatin to Viscount de Chateaubriand.*

PARIS, April 15, 1823.

SIR, I had the honour to receive your Excellency's letter of the 5th instant on the subject of the Newfoundland fisheries.

The observation in my letter of the 14th of March last, that the obligation contracted by the United States by the treaty of 1778, did not apply to the western coast of Newfoundland, was expressed in too general terms, and applies only to that part of the coast which extends from Cape Ray to Point Riche. However uncertain the position of this point, which I have not been able to find in any of the maps published before the treaty of Utrecht, it appears to have been understood by both parties to be somewhere on the western coast, and the right to fish between it and the Quirpon Islands, was therefore secured to France by that treaty. This does not however, affect the main arguments used in my letter, as I reasoned on the supposition that the treaty of 1778 was applicable to the whole western coast.

It was not denied that if France had an exclusive right to the fisheries in question prior to and independent of the treaty of 1778, that right is still in full force ; but I have contended that the stipulation then entered into was not renewed by the convention of 1800, and that if founded in error, the recognition of such right by the treaty above mentioned was at this time no more binding on the United States than any of its other conditions. I regret that my observations in that respect should have failed in producing any effect, but it is hoped that the chargé d'affaires of France at Washington has been instructed to give some answer to them, and to state the grounds on which independent of the treaty of 1778, the exclusive right claimed by her, is founded.

That conciliatory means should be found, which may be consistent with the exercise of its rights, is the earnest desire of the Government of the United States, as well as of that of France. It has already been explicitly stated that the forcible means to which she has resorted, are an aggression on those rights, and she will neither commit her own or injure the interests of her subjects, in abstaining with every necessary reservation, from similar proceedings, until a satisfactory arrangement shall have taken place.

I request your Excellency to accept &c &c.

(Signed) ALBERT GALLATIN.

No. 53.—1823, June 24: *Extract from Letter from Mr. Gallatin to Mr. J. Q. Adams.*

NEW YORK, 24th June, 1823.

SIR.—I arrived here this morning, after a passage of thirty-four days from Havre. Nothing had taken place at the time of my
107 departure which altered our relations with France. In a conference with Mr. de Chateaubriand on the 13th ult., I complained of the want of disposition evinced by France to arrange the subjects of difference between the two countries, and of the manner in which the question had been treated by her Government, and by him in particular. It is unnecessary to repeat to you what was said on the subject of the American claims; but I dwelt on his last letter to me respecting the fisheries, and told him that if he intended to preserve an amicable understanding with the United States, he must answer the arguments used in support of their claims, instead of simply saying that they did not alter his view of the subject, and, above all, suspend every act of aggression pending the discussion. I also adverted to his not having given any explanation on the subject of the second separate article of the commercial convention, and observed generally that that apparent determination on the part of the French Government to avoid every discussion had an unfriendly and offensive aspect, which could not fail ultimately to produce an unfavourable effect on our relations. What I said seemed to produce at least some momentary effect, and Mr. de Chateaubriand sent me, two days after our interview, the enclosed letters for Count de Menou, which may perhaps contain some instructions arising from that conversation. You need not, however, expect anything beyond words, or that justice shall be done in any respect. With respect to the fisheries, although France may abstain from positive aggression, and of this I have no assurances, she will again act as formerly unless fully satisfied that the Government of the United States will resist.

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No. 54.—1823, June 27: *Letter from Mr. Adams (United States Secretary of State) to Mr. Rush (Envoy at London).*

DEPARTMENT OF STATE, Washington, June 27, 1823.

SIR: Your despatches Nos. 265 and 275, enclosing copies of your correspondence with Mr. Gallatin concerning the question which has arisen with France in regard to the right of fishing on a certain part of the coast of Newfoundland, have been duly received.

The transactions which gave rise to this controversy occurred in the years 1820 and 1821, when several fishing vessels of the United States, on the coast and within the strictest territorial jurisdiction of the Island of Newfoundland, were ordered away by the commanders of French armed vessels upon the pain of seizure and confiscation. Two distinct questions arose from these incidents: one, upon the pretension of France to the *exclusive* right of fishing on that part of the coast of Newfoundland; and the other, upon the right of French armed vessels to order away vessels of the United States from places within the exclusive jurisdiction of Great Britain. In both these questions Great Britain had an interest and concern not less important than that of the United States; but the President, in the first instance, determined to address the complaint which the occasion required to the French Government alone. The motives for this forbearance were, to give the French Government the opportunity of disowning these acts of its officers, and of disclaiming any pretensions to the exclusive fishing right at the place where they had occurred, without implicating Great Britain at all in the transaction. This course of proceeding was thought to be most consistent with delicacy towards both those Governments, by avoiding towards France the appearance of recurring upon a question between her and us to the interposition of a third Power, and by abstaining towards Great Britain from calling for her interference with France in a difference which might be adjusted without needing the aid of her influence. This was the reason upon which the instructions to make representations on this subject were forwarded only to Mr. Gallatin, and that until now it has never been mentioned in the instructions from this department to you.

But the complaint to France has hitherto proved ineffectual, excepting to demonstrate that the pretensions of France to an exclusive right of fishing at the place referred to are without solid foundation, and that her intention of resorting to force to maintain this inadmissible pretension, though not yet unequivocally asserted, has been so far ascertained as to remove all scruple of delicacy with regard to the propriety of stating the case to the British Government, and calling upon them to maintain at once the faith of their treaty with us and the efficacy of their own territorial jurisdiction, violated by the exercise of force against the fishing vessels of the United States engaged in their lawful occupation under its protection.

The untenable character of the French claim and pretension has been so satisfactorily proved, as well in the correspondence between you and Mr. Gallatin as in that of Mr. Gallatin with the French Government, that it is altogether unnecessary for me to enter upon the discussion. I am not aware of anything that has escaped your attention in the development of our right to the free participation in the fisheries at the controverted points, and from the result of your oral communications with Mr. Robinson, in the course of your enquiries relating to this affair, it is not to be doubted that the whole contest will continue to be seen in its true light by Great Britain:

Copies are herewith transmitted to you of the correspondence between Mr. Gallatin in the execution of his instructions, with the Viscount de Chateaubriand, in which you will find all the argument that France has been able to adduce in support of her claims to the *exclusive* right of fishery. It completes the demonstration that

108 the pretension can not be supported. But you will see that Mr. de Chateaubriand, in his letter of the 5th of April last, while evading or abandoning the attempt of reply to Mr. Gallatin, with regard to the claim of *exclusive* fishery, says that he had *some time since* instructed the chargé d'affaires of France at this place to enter upon explanations with the Government of the United States concerning this object, and that he was then writing to him again about it. With regard to the exercise of force within the British jurisdiction the Viscount has given Mr. Gallatin no answer whatever; but Mr. Gallatin, in his letter to this department of 17th April, states that in a conversation with the Minister of Marine, to whom he knew the subject had been referred, that Minister "gave it as his opinion, in explicit terms, that France, being in possession of the exclusive right of fishing on the coast in question, inasmuch as she had not before the last occurrence been disturbed in it by the fishermen either of England or America, she had the right to retain such possession, and ought to continue to exercise that right by expelling any vessels that should attempt to participate in the fisheries." Mr. Gallatin had not ascertained whether the Viscount de Chateaubriand and the other Minister concurred in this opinion of the Minister of Marine, the candour and explicitness of which must be acknowledged, but the charge d'affaires of France here declares that he has received no instructions from his Government to give the explanations promised by the letter of Mr. Chateaubriand to Mr. Gallatin, and we should no longer be excusable for refraining from a representation of the whole case to the Government of Great Britain. The question concerning the jurisdiction belongs peculiarly to her. The documents cited by you, in your correspondence with Mr. Gallatin, show that the premises of the French Marine Minister, upon which he relies for the basis of his opinion, are as incorrect in point of fact as his conclusion is extraordinary in point of principle. The deliberate pretension to exercise force within purely British waters was unexpected on the part of France. We shall not, for the present, employ force to meet force, although that result was properly presented by Mr. Gallatin to the French Government as a consequence to be anticipated from the perseverance of their armed vessels in disturbing our fishermen. We respect the territorial jurisdiction of Great Britain in resorting to her for the effectual exercise of it to carry into execution her engagements with us.

The President desires that, in your conferences with the British Secretary of State, you will give him information of the present state of this concern between us and France. You will be careful to present it in the aspect the most favourable and friendly towards France that can be compatible with the effective maintenance of our own rights. It is probable that there may be no such interruption to our fishermen during the present season; and the occasion appears to be highly favourable for an adjustment of it to our satisfaction. Perhaps a mutual explanation and understanding between the British and French Governments concerning it, at this time, may render any resort to other measures unnecessary. But if, on discussion of the subject between them, France should not explicitly desist from both the pretensions to the exclusive fishery and to the exercise of force within British waters to secure it, you will claim that which the British Government cannot fail to perceive is due, the unmolested execution

of the treaty stipulation contained in the convention of October 20, 1818; and if the British Government admits the claim of France to *exclusive* fishery on the western coast of Newfoundland from Cape Bay [Ray] to the Quirpon Islands, they will necessarily see the obligation of indemnifying the United States by an equivalent for the loss of that portion of the fishery, expressly conceded to them by the convention, which, in the supposed hypothesis, must have been granted by Great Britain under an erroneous impression that it was yet in her power to grant.

I am, with great respect, Sir,

Your very humble and obedient servant,

JOHN QUINCY ADAMS.

Hon. R. RUSH, *Envoy Extraordinary and*
Minister Plenipotentiary of the United States, London.

No. 55.—1823, July 8: *Extract from Diary of Mr. John Quincy Adams.*

* * * * *

The Count de Menou came to inquire where were the Quirpon Islands; I showed him upon Mitchell's map. We had much conversation upon the subject of the French claim to exclusive fishery from them to Cape Ray. He said he had received further instructions from the Viscount de Chateaubriand on this affair, but there were still two previous instructions which he had not received. He saw it was an affair of great delicacy, and he did not see how they and we could enjoy a concurrent right of fishery on the same coast.

I told him the whole affair was a question between France and Great Britain, with which we had but a secondary concern. Great Britain was bound to maintain her own jurisdiction. And if she had conceded to us a right which she had already granted as an exclusive possession to France, she must indemnify us for it. The Count spoke also upon the subject of the maritime questions arisen from the war between France and Spain, upon which he said he should write to me.

* * * * *

109 No. 56.—1824, March 30: *Letter from Messrs. Huskisson and Stratford Canning to Mr. G. Canning (British Secretary for Foreign Affairs).*

No. 5.

BOARD OF TRADE, March 30, 1824.

SIR, The American plenipotentiary in a conference which we held with him yesterday, communicated the enclosed papers in explanation of the circumstances concerning which he has received the instructions of his Government with reference to the Newfoundland fisheries.

The general purport of this communication is that the French lay claim in virtue of treaties with Great Britain to an exclusive enjoy-

ment of the fisheries on the northern and western coasts of Newfoundland, and under this claim have taken upon themselves to exclude the citizens of the United States from that part of the fishery which is carried on between Cape Ray and the Quirpon Islands, along the whole western coast of Newfoundland, the enjoyment of which in common with His Majesty's subjects was conceded to the United States by the convention of October 1818.

The American plenipotentiary appears to be of opinion that His Majesty's Government is bound either to make the rights which his country has obtained under that convention, in common with His Majesty's subjects, respected by the French, or in case of the French substantiating their exclusive claim, to make compensation to the United States for the loss of so large a portion of their fishing ground.

It strikes us on a first view of the case as presented by Mr. Rush that the circumstances are not of a nature to be settled by negotiations between him and us; but we defer submitting any distinct opinion on this point, until we have made enquiry into the state of the regulations under which the fishery is practically carried on along the western coast of Newfoundland.

We have the honour to be, Sir, your most obedient humble servants

W. HUSKISSON
STRATFORD CANNING.

To The Right Honble GEORGE CANNING
&c &c &c

No. 57.—*Statement respecting Newfoundland Fishery, given in by Mr. Rush.*

By the 13th article of the treaty of Utrecht of 1713, the sovereignty of the Island of Newfoundland was ceded by France to Great Britain. France being allowed the right of fishing and of drying fish from Cape Bonavista, on the eastern coast, to the place called Point Riche, but on no other parts.

The provision of this treaty were renewed and confirmed by that of Aix-la-Chapelle of 1748, and also, as far as relates to Newfoundland and the French fisheries on its coast, by the treaty of Paris of 1763.

By the treaty of peace between the United States and Great Britain of September 3rd 1783, article 3, it is stipulated that "the inhabitants of the United States shall have liberty to take fish of every kind on *such part of the coast of Newfoundland as British fishermen shall use*, but not to dry or cure the same on that island.

By the treaty of the same date between Great Britain and France, articles 4th and 5th, the right of Great Britain to this island was confirmed, (the small adjacent islands of St. Pierre and Miquelon being excepted), and the right of the French to fish on a certain part of the eastern coast as above recited, was exchanged for that of fishing on the remainder of the eastern, and on the whole of the western coast, as far down from the north as Cape Ray. See also the declaration and counter-declaration of the plenipotentiaries of the two Governments annexed to this treaty, which are material as respects fishing rights.

By the treaty of Paris of 1814 between Great Britain and France, the former restores to the latter, the colonies, fisheries, factories, and establishments of every kind, which France possessed on the 1st of January 1792, in the seas or on the continents of America, Asia, and Africa, with the exception of Tobago, St. Lucia, and the Isle of France. By the 13th article of this treaty it is declared that "as to the French right of fishery on the Grand Bank of Newfoundland, on the coasts of the island of that name, and the adjacent islands, and in the Gulf of St. Lawrence, everything shall be restored to the same footing as in 1792."

Finally by the convention of October 20, 1818, between the United States and Great Britain, it is provided, article 1st, that "the inhabitants of the said United States shall have for ever, *in common with the subjects of His Britannic Majesty*, the liberty to take fish of every kind on that part of the southern coast of Newfoundland, 110 which extends from Cape Ray to the Rameau Islands, and on the *western and northern coast*, from the said Cape Ray to the Quirpon Islands." By the same convention, the United States are allowed to *dry and cure* fish on the *southern* part of the coast of this island, as above described, but not on the *western* coast.

From the preceding statement it follows, that the French have the right of taking and drying fish on the western coast of the Island of Newfoundland. The United States claim the right of *taking* fish on the same coast. But this the French deny, saying that the right both of taking and drying belongs to France *exclusively*. Their cruisers have accordingly in 1820 and 1821, ordered off the American fishing vessels, whilst within the acknowledged jurisdiction of the coast, threatening them with seizure in case of refusal.

It may be that France will allege in support of her doctrine, that by her treaty of September 3, 1783, with Great Britain, which gave her the right of fishing and drying fish on the western coast of the island, it was intended that this right should be exclusive; that the words of the treaty, and, above all, those of the declaration annexed to it, show this to have been the meaning, as France obtained the western coast *in exchange* for a part of the eastern coast with a view to prevent quarrels between the French and British fishermen. To this end, as it may perhaps be also alleged, the words of the declaration provide that British subjects were not to "interrupt the French fishery on this coast by their competition in any manner;" and further provide that the "fixed settlements" which had been formed there (by British subjects it is presumed) *should be removed*.

The United States will insist on the other hand, that Great Britain never could have intended by her treaty of 1783 with France to grant a right of fishing and of curing fish on the western coast to French fishermen *exclusively*, but that the right of British subjects to resort there *in common*, must necessarily be implied. That a contrary construction of the instrument cannot be received, the *sovereignty of the whole island* having been fully vested in Great Britain, and even confirmed by this very treaty. That it can never be presumed that she intended so far to renounce, or in any wise to diminish this sovereignty as to exclude her own subjects from any part of the coast. That no positive grant to this effect is to be found in the treaty, and that the claim of France to an exclusive right, a claim so repugnant to the sovereign rights of Great Britain, can rest on noth-

ing less strong than a positive grant. That all that the words contained in the *declaration* to the treaty can be construed to mean is "that British subjects should never whilst exercising *their* right, improperly or injuriously" interrupt by their competition "the enjoyment of the *French* right. Furthermore the United States cannot suppose, that Great Britain by the convention of the October 20, 1818, above recited, would ever have agreed that the inhabitants of the United States should have (for a just equivalent contained in the convention) the right or the liberty to take fish on the very coast in question *in common with British subjects*, but under the natural conviction and belief that British subjects had the liberty of resorting there; and if they had, the claim of France to drive away the fishermen of the United States cannot stand.

The above summary may serve to present the general nature of the question which has arisen between the United States and France respecting fishing rights, and which Great Britain will doubtless desire to see settled in a manner satisfactory to the United States. It is obvious that if Great Britain cannot make good the title which the United States hold under her to *take* fish on the western coast of Newfoundland, it will rest with her to indemnify them for the loss. Another question which it is supposed will also be for her consideration is, how far she will consider it just or proper that France should be allowed to drive or order away vessels of the United States from a coast which is clearly within the jurisdiction and sovereignty of Great Britain.

August, 1822.

Since the foregoing summary was drawn up, and which, as will be seen, was in part hypothetical, a correspondence which has taken place between the Minister of the United States at Paris, and the French Government, will serve to show more distinctly the grounds upon which France claims to evict the United States from so essential a portion of their fishing rights on the coast of this island. The correspondence consists of four letters from Mr. Gallatin to Viscount Chateaubriand dated January the 22nd, March the 14th, April the 2nd, and 15th, 1823; and two from Viscount Chateaubriand to Mr. Gallatin dated February the 28th and April the 5th 1823.

Copies of these letters are annexed. For the articles of the treaties (no longer however in force) between the United States and France to which Viscount Chateaubriand alludes, see volume 1. of the *Laws of the United States*, edition of 1815, pages 80 and 131.

March, 1824.

No. 58.—1824, May 3: *Letter from Mr. Rush (United States Minister at London) to Mr. G. Canning.*

The undersigned Envoy Extraordinary and Minister Plenipotentiary from the United States, has received the instructions of his Government to lay before Mr. Canning, His Majesty's Principal Secretary of State for Foreign Affairs, the following case.

111 By the first article of the convention between the United States and Great Britain, concluded at London on the twen-

tieth day of October 1818, it is, amongst other things, provided, that the "inhabitants of the said States shall have, for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland, which extends from Cape Ray to the Rameau Islands, on the western and northern coasts of Newfoundland from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours, and creeks, from Mount Joly on the southern coast of Labrador to and through the Straits of Belleisle, and thence northwardly indefinitely along that coast."

After the ratification of the above convention, the fishermen of the United States proceeded, according to its stipulations to take fish on the western and northern coast of Newfoundland between the limits of Cape Ray and the Quirpon Islands; but, in the course of the years 1820 and 1821 whilst pursuing in a regular manner their right to fish, within these limits, and being also, within the strictest territorial jurisdiction of the island, these fishermen found themselves ordered away by the commanders of the armed vessels of France, on pain of seizure and confiscation of their fishing vessels.

This order was afterwards ascertained to rest upon a claim set up by France to an exclusive fishery upon that part of the coast of the island, a claim conceived by the Government of the United States to be without just foundation, and in violation of the rights of the citizens of the United States, as settled by the foregoing article of the convention of 1818.

The Government of the United [States] forebore at first to make any representation of the above occurrence, so injurious to the interests as well as rights of their citizens, to the Government of His Britannic Majesty, cherishing the hope that the difficulty which appeared to have arisen would be removed on a fit representation to the Court of France. A correspondence accordingly took place upon the subject, between the American plenipotentiary at Paris, and the Minister of Foreign Affairs of His Most Christian Majesty, which, has not terminated in a manner satisfactory to the Government of the United States, it appearing from it that France distinctly asserts an exclusive right of fishing within the limits in question. Copies of this correspondence, consisting of three letters from Mr. Gallatin dated the 22nd of January the 14th of March and the 2nd of April 1823, and two letters from Viscount Chateaubriand dated February the 28th and April the 5th of the same year, the undersigned has the honour to inclose for the more full information of Mr. Canning. It will be seen that the United States claim for their citizens the right to *take* fish only, not to cure and dry the same, within the limits from which France would interdict them, and that their claim is in common with the subjects and fishermen of His Britannic Majesty. The undersigned has not been furnished with any affidavits or other formal proofs to substantiate the fact of the fishing vessels of the United States having been ordered away by French vessels of war as above mentioned, since it will be seen by the notes of the French Minister of State that no question is raised upon that point, but that the fact itself is justified under a claim of right, thereby rendering superfluous all extrinsic evidence of its existence. The grounds of justification, assumed by France, are believed by the Government of the United States to be satisfactorily refuted by their plenipotentiary,

in the correspondence enclosed, and although France has placed her claim as against the United States upon the footing of treaties once subsisting between the two Powers, it will not fail to be perceived, that she also asserts in the most unqualified manner her anterior, unlimited and exclusive right to the fishery in question under the treaties of Utrecht and of Paris; consequently as preexistent to her former treaties with the United States, and paramount all title in any other Power. In the note of Viscount Chateaubriand of the 5th of April, it is stated that the chargé d'affaires of France at Washington had been instructed to enter upon explanations with the Government of the United States concerning this interest, and was then about to be again written to on the same head; yet it becomes the duty of the undersigned to say, that no adjustment of the subject has taken place, and that the fishing vessels of the United States still remain under the interdiction put upon them by the cruisers of France.

The undersigned in fulfilling the orders of his Government to bring under the official notice of Mr. Secretary Canning the circumstances of the above case, does so in full reliance that, through the friendly dispositions of His Majesty's Government, the whole subject will receive such attention as it will be seen to merit. The United States seek only the fair and unmolested enjoyment of the fishing rights which they hold at the hands of Great Britain under the convention of 1818, satisfied that Great Britain, whether as regards the guarantee of those rights, or the maintenance of her own sovereign jurisdiction over this island and its immediate waters, will take such steps as the occasion calls for, and above all as are appropriate to the just and amicable intentions, which it may be so confidently supposed will animate the Government of His Most Christian Majesty, as well as that of His Britannic Majesty, towards the United States, touching the full rights of the latter under the Convention aforesaid.

The undersigned prays Mr. Canning to accept the assurances of his distinguished consideration.

RICHARD RUSH.

LONDON MAY 3d. 1824.

1 George Street Portman Square.

The Rt Hon GEORGE CANNING

His Majesty's Principal Secretary of State for Foreign Affairs.

112 No. 59.—1824, May 6: Letter from Mr. Stratford Canning to Mr. G. Canning.

LONDON, May 6th 1824.

The Rt Honble GEORGE CANNING,

SIR, Agreeably to your directions communicated to me this evening by Mr. Planta, I have examined with attention the note and accompanying documents submitted to you by the American envoy under date of the 3d instant. It appears from these papers that the Govt. of the United States desire the intervention of Great Britain in order to obtain for their citizens the actual enjoyment of the right to take fish on the western coast of Newfoundland, in virtue of their con-

vention with His Majesty of October, 1818,—the Government of France denying that right, and the armed vessels of France being described as having interfered by force to prevent the exercise of it by American fishermen.

In considering the subject matter of Mr. Rush's statement & the annexed correspondence between M. Gallatin and Viscount Chateaubriand, two leading points present themselves for enquiry; namely, the extent, as far as relates to the question raised by France,—of the American claim upon Great Britain, and, secondly, the nature of the French pretension to an exclusive right of fishing on the western coast of Newfoundland.

The former of these questions may be answered by a reference to the terms of the convention already named.—The first article of that instrument stipulates that “the inhabitants of the United States shall have for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on . . . the western and northern coasts of Newfoundland from Cape Ray to the Quirpon Islands.”

It is obvious from these expressions that whatever right to take fish is enjoyed by British subjects on the western coast of Newfoundland, the same is to be equally enjoyed by the citizens of the United States, in so far as depends on the consent and authority of the British Government. It follows that within the jurisdiction of His Majesty, as Sovereign of Newfoundland, the same local protection, which secures to British subjects the peaceable exercise of their fishing rights on the coast, ought also to be extended to the citizens of the United States, though it does not appear that any engagement amounting to a guaranty of that right, in the proper sense of the term, has ever been contracted towards them by the Crown of Great Britain.—

The second point of enquiry, if viewed only in connection with the correspondence presented by Mr. Rush, appears to admit of a plain and conclusive answer.—The pretension advanced by Viscount Chateaubriand, whatever be the grounds on which it virtually rests, is not brought openly to bear against the rights of the British, but solely against those of the United States. It is true that the French Minister has endeavoured to establish that pretension on grounds independent of the actual validity of treaties at any time subsisting between the United States and France; but this argument will be found to stop short of Great Britain, amounting only in substance to an exclusion of the United States from any participation in the disputed privilege, in consequence of their having recognised, to their own prejudice, the claim of France, in the full extent attached to that claim by the French Government, and having thereby incapacitated themselves from reaping any benefit, as to the western coast of Newfoundland, except by consent of France, from their subsequent agreement with Great Britain. The argument of M. de Chateaubriand is, in fact, an argument *ad verecundiam*. The sum of it is this: admitting that the treaties by which the American Government bound itself to recognise and respect the right alleged by France, are no longer in force, the just and powerful reasons which formerly prevailed to obtain from the American Govt. a recognition of the right, and on which the treaty-stipulations were grounded, ought, never-

theless, to operate on the conduct of that Government with equal force at the present period.—

If this be a correct view of the matter, it remains for the American Government to prove its title to the intervention of Great Britain, by showing how that title is to be reconciled with the dis-qualification resulting from its own anterior engagements with France, engagements to which Great Britain is no party, and the very basis of which was, in truth, hostility to her power.—

But there is another case to be provided for. The claim of France to take fish on the western coast of Newfoundland may turn out to be exclusive with respect to Great Britain as well as to the United States. As to how far it may be just and necessary for Great Britain to admit, or possible for France to make good such a pretension, in virtue of treaties, I must take the liberty of referring you to the report, No. 7, addressed to you on the 15th. ultimo by Mr. Huskisson and myself. Whatever information we were able to collect on this branch of the subject is substantially contained in that statement.—

In the event of the supposed claim being either at once admitted, or fairly substantiated in such manner as to exclude the British no less than the American fishermen from the limits assigned to France it is not improbable that His Majesty's Ministers may feel themselves bound in equity to allow the Americans an equivalent in some other quarter, unless they can prevail on France to waive her extreme right and to consent to their participating henceforward in the west-coast fisheries of Newfoundland. It is not to be imagined that the British plenipotentiaries in framing the convention of 1818, could have meant to concede, in return for concessions made by

113 America, a privilege already made over *in toto* to another Power, even to the exclusive exclusion of British subjects; though it is not impossible, that the clause relating to the western coast of Newfoundland may have been inserted with a knowledge of the French claim, and intended only to have an eventual and contingent effect.—

Supposing that doubts were entertained by His Majesty's Ministers as to the real character of the French title, notwithstanding the conviction of its limited nature expressed by the American envoy at Paris, you might perhaps think it advisable, sir, for the readier satisfaction of all parties, to communicate on the subject directly with the French Govt. But if, on the contrary, it be determined, according to the known merits of the case, to reject the *exclusive* claim of France, as obligatory on the British Govt, the American Minister may be entitled to expect that such determination should be made known to him.

On either supposition the rights and dignity of His Majesty's Crown would seem to require that no French officer should be allowed to exercise authority over the citizens of the United States while engaged, under treaty with Great Britain in fishing within the limits of His Majesty's exclusive jurisdiction, as Sovereign of the Island of Newfoundland.—

Recurring, however, to the correspondence between Viscount Chateaubriand and Mr. Gallatin, it still remains to be seen whether it be the intention of the French Government to maintain an exclusive claim against Great Britain as well as against the United States; and while this uncertainty prevails, and the fisheries in question are

practically open to British subjects, His Majesty's Govt. may not feel themselves called upon to originate a discussion on the subject with France, but deem it sufficient, in the first instance, to issue such orders to the authorities at Newfoundland, as may secure a proper degree of protection to the American, in common with the British fishermen, within the limits of His Majesty's peculiar jurisdiction.—

You will probably be of opinion that the conflicting claims of France and the United States, however to be regretted as sources of disagreement between two Powers in friendship with His Majesty, can only be decided between the parties themselves.—

I have &c.

(Signed) STRATFORD CANNING.

No. 60.—1825, January 3: *Letter from Mr. Addington (British Minister at Washington) to Mr. G. Canning.*

No. 7.

WASHINGTON 3d January 1825.

SIR, Thinking it might be agreeable to His Majesty's Government to be made acquainted with the determination of that of the United States on the subject of the further prosecution of the negotiations entered upon last year between the two countries, I ascertained, a few days since, from the American Secretary of State, that there was no intention on the part of the President to pursue those negotiations any further for the present.—That magistrate would be too much occupied, Mr. Adams said, during the remainder of his term in winding up his public administration: besides which Mr. Rush was on the eve of returning to his own country, nor would a successor be appointed to him by the present President.

The negotiations might therefore be considered as suspended for the present.

I have the honour to be with the highest respect, Sir,

Your most obedient humble servant,

H. U. ADDINGTON.

The Right Honble GEORGE CANNING,
&c &c &c

No. 61.—1830, October 6: *Circular of the United States' Treasury Department to the Collectors of the Customs.*

TREASURY DEPARTMENT, 6th October 1830.

SIR, You will perceive, by the proclamation of the President, herewith transmitted, that, from and after the date thereof, the Act, entitled, "An Act concerning Navigation," passed on the 18th of April, 1818; an Act, supplementary thereto, passed the 15th of May, 1820; and an Act entitled "An Act to regulate the Commercial Intercourse between the United States and certain British Ports," passed on the 1st of March 1823; are absolutely repealed; and the ports of the United States are opened to British vessels and their cargoes, arriving from the ports of the British colonial possessions in the West Indies, on the continent of South America, the Bahama Islands, the

Caicos, and the Bermuda or Somer Islands; also from the islands, provinces, or colonies, of Great Britain, on or near the North American continent, and north or east of the United States. By virtue of the authority of this proclamation, and in conformity with the arrangement made between the United States and Great Britain, 114 and under the sanction of the President, you are instructed to admit to entry such vessels, being laden with the productions of Great Britain, or her said colonies, subject to the same duties of tonnage and impost, and other charges, as are levied on the vessels of the United States, or their cargoes, arriving from the said British colonies. You will also grant clearances to British vessels, for the several ports of the aforesaid colonial possessions of Great Britain, such vessels being laden with such articles as may be exported from the United States in vessels of the United States. And British vessels, coming from the said British colonial possessions, may also be cleared for foreign ports and places, other than those in the said British colonial possessions, being laden with such articles as may be exported from the United States in vessels of the United States.

I have, &c.

S. D. INGHAM.

The Collectors of the Customs.

No. 62.—1832, July 27: *Extract from Dispatch from Lord Goderich to Sir Thomas Cochrane, Governor of Newfoundland, with instructions in connection with the Establishment for the first time of a Legislative Assembly.*

DOWNING-STREET, 27 July 1832.

SIR, I have the honour herewith to transmit to you His Majesty's Commission under the Great Seal, appointing you Governor of the Island of Newfoundland, together with your General Instructions under the Royal Sign Manual, referred to in that Commission.

As this is the first occasion on which provision has been made for convening of a Legislative Assembly for the Island of Newfoundland, the importance of that measure requires that I should not limit myself to the merely formal duty of placing you in possession of these instruments, but that I should shortly explain the grounds and the nature of the policy by which His Majesty's councils on this subject have been directed.

It were superfluous at the present day to enquire into the wisdom of that system which was pursued for so many years towards the ancient colony under your government, the fundamental principle of which was to prevent the colonisation of the island, and to render this kingdom the domicile of all persons engaged in the Newfoundland fisheries. The common interest or convenience of those persons virtually defeated the restrictions of the various statutes respecting them, long before Parliament admitted the necessity of repealing those laws. A colony gradually settled itself along the shores of the island, and has of late years assumed a rank of no inconsiderable importance amongst the foreign possessions of the British Crown; but notwithstanding the growing population and the wealth of Newfoundland, no plan has hitherto been adopted for regulating such

of the internal affairs of the colonists as demanded the enactment of laws specially adapted to their peculiar situation. Parliament, indeed, contemplated the erection of corporate towns, with the power of making bye-laws, for remedying this inconvenience; but on attempting to carry this design into effect, unforeseen obstacles were encountered. It was found altogether impracticable to reconcile the contradictory wishes and recommendations of the parties who would have been more immediately affected by the measure; and it became evident that the boon which it was proposed to confer would be received by a great body of the inhabitants, not as an act of grace, but as an infringement of their rights, into whatever form the intended charters might have been thrown. The consequence was, that His Majesty became practically unable to execute the trust which Parliament had confided to him.

The necessity of some provision for regulating the internal concerns of Newfoundland by enactments adapted to the peculiarities of their local position became however daily more and more evident. Carrying with them from this kingdom the law of England, as the only code by which the rights and duties of the people in their relations to each other, and in their relation to the State, could be ascertained, it was obvious, as soon as the colony began to assume a settled form, that the adaptation of that code to the various exigencies of the local society was a task demanding the exercise of much reflection and caution; that many of its provisions were entirely inapplicable to the wants of a population so peculiarly situated; and that many more could be applied only by a distant and uncertain approach to the original standard. Hence it occurred that, in the administration of the law, the judges virtually assumed to themselves functions rather legislative than judicial; and undertook to determine not so much what the law actually was, as what, in the conditions of Newfoundland, it ought to be. For this assumption of power no censure attaches to those learned persons; without any positive rule of decision, nothing remained for them but to engage in such an enquiry; yet the practical inconvenience was not the less urgent, nor the anomaly the less glaring.

It was not, however, merely in the absence of rules, which this latitude of judicial interpretation might supply, that the public detriment was sustained. There were still wanting other regulations, which no judge could either invent or enforce. Especially in whatever related to police and internal improvements, demanding the co-operation of different persons, nothing could be carried into effect, which any individual found an adequate reason for opposing, or which he opposed from mere caprice. I find that in a matter so trifling in appearance, and yet affecting the comforts of so many, as the prevention of domestic animals wandering at large through the country, an earnest application was made to His Majesty's
115 Government to obtain an Act of Parliament for the redress of the grievance endured by the colonists. Although it was thought improper to encumber the British statute-book with such provisions, yet it was fully admitted that they could be supplied by no other authority; and the application itself forcibly illustrated the inconvenience of so remote a society being destitute of any local Legislature.

It may seem, however, superfluous to accumulate reasons in proof of the propriety of establishing in Newfoundland that form of constitution which generally prevails throughout the British Transatlantic colonies; the difficulty would consist rather in finding valid arguments for withholding it * * *

* * * * *

I have, &c.

(signed) GODERICH.

Governor Sir THOMAS COCHRANE,
&c &c &c

No. 63.—1836, January 21: *Circular Instructions from United States Treasury Department to Officers of the Customs residing in Collection Districts where Vessels are Licensed for Employment in the Fisheries of the United States.*

TREASURY DEPARTMENT, January 21, 1836.

Representations have been made to our Government through the chargé d'affaires of His Britannic Majesty, of encroachments by the American fishermen upon the fishing-grounds secured exclusively to British fishermen by the convention between the United States and Great Britain, bearing date the 20th day of October, 1818.

The President, being desirous of avoiding any just cause of dissatisfaction on the part of the British Government on this subject, and with a view of preventing the injury which might result to the American fishermen from trespassing upon the acknowledged British fishing-grounds, directs that you will inform the masters, owners, and others employed in the fisheries in your district, of the foregoing complaints; and that they be enjoined to observe strictly the limits assigned for taking, drying, and curing fish, by the fishermen of the United States, under the convention before stated.

In order that persons engaged in the fisheries may be furnished with the necessary information, the first article of the convention, containing the provisions upon this subject, is annexed to this circular.

LEVI WOODBURY,
Secretary of the Treasury.

To the Collector of ———.

P. S.—The collectors of Portland, Penobscot, Bath, Boston, Portsmouth, Gloucester and Newport are directed to publish these instructions twice a week for one month in each of the newspapers published at their respective ports, and charge the expenses as incidental to the collection of the revenue.

No. 64.—1838, June 13: *Letter from Mr. Denis Le Marchant (Secretary of Board of Trade) to Mr. J. Backhouse (Under Secretary of State).*

OFFICE OF COMMITTEE OF PRIVY COUNCIL FOR TRADE
Whitehall 13th. June 1838.

SIR, I have laid before the Lords of the Committee of Privy Council for Trade, your letter of the 4th. December last, with its accom-

panying papers on the aggressions alleged to have been committed by the citizens of the United States on our fisheries in the Gulf of St. Lawrence, and the coast of Newfoundland, and also the Queen's Advocate's opinion thereon.

Their Lordships in reply, direct me to request that you will inform Lord Palmerston that having pursuant to his Lordship's desire, at the Queen's Advocate's suggestion, perused the above mentioned documents, and having likewise communicated with various individuals well acquainted with the matters in dispute, they have to offer the following observations thereon for his Lordship's consideration.—

Their Lordships presume that after the opinion expressed by the Queen's Advocate upon the international rights of this Kingdom and the United States in respect to the fisheries in question, the recommendation of Lord Glenelg that the intervention of Her
116 Majesty's Government should be employed for the protection of the British subjects engaged in such fisheries will be adopted—and that Her Majesty's Minister at Washington will be instructed by Lord Palmerston to come to a proper understanding with the Government of the United States upon the subject.—

In the instructions that Lord Palmerston may give to Mr. Fox for this negotiation, their Lordships would suggest that his Excellency's attention should be drawn to the depositions of the witnesses attached to the Report of the Committee of the House of Assembly of Nova Scotia, as constituting in conjunction with the remarks of the Queen's Advocate, the case on which his application must be grounded. The case however may be brought within a more narrow compass than the colonists seem to apprehend, for the grievances of which they complain are in many instances in no degree imputable to the American Government; and consequently will not enter into the negotiation. That the Americans have succeeded in appropriating to themselves a very valuable portion of the fishing trade, to the serious prejudice of the colonists is unhappily an incontrovertible fact, but it should be borne in mind, that the above mentioned report admits the Americans concerned in the trade to abound in capital, enterprise and skill, whilst the colonial fishermen are usually poor, ill provided with vessels, and often following other pursuits besides fishing, which must cause them to be but moderately skilled fishermen, and as long as the competition is carried on upon such unequal terms, the superior prosperity of the fishermen of the United States, over our fishermen may be sufficiently explained, without resorting to the alleged violation of the Treaty by the former.—In fact the complaints made by the colonists against the Americans, are too much like those raised by our own fishermen at home against the French, which have so often been brought before the public and the Government without producing a satisfactory result.

The exclusion of the Americans from the Gut of Canso, might indeed be of great service to the colonists, but this has been pronounced by the Queen's Advocate to be impracticable.—The act of aggression with which the citizens of the United States are charged, will probably be disputed, but their Lordships do not entertain a doubt of their having been committed.—It may be presumed that if the French venture upon vexatious and fraudulent practices against our fishermen absolutely on our coasts, the citizens of the United States are not likely to pay scrupulous attention to the exclusive rights of

the Nova Scotia fishermen.—In the one case the remedy may be said to be in our hands, and to rest mainly with ourselves, but the same argument cannot be used in the other, for the distance of Nova Scotia from this country, and the long line of coast to be watched, makes it incumbent on a friendly Power such as the United States, considering their participation in the benefits of the fisheries, which is certainly a serious sacrifice on our part, to co-operate with us in putting down the offences in question, and for that purpose to give the Nova Scotia fishermen the benefit of a liberal construction of the treaty in their favour.—The points which Mr. Fox will have to establish are,

1st.—The three marine miles within which the citizens of the United States are, by the Convention prohibited from fishing, must be calculated from the headlands of Nova Scotia, and not as the Americans contend, beyond a line curving and corresponding with the coast.

2d.—The fishermen of the United States are to be restrained from setting their nets within the bays or harbours of Nova Scotia and Newfoundland.—

3d.—They are to be restricted from the use of jigs upon the coasts of Nova Scotia and Newfoundland.—

4th.—They are to be restrained from coming within the bays, or harbours of Nova Scotia or Newfoundland, the Magdalen Islands not excepted, for any other purpose than obtaining shelter or repairing damage, or purchasing wood, or procuring water, and the provision in the 1st. article of the Convention by which such limitation is expressed, should be strictly enforced.—

How these restrictions are to be carried into effect will be a most important subject of consideration, and one involved in much difficulty, but under the circumstances stated in the Report of the Committee above mentioned, their Lordships think that additional facilities should be required from the Government of the United States for the detection of offenders with perhaps a more summary mode of punishment than the Admiralty Court affords, but the negotiation will probably lead to the suggestion of measures for this purpose on which their Lordships will be ready to give an opinion when the same shall have been brought before this Board.—

Their Lordships direct me further to enclose for Lord Palmerston's information, the opinion of the Queen's Advocate upon a case submitted to him by this Board with reference to some parts of the Report of the Committee which their Lordships had reason to believe might otherwise be supposed to have escaped his attention.—

I am Sir Your most obedient servant

DENIS LE MARCHANT

J BACKHOUSE Esqr &c &c &c

P.S.—The Printed Report being in original is herewith returned.

117 No. 65.—1838, October 6: Letter from Viscount Palmerston to Mr. Fox (British Minister at Washington).

(No. 16.)

FOREIGN OFFICE October. 6th 1838

SIR, An Address of the Legislative Council and House of Assembly of Nova Scotia having been transmitted to Her Majesty, com-

plaining of the habitual encroachments of American citizens on British fishery ground in violation of existing Treaties between Great Britain and the United States, and praying that Her Majesty would be pleased to adopt measures for the protection of the commerce and fisheries of Her Majesty's subjects in that Colony; Her Majesty's Government have deemed it expedient to direct that some small vessels of war should be stationed on the coast of Nova Scotia for this purpose.

I have consequently to instruct you to give notice of this precautionary measure to the Government of the United States; and at the same time to invite that Government to take such steps on its part, as may be necessary to warn American citizens of the illegality of their proceedings in transgressing the bounds defined by Treaty.

The chief matter of complaint is, that American citizens in violation of the Convention of 1818, enter the gulfs, bays, harbours, creeks, narrow seas, and waters of the Colonies, and that they land on the shores of Prince Edward and the Magdalen Islands, and by force, aided by superior numbers, drive British fishermen from banks and fishing grounds solely and exclusively British.

I inclose for your information and guidance, in your communications with the American Government upon this subject, copies of a despatch from Sir Colin Campbell to Lord Glenelg, inclosing the Address of the Legislative Council and House of Assembly of Nova Scotia; and also copies of two Reports from Her Majesty's Advocate General and of a letter from the Board of Trade, founded upon representations received from Nova Scotia last year, to the same effect as those now immediately under consideration.

If you should find the Government of the United States disposed to aid and cooperate with Her Majesty's Government in enforcing the observance of Treaties on the part of American citizens on the coasts in question, by affording greater facilities for the detection and punishment of offenders, or by the adoption of any mutual measures which might be suggested for the better attainment of the object in view, you will avail yourself of such disposition, to endeavour to come to some agreement upon this subject. You will observe that the points which Her Majesty's Government have to enforce are:

1st. That the three marine miles within which the citizens of the United States are by the Convention prohibited from fishing, must be calculated from the headlands of Nova Scotia, and not as the Americans contend, from a line curving and corresponding with the coast;

2nd. That the fishermen of the United States are to be restrained from setting their nets within the bays or harbours of Nova Scotia and Newfoundland;

3rd. That they are to be restricted from the use of jigs upon the coasts of Nova Scotia and Newfoundland;

4th. That they are to be restrained from coming within the bays or harbours of Nova Scotia or Newfoundland, the Magdalen Islands not excepted, for any other purposes than to obtain shelter, or to repair damage, or to purchase wood, or to procure water, agreeably to the provision of the Article of the convention.

You will report to me for the information of Her Majesty's Government any communications which you may have with the Government of the United States upon this subject.

I am with great truth and regard, Sir,
Your most obedient humble servant

PALMERSTON

HENRY STEPHEN FOX Esqre
&c &c &c

No. 66.—1839, July 15: *Letter from Mr. James Primrose, United States Consul at Pictou, Nova Scotia, to Sir R. D. George, Provincial Secretary.*

CONSULATE OF THE UNITED STATES,
Pictou, Nova Scotia, July 15, 1839.

SIR: I most respectfully beg leave to bring under the notice of the government the existing practice of collecting light-dues at the Strait of Canso.

American vessels bound to Pictou have this season been frequently fired at and brought to at that place, by an armed boat, and boarded by an officer, armed with a cutlass and a brace of pistols, who has enforced payment of light-dues. As but few of these vessels
118 were provided with funds, the masters have been subjected to great inconvenience by being compelled, in many instances, to part with portions of their cargoes or ship's stores, and to pursue other objectionable courses to enable them to meet the demand, which I respectfully submit might be collected here, where the consignees reside, with as much safety to the revenue, and, as you will perceive by the enclosed affidavits, with less danger to strangers, who are led to commit acts seriously affecting the safety of their vessels, through the misrepresentation of an officer claiming to be clothed with authority.

Will you do me the favour of informing me whether the collectors of light-dues at the Strait of Canso act under the authority of the government of this province, in levying that rate there on American vessels not bound to any port or place within the same?

The imposition of any tax by the province of Nova Scotia upon American vessels engaged in the prosecution of the fisheries using that passage *in transitu*, would appear to deprive it of the character of constituting a portion of the high seas.

With the greatest respect, I have the honor to be, sir, your most obedient and humble servant,

JAMES PRIMROSE,
Consul, U. S. A.

To the Honorable Sir RUPERT D. GEORGE,
Provincial Secretary, &c., Halifax.

No. 67.—1839, August 14: *Extract from Report from United States Acting Secretary of State to the President of the United States.*

DEPARTMENT OF STATE, August 14, 1839.

In obedience to the directions of the President, received at the Department of State on the 9th instant, "to report to him the treaty

stipulations which bear upon the subject, (the seizure of American fishing vessels on the coast of Nova Scotia;) the conflicting questions of right, if any, which have arisen under them; and the nature and circumstances of the cases which have been presented to this Government by our citizens, as infractions of right on the part of the British authorities," the acting Secretary of State has the honor to state:

That the only existing treaty stipulations bearing upon the subject are to be found in the first article of the convention between the United States and Great Britain, signed at London on the 20th day of October, 1818, which is in the words following:^a

* * * * *

Under this article—

1. American vessels are allowed, forever, to take, dry, and cure fish on and along the coasts of Newfoundland and Labrador, within certain limits therein defined.

2. The United States renounce, forever, any liberty before enjoyed by their citizens to take fish within three marine miles of any coasts, bays, creeks or harbors of the British dominions in America, not included within the above limits, *i. e.* Newfoundland and Labrador.

3. American vessels retain the privilege (under necessary restrictions to prevent their taking fish) of entering the bays, creeks, and harbors of said possessions, for the purposes of shelter, repairing damages, purchasing wood and obtaining water, and for no other purpose whatever.

It does not appear that the stipulations in the article above quoted have, since the date of the convention, been the subject of conflicting questions of right between the two Governments. The rights of the respective parties are so clearly defined by the letter of the treaty, as scarcely to leave room for such questions of an abstract or general character. In their actual operation, however, inasmuch as their application on the part of Great Britain was to be subjected to local legislation, and committed to the hands of subordinate British agents, the provisions of the treaty might naturally be expected to give rise to difficulties growing out of individual acts on either side. The recent seizures appear to have had their origin in such causes, like other causes of anterior date, to which a brief allusion may here be useful.

In June, 1823, the Secretary of State addressed a note to the British Minister at Washington, complaining of the seizure of the schooner *Charles*, and demanding reparation for the indignity offered to the American flag. The answer of the British Government was, that the vessel had been found at anchor in a British harbor, which she had entered on a false pretence of avoiding a storm; and had been legally condemned by the vice admiralty court of New Brunswick, for a breach of the convention of 1818, and of the Act of Parliament to carry the same into effect. The vessel was subsequently restored.

In September, 1824, a complaint was made to the British chargé d'affaires that several citizens of the State of Maine had been inter-

^a For Article I see p. 30 of this Appendix.

rupted by British cruisers, while engaged in taking and curing fish in the Bay of Fundy; and was accompanied by a similar demand of indemnity and reparation. The British *chargé d'affaires*, in answer, promised to institute an inquiry into the circumstances of the case, invited the United States to a similar proceeding on their
119 part, and closed with a remonstrance against the act of American citizens who, with an armed force, had rescued the seized property from the custody of British officers.

In January, 1836, the British Government became, in its turn, the complainant. Its *chargé d'affaires* at Washington, remonstrated against the encroachments of American citizens upon the fishing grounds secured exclusively to British fishermen by the convention of 1818. The result of this complaint was a circular letter addressed by the Secretary of the Treasury to the officers of customs in districts where vessels are licensed for the fisheries, directing them to impress the crews of fishing vessels with a sense of the treaty obligations of their Government, and of the dangers to which they exposed themselves by encroaching upon British rights. The recent cases of seizure constitute the last instance of alleged violation of rights, and the charge is laid to the British account. The attention of this department was first called to the subject by a reference by the Treasury of a letter from B. and J. M. Leavitt, of Boston, asking for information as to the existing treaty stipulations regulating the matter. The inquiry was answered by a reference to the first article of the convention of 1818. On the 3d July the Secretary of the Treasury referred to the department a communication from the collector of Boston, transmitting a report from the naval officer who had been despatched to Nova Scotia with directions to inquire into the alleged causes of the seizure and detention of American fishing vessels. The report, after alluding in general terms to some of the seizures, refers, with regard to the particulars of four of the cases then pending before the court of vice admiralty of Halifax, to an abridged statement, furnished by the consular agent of the United States at Yarmouth, of the depositions of the masters and crews of three American fishing schooners, viz: the "Independence," the "Magnolia," and the "Java," and the fishing boat "Hart." The statement, with the report accompanying it, is annexed, and contains the most detailed information in the possession of this department in relation to the "nature and circumstances of the cases."

According to that statement, the Independence is alleged to have anchored in the Tusket islands, and, while there, hired her nets to an English fisherman, for the purpose of taking fish on shares. The crew state that they were forced to anchor there by stress of weather; and that their nets had been lent, and not hired, for which they had received a few herrings.

The Magnolia is charged with having been engaged in fishing while at anchor in the Tusket islands, and with the fact having been acknowledged by the crew. This is denied; and the reason alleged for anchoring within British grounds is, want of shelter, wood and water.

The charge against the Java, of having been engaged in taking fish in the Tusket islands, is admitted by the master.

Against the Hart it is alleged that her crew were seen cleaning fish on board, while at anchor in the islands, and that her master

had acknowledged that he had procured a quantity of herrings. The taking of fish is denied; and the fact of the crew having been seen cleaning fish is explained by stating that two barrels of herrings had been received from a British fisherman in recompense of services rendered.

On the 20th of July, a letter from the consul of the United States at Halifax, dated the 27th of June, was received at this department, informing it of the seizure of the four vessels above referred to, and of seven others, viz: the "Shetland," seized at Whitehead, near Canso; the "Charles," at Canso; the "Mayflower," and a schooner name unknown, at Guysborough; the "Battelle," "Hyder Ally," and "Eliza," at Beaver harbor.

The "Shetland" was seized on the ground of the master having sold to a lad who came on board, while the vessel lay at anchor in the harbor of Whitehead, whither she had been forced by stormy weather, a pair of oil-cloth trousers, and small quantities of tea and tobacco. The master states that in doing so he yielded to the importunities of the lad, whom he believes to have been sent purposely to entrap him into an attempt at smuggling. He denies having caught fish within British limits.

With the exception of the "Eliza," which was likewise compelled to make a harbor by bad weather, and the crew of which deny having taken fish within the British limits, or having sold or bartered any articles whatever, the particulars of the cases are not given; but in communications addressed by the consul to the Lieutenant Governor of Nova Scotia, asking his interference in behalf of the owners of the seized vessels, he urges the exercise of indulgence and mercy, on the ground that some of the sufferers had only erred in a slight degree either from ignorance or temptation, and without intention to violate regulations, of the existence of which they might, perhaps, never have heard.

The communications from the consul to the Lieutenant Governor of Nova Scotia, having been referred to the advocate general of the Province, underwent examination, and a copy of his report accompanies the consul's letter to the department. In this document, the advocate general denies the power of the Governor to interfere or stay proceedings in the court of vice-admiralty, which alone has jurisdiction over the subject matter. He adds, that several of the cases had been commenced during his absence, and the evidence had not yet been submitted to him.

Commissions had been issued to take depositions in others. Three vessels had been proceeded against by him, and the examination had proved that the crews of two of them had actually taken fish with set nets in Beaver harbor. In all other cases, where the evidence had not been submitted to him it was to be called for before any further proceedings were had. He concludes by stating that, where the evidence is not complete, no decree will be urged by default, until ample time and opportunity be afforded for defence, upon the most favorable terms that by law can be granted; and that in any case where there shall not appear good cause of prosecution, he will exercise his own discretion in releasing the property.

From these statements it will appear that the only cases of seizure of which anything is known at the department, not being made on the coasts of Newfoundland or Labrador, occurred at

120 places in which, under the convention of 1818, the United States had forever renounced the right of their vessels to take, dry and cure fish; retaining only the privilege of entering them for the purposes of shelter, repairs, purchasing wood and obtaining water, and no other. In the absence of information of a character sufficiently precise to ascertain either, on the one side, the real motives which carried the American vessels into British harbors, or, on the other, the reasons which induced their seizure by British authorities, the department is unable to state whether, in the cases under consideration, there has been any flagrant infraction of the existing treaty stipulations. The presumption is, that if, on the part of the citizens of the United States, there has been a want of caution or care in the strict observance of those stipulations, there has been, on the other hand, an equal disregard of their spirit, and of the friendly relations which they were intended to promote and perpetuate, in the haste and indiscriminate rigor with which the British authorities have acted.

Under the supposition that many of the seizures had been made upon insufficient grounds, and in order, if possible, to preclude for the future the recurrence of such proceedings, the acting Secretary of State, in a note dated the 10th of July, called the attention of the British minister to the cases of seizure which had come to the knowledge of the department, and requested him to direct the attention of the provincial authorities to the ruinous consequences of the seizures to the owners of the vessels, whatever might be the issue of the legal proceedings instituted against them; and to exhort them to exercise great caution and forbearance in future, in order that American citizens, not manifestly encroaching upon British rights, should not be subjected to interruption in the pursuit of their lawful avocations. The President's directions, that a vessel of war of suitable force should be held in readiness to proceed to the coasts of the British provinces having been communicated to the Secretary of the Navy, an answer has been received that the schooner *Grampus*, now lying at Norfolk, would be prepared to proceed to that quarter at a moment's notice; and that, should it be the desire of the President that a vessel of higher class should be employed on that duty, a sloop of war can be detailed from the station at Pensacola so as to be ready to sail at the end of this month.

Respectfully submitted.

A. VAIL, *Acting Secretary of State.*

To the PRESIDENT OF THE UNITED STATES.

No. 68.—1839, September 28: Letter from Mr. James Primrose, United States Consul at Pictou, Nova Scotia, to Sir R. D. George, Provincial Secretary.

CONSULATE OF THE UNITED STATES OF AMERICA,
Pictou, September 28, 1839.

SIR: It becomes my duty to call your attention to the enclosed copy of an affidavit of the master of the American brig *Emerald*.

The conduct of the collector of light-dues at the Strait of Canso towards vessels of the United States bound to this port, continues to

be characterized not only by a total want of courtesy, but very frequently assumes the aspect of open and wanton aggression.

In the hope of receiving your reply to my note of the 15th of July, I have refrained from multiplying complaints; but the nature of the outrage committed on the Emerald requires that I should make the government of this Province acquainted with it.

With great respect, I have the honour to be, sir, your most obedient and humble servant.

JAMES PRIMROSE,

Consul of the United States of America.

HON. SIR R. D. GEORGE,
Provincial Secretary, &c., Halifax.

No. 69.—1839, November 9: Letter from Sir Rupert D. George, Provincial Secretary, to Mr. James Primrose, United States Consul at Pictou, Nova Scotia.

PROVINCIAL SECRETARY'S OFFICE,
Halifax, November 9, 1839.

SIR: The attention of the Lieutenant Governor and her Majesty's Council having been directed, by your letters of the 15th July and 26th September last, to the mode of collecting light-duties from American vessels in the Gut of Canso, that subject has received the best consideration of the board; and I am directed to acquaint you, with reference to the particular cases which you have brought under his Excellency's notice, that the taking of merchandize or ship's stores, instead of money, in payment of light-duty, (as in some few cases appears to have been done,) is, under any circumstances, unauthorized on the part of the collector. The collectors have accordingly been informed that such a proceeding is irregular and unlawful, and must on no account be hereafter resorted to; and it has been further intimated to them, that when the light-duty has been incurred, and its payment after demand has been refused or neglected, the vessel is liable to seizure; but that the law does not give warrant for the use of violence in bringing vessels to in cases where no previous demand has been made; and that the exhibition of fire-arms, while in the performance of their office, is highly reprehensible. The collectors are also instructed not to demand light-duty from vessels bound to Pictou, unless they come to anchor in the strait.

With respect to the concluding paragraph of your letter of the 15th of July, I have it in command to remark that His Excellency cannot admit the character given to the Gut of Canso as a part of the high seas until recognized by some authoritative decision, as the correctness of its application to that narrow passage lying entirely between the lands of this province may be questionable, more especially as an open communication around the eastern end of the island of Cape Breton is to be found on the high seas to the Gulf of Saint Lawrence, or any other point to which the State of Canso can be made subservient.

I take this opportunity to state that the case of the American schooner Amazon, which was the subject of your letter of the 26th

August, remains under consideration; all the information with respect to it, which is desired, not having been yet obtained.

I have the honour to be, sir, your obedient, humble servant,

RUPERT D. GEORGE.

JAMES PRIMROSE, Esq.,
American Consul.

No. 70.—1839, December 29: Letter from Lieutenant Paine (*United States Navy*) to Mr. Forsyth (*United States Secretary of State*).

WASHINGTON, December 29, 1839.

SIR: In my late cruise on the coasts of Her Britannic Majesty's provinces, I found the convention of 1818, on the subject of fisheries, so variously construed, that I deemed it proper to address the Navy Department on the subject—the letters to which I alluded in conversation with you.

Avoiding unnecessary repetitions, I will endeavor to give, in the following, all that seems of importance in a more concise form.

I visited the seat of government of Nova Scotia, and that of Prince Edward's Island, and St. John's, the principal city of New Brunswick, where I communicated with the principal government officers, with our consuls, with Admiral Sir Thomas Harvey, and the commanders of the British vessels of war with whom I met; as also with the collectors of Portland and Eastport, Maine, and such other persons as from their situations seemed qualified to impart information on the questions arising.

I had believed the vessels seized had been generally guilty of systematic violation of the revenue laws; but I was soon led to suspect that this was not the cause, so much as a pretence, for seizing.

A vessel once seized must be condemned, unless released as a favor; because the owners will not claim her under the present laws of Nova Scotia, where the only seizures have taken place.

The questions on which dispute may arise, are—

1st. The meaning of the word *Bay*, in the convention of 1818, where the Americans relinquish the rights before claimed or exercised, of fishing in or upon any of the coasts, *bays*, &c., of Her Britannic Majesty's provinces, not before described, nearer than three miles.

The authorities of Nova Scotia seem to claim a right to exclude Americans from all bays, including those large seas such as the Bay of Fundy and the Bay of Chaleurs; and also to draw a line from headland to headland; the Americans not to approach within three miles of this line.

The fishermen, on the contrary, believe they have a right to work any where, if not nearer than three miles to the land.

The orders of Admiral Sir Thomas Harvey, as he informed me, are only to prevent their fishing nearer than three miles.

According to this construction, Americans may fish in the Bay of Fundy, Bay of Chaleurs, and the Bay of Miramichi; while their right would be doubtful in Chedabucto Bay, and they would be prohibited in the other bays of Nova Scotia.

On that part of the coast of Newfoundland where the right of fishing is relinquished, there are several bays in which fisheries may be prosecuted at three or more miles from the land.

On that part of the coast of Newfoundland where the right of taking and curing fish is secured by the convention of 1818, it is to be feared that troubles may arise with the French, who assume an exclusive right, and who have gone so far as to drive off even English fishermen.

122 The right of fishing on the shores of the Magdalen Islands, though sometimes questioned, seems so secured by the convention of 1818 that I think it unnecessary to lengthen this communication by further discussing it.

2d. The right of resorting to ports for shelter, and to procure wood and water. The provincial authorities claim a right to exclude vessels, unless in actual distress; and the subordinates, as well as the naval forces of her Majesty, warn, as they term it, vessels to depart, or order them to get under weigh and leave a harbor when they suppose a vessel has lain a reasonable time; but this is often done without examining or knowing much of the circumstances under which the vessel entered, or how long she has been in port.

The English men-of-war also endorse the papers of the fishermen, as if they had violated the blockade, or committed some other illegal act.

The fishermen claim a right, under the convention, to resort to the ports for shelter whenever from rough weather, calms or fogs, they cannot prosecute, without risk or inconvenience, their labors at sea; and the navigation on some parts of the coast is, on account of the extraordinary tides, as perilous in calms and fogs as in rough weather.

The Nova Scotia Courts would exact that American fishermen shall have been supplied, on leaving home, with wood and water for the cruise; but the Americans believe they can, by the terms of the convention, resort to the ports to procure wood and water at their convenience during the cruise; and they do not, on account of the inconvenience, as well as the high price, take on board either water-casks or wood for the whole cruise.

If the grounds assumed by the British provincial authorities be carried out, it will be in their power to drive the Americans from those parts of the coast where are some of the most valuable fisheries: whereas, if the ground maintained by the Americans be admitted, it will be difficult to prevent their procuring articles of convenience, and particularly bait; from which they are precluded by the convention, and which a party in the provinces seems resolved to prevent.

The questions will, I doubt not, ere long be brought to a crisis; and it seems probable that the vexatious course pursued towards the fishermen, with the object of fostering their own at the expense of our fisheries, and the care taken by the French to protect and encourage theirs, will tend to injure, perhaps destroy those of this country; a result to be deprecated in connexion with the navy, for there is no branch of commerce which supplies so large a portion of hardy and efficient seamen.

Although several of the vessels seized by authority of the province of Nova Scotia were afterwards released, the great expense incurred and the time they were detained made the injury to the owners nearly equal to a total loss.

The person who made the most of these seizures, (a Mr. Darby, who commands a chebacco boat, with ten or twelve men armed with muskets,) is prompted, as well by his interest as by a certainty of impunity, to seize all he can find.

The law of this province, entitled William IV, chap. viii, 1836, which seems solely intended to prosecute our fishermen, could only have been approved by orders in council through an oversight.

It is not possible that Great Britain intends, when the property of citizens of a nation in amity is seized on false pretences, or with no pretence, to force the lawful owner to give heavy bonds, liable to be forfeited, in addition to vessel and cargo, before he can claim his property:

To give a month's notice to the seizing officer; the notice to contain every thing intended to be proved against him, before a suit can be instituted; and, again, to prove that the notice has been given.

To force the owner to bring his action or claim within three months—one of which is expended in thus giving notice, and the other two may well expire, owing to the infrequency and uncertainty of communications, before the distant owner can transfer funds and give the requisite bonds to precede his suit, or lay claim to his illegally seized property, which property will thus be condemned by default:

To force the owner, if he cannot prove the illegality of the seizure, to pay treble costs:

To screen the officer seizing, by providing that, if the judge shall say there was probable cause, he shall be liable to no prosecution; the plaintiff only entitled to second damages; the defendant only liable to costs.

The whole of this act, and the proceedings on the subject, as detailed in the journals of the assembly, display an unfriendly disposition towards Americans, or rather a determination to quarrel or drive them from the exercise of rights secured by solemn treaty.

The injustice and annoyance suffered by the fishermen have so irritated them, that there is ground to believe that violence will be resorted to, unless some understanding be had before the next season.

As the facts relating to these seizures have been reported to the government by Messrs. Consuls Morrow, of Halifax, and Primrose, of Picton, I have confined myself to such a representation of the grounds assumed as may be useful in judging of the danger of serious difficulty, which has seemed to me considerable.

There is another law of this province, unjust towards foreigners, and likely to be injurious to Americans. It relates to passenger-vessels which may be forced from any cause to make a harbor, and is entitled 1st Victoria, 1839, chapter xlv., sections 3 and 5.

If any of the passengers please, they may remain on shore, and the vessel may be cleared until bonds are given to the amount of £50 for each person so remaining that they shall not become chargeable to the community; and this, while the captain is willing or desirous of finishing his contract by conveying them to their destination.

At Prince Edward's Island, the schooner Three Brothers, of Belfast, having met with some injury by grounding, commenced lightening; but the captain was advised to apply for permission, and did so; the permission was refused, and the articles landed (some barrels of salt) were seized.

This was afterwards ordered to be restored to the owners, but had already been sold; and the proceeds are now in the hands of the collector of customs at Charlestown, subject to the orders of the honorable the board of customs in London, and cannot be claimed by the owners without first entering into bonds—probably ten times the amount of salt seized.

I believe that a consul, to reside at Charlottetown, with the usual power of appointing agents, would be a means of preventing future difficulties; the only intercourse with the authorities now being through a consular agent appointed by Consul James Primrose, of Pictou, in another province.

I have the honour to subscribe myself, with high respect, your obedient servant,

JNO. S. PAINE,

Lieut. Comd'g U. S. Schooner Grampus.

Hon. JOHN FORSYTH, *Secretary of State.*

No. 71.—1840, March 27: *Address of the House of A* ^{ment} *it ap-*
Scotia. ^{clude Amer.}

To the Queens Most Excellent Majesty.

May it please your Majesty

We your Majestys dutiful and loyal subjects the representatives of your Majestys loyal people of Nova Scotia humbly approach your Majesty with their complaints against the citizens of the United States of America who continue to disregard the terms and provisions of Treaties existing between the two nations by encroaching on the reserved fishing grounds of this province and the adjoining Colonies to the detriment and injury of the inhabitants thereof—

Your Majesty's Council and Assembly in 1838 approached your Majesty's Throne with an Address humbly referring your Majesty to the Convention of 1818 between your Majestys Government and that Republic and to the Report of this House of 1837 as exhibiting the gross violation of the rights of the inhabitants of the Lower Provinces, and your people regret that the defective state of the regulations for the protection of the British North American fisheries still permits such infringements with comparative impunity.

Although the Convention of 1818 secured to the people of Great Britain and your Majesty's Dominions in America certain rights of exclusive fishery on the shores of such provinces and the citizens of the United States renounced for ever any liberty enjoyed or claimed by the inhabitants thereof to take dry or cure fish within three marine miles of any of the coasts, bays, creeks or harbours not included within certain limits mentioned in said Convention no rules or regulations were adopted to prevent the abuse of the privileges added to the United States until 1836 when His late Majesty William the Fourth signified his Royal assent to a statute of this province embodying rules and regulations for the fishery thereof the operation of which has been most wholesome and has curbed the illegal trespasses of foreigners by subjecting their vessels to forfeiture or de-

tection and condemnation in the Court of Vice Admiralty of Nova Scotia—

That no regulations having been adopted (as your House of Assembly believe) for the same salutary purposes in the provinces of New Brunswick, Prince Edward Island the Canadas and Newfoundland the revenue vessels employed by the Government of this province cannot make seizures because the encroachments are beyond the operation of the said law which is confined to the province and therefore it becomes indispensable for the preservation of the valuable source of wealth with which Providence has blessed these Colonies, that similar regulations should be granted by your Majesty for all the Colonies. And your Assembly solicit your Royal attention to the accompanying code as well adapted for such important purpose—

That the citizens of the United States pass through the Strait of Canso a narrow strip of water completely within and dividing several counties of this province whereby they violate the letter and spirit of the Treaty or Convention of 1818 to the detriment of your Majesty's people; and on the shores of the Magdalen Islands they ~~con-~~ of commishery in a manner destructive thereof by taking herring give the reason those shores at the time they are casting their spawn. ~~salvage~~ ~~reign~~ the solicitude of your Majesty for the happiness and welfare of your faithful North American subjects your Assembly humbly prays encouragement and protection of their commerce and fishery and as they have appointed revenue cutters for such service that your Majesty will order armed vessels to aid them in such laudable undertaking and extend to your loyal subjects of Nova Scotia that protection which may be consistent with the claims of other portions of your Majesty's extensive dominions—

In the House of Assembly 27th March 1840

S. G. W. ARCHIBALD *Speaker.*

- 124 No. 72.—1841, February 20: Letter from Mr. Forsyth (*United States Secretary of State*), to Mr. Stevenson (*United States Minister at London*).

[No. 89.]

DEPARTMENT OF STATE,

Washington, February 20, 1841.

SIR: At the time of addressing you the instructions numbered 71, of 17th of April last, relating to the interruptions experienced by the vessels of our citizens employed in intercourse with the ports of Nova Scotia, and in the prosecution of the fisheries on the neighbouring coasts, it was deemed expedient, before presenting through you the latter branch of the subject to Her Majesty's Government in a formal manner, to await the communication to this department of a case in which the details of the seizure—the grounds on which it was made, and the consequent judicial and other proceedings should be fully set forth. Several cases of seizures and detention have, as was apprehended, occurred since the date of my letter, but none of those reported to the department have been presented in a form to fulfil the expectation entertained that the Government would be enabled to found upon it a specific complaint against the conduct of the local

authorities, whilst protesting against the injurious operation of provincial law upon American interests brought involuntarily and unjustly within its jurisdiction.

The first article of the Convention of 1818, between the United States and Great Britain, which contains the treaty stipulations relating to the subject, is so explicit in its terms that there would seem to be little room for misapprehending them; and indeed it does not appear that any conflicting questions of right between the two governments have arisen out of differences of opinion between them regarding the intent and meaning of this article. Yet in the actual application of the provisions of the treaty, committed, on the part of Great Britain, to the hands of subordinate agents, subject to and controlled by local legislation, difficulties growing out of individual acts have sprung up from time to time, and of these, perhaps the most grave in their character, are the recent seizures of American vessels, made, it is believed, under color of a provincial law, entitled William IV., chap. 8, 1836, enacted doubtless with a view rigorously to restrict, if not intended directly to aim a fatal blow at our fisheries on the coast of Nova Scotia.

From the information in the possession of the department, it appears that the provincial authorities assume a right to exclude American vessels from all their bays, even including those of Fundy and Chaleurs, and to prohibit their approach within three miles of a line drawn from headland to headland.

These authorities also claim a right to exclude our vessels from resorting to their ports unless in actual distress, and American vessels are accordingly warned to depart or ordered to get under weigh and leave a harbor whenever the provincial custom-house or British naval officer supposes, without a full examination of the circumstances under which they entered, that they have been there a reasonable time.

Now, by the convention above referred to, American fishermen are forever secured in their right to take, dry, and cure fish on the coasts of the Magdalen Islands and of Newfoundland and Labrador, within certain defined limits, and the United States renounced forever any liberty before enjoyed by their citizens of fishing within three marine miles of any coasts, bays, &c., of the British domains in America not included within those limits, and retain for their vessels the privilege (under the restrictions therein named) of entering such bays or harbors for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water.

Our fishermen believe, and they are obviously right in their opinion, if uniform practice is any evidence of correct construction, that they can with propriety take fish any where, on the coasts of the British provinces, if not nearer than three miles to land, and resort to their ports for shelter, wood, water, &c.; nor has this claim ever been seriously disputed, based as it is on the plain and obvious terms of the convention, whilst the construction attempted to be put upon that instrument by the authorities of Nova Scotia is directly in conflict with its provisions, and entirely subversive of the rights and interests of our citizens. It is one which would lead to the abandonment, to a great extent, of a highly important branch of American industry, and cannot for one moment be admitted by this Government.

I am instructed by the President to convey to you his desire that, on the receipt of this letter, you immediately address a representation of the whole subject to Her Majesty's Government, earnestly remonstrate against the illegal and vexatious proceedings of the authorities of Nova Scotia towards our fishermen, and request that measures be forthwith adopted by Her Majesty's Government to remedy the evils arising out of this misconstruction, on the part of the provincial authorities, of their conventional obligations, and to prevent the possibility of the recurrence of similar acts.

It is important that this subject should be acted upon without delay, as in the House of Assembly of Nova Scotia, at the session of 1839-40, an address to the Queen was voted, suggesting the extension to the adjoining British Colonies, of rules and regulations relating to the fisheries similar to those in actual operation in that province, which have proved so onerous to American fishermen, and efforts, it is understood, are still making to induce the other colonies

to unite with Nova Scotia in her restrictive system. Some of
125 the provisions of her code, supposed to be substantially the same with those of the provincial law above referred to, are of the most extraordinary character. For instance, a foreign vessel *preparing* to fish within three miles of the coast of Her Majesty's dominions in America, is, together with her cargo, to be forfeited; in cases of seizure the owner or claimant of the vessel, &c., to be held to prove his innocence or pay treble costs; he is forced to try his action within three months; to give a month's notice to the seizing officer, which notice must contain everything intended to be proved against him, before a suit can be instituted; and also to prove that the notice has been given. The seizing officer is almost wholly irresponsible, since he is liable to no prosecution; if the judge certify that there was probable cause, and the plaintiff in such suit, if he be successful, is only entitled to two pence damages without costs, the defendant to be fined not more than one shilling, &c., &c. In short, some of these rules and regulations are violations of well established principles of the common law of England and of the principles of all just powers and all civilized nations, and seem to be expressly designed to enable her Majesty's authorities, with perfect impunity, to seize and confiscate American vessels, and to embezzle, almost indiscriminately, the property of our citizens employed in the fisheries on the coasts of the British possessions.

In pointing out to her Majesty's government the points in these regulations which have proved or are likely to prove most injurious and oppressive in their practical operation on the interests of the citizens of the United States, it will also be proper to notice the assertion of the provincial legislature, that the Strait of Canso is a "narrow strip of water completely within and dividing several counties" of the province, and that our use of it is in violation of the convention of 1818. That strait separates Nova Scotia from the island of Cape Breton, which was not annexed to the province until 1820. In 1818, Cape Breton was enjoying a government of its own entirely distinct from Nova Scotia, the strait forming the line of demarcation between them, and being then, as now, a thoroughfare for vessels passing into and out of the Gulf of St. Lawrence. The union of the two Colonies cannot be admitted as vesting in the province the right to close a passage which has been freely and

indisputably used by our citizens since the year 1783, and it is impossible to conceive how the use, on our part, of this right of passage, common it is believed to all other nations, conflicts either with the letter or the spirit of our treaty obligations.

I transmit to you enclosed a printed House document (No. 186) of the last session of Congress, and also a copy of the journal and proceedings of the House of Assembly of Nova Scotia at its session of 1839-40, both of which will be useful to you in the examination of the subject to which this letter relates.

I am, Sir, your obedient servant,

JOHN FORSYTH.

A. STEVENSON, &c., &c., &c.

No. 73.—1841, March 27: *Letter from Mr. Stevenson to Lord Palmerston.*

32 UPPER GROSVENOR STREET, March 27, 1841.

The undersigned, Envoy Extraordinary and Minister Plenipotentiary from the United States, has the honour to acquaint Lord Viscount Palmerston, her Majesty's Principal Secretary of State for Foreign Affairs, that he has been instructed to bring to the notice of her Majesty's Government, without delay, certain proceedings of the colonial authorities of Nova Scotia, in relation to the seizure and interruption of the vessels and citizens of the United States engaged in intercourse with the ports of Nova Scotia, and the presecution of the fisheries on its neighbouring coasts, and which, in the opinion of the American government, demand the prompt interposition of her Majesty's government. For this purpose the undersigned takes leave to submit to Lord Palmerston the following representation:

By the first article of the convention between Great Britain and the United States, signed at London, on the 20th of October, 1818, it is provided: "1st. That the inhabitants of the United States shall have forever, in common with the subjects of Great Britain, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau islands; on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon islands; on the shores of the Magdalen islands; and also on the coasts, bays, harbors and creeks from Mount Joly, on the southern coast of Labrador, to and through the straits of Belleisle, and thence northwardly indefinitely along the coast, without prejudice, however, to the exclusive rights of the Hudson Bay Company. 2dly. That the American fishermen shall also have liberty forever to dry and cure fish in any part of the unsettled bays, harbors and creeks of the southern portion of the coast of Newfoundland before described, and of the coast of Labrador; the United States renouncing any liberty before enjoyed by their citizens to take fish within three marine miles of any coasts, bays, creeks or harbors of the British dominions in America not included within the above limits, *i. e.* Newfoundland and Labrador. And 3dly. That American fishermen shall also be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, and also of purchasing wood and obtaining water, under such restrictions only as might be

necessary to prevent their taking, drying or curing fish therein, or abusing the privileges reserved to them." Such are the stipulations of the treaty, and they are believed to be too plain and explicit to leave room for doubt or misapprehension, or render the discussion of the respective rights of the two countries at this time necessary. Indeed it does not appear that any conflicting questions of right between them have as yet arisen out of differences of opinion regarding the true intent and meaning of the treaty. It appears, however, that in the actual application of the provisions of the convention, (committed on the part of Great Britain to the hands of subordinate agents, subject to and controlled by local legislation,) difficulties, growing out of individual acts, have unfortunately sprung up from time to time, among the most important of which have been recent seizures of American vessels for supposed violations of the treaty. These have been made, it is believed, under color of a provincial law of 6 William IV., chapter 8, 1836, passed doubtless with a view to restrict vigorously, if not intended to aim a fatal blow at the fisheries of the United States on the coasts of Newfoundland.

It also appears, from information recently received by the Government of the United States, that the provincial authorities assume a right to exclude the vessels of the United States from all their bays, (even including those of Fundy and Chaleurs,) and likewise to prohibit their approach within three miles of a line *drawn from headland to headland, instead of from the indents of the shores of the provinces*. They also assert the right of excluding them from British ports, unless in actual distress; warning them to depart, or get under weigh and leave harbor, whenever the provincial custom-house or British naval officer shall suppose that they have remained a reasonable time; and this without a full examination of the circumstances under which they may have entered the port. Now, the fishermen of the United States believe (and it would seem that they are right in their opinion, if uniform practice in [is] any evidence of correct construction), that they can with propriety take fish any where on the coasts of the British provinces, *if not nearer than three marine miles to land*, and have the right to resort to their ports for shelter, wood and water; nor has this claim, it is believed, ever been seriously disputed, based as it is on the plain and obvious terms of the convention. Indeed, the main object of the treaty was not only to secure to American fishermen, is [in] the pursuit of their employment, the right of fishing, but likewise to insure to them as large a proportion of the conveniences afforded by the neighbouring coasts of British settlements, as might be reconcilable with the just rights and interests of British subjects, and the due administration of her Majesty's dominions. The construction therefore, which has been attempted to be put upon the stipulations of the treaty by the authorities of Nova Scotia, is directly in conflict with their object, and entirely subversive of the rights and interests of the citizens of the United States. It is one moreover, which would lead to the abandonment, to a great extent, of a highly important branch of American industry, which could not for a moment be admitted by the government of the United States. The undersigned has also been instructed to acquaint Lord Palmerston that the American government has received information that in the House of Assembly of Nova Scotia during the session of 1839-'40, an address to her Majesty was voted,

suggesting the extension to adjoining British colonies of rules and regulations relating to the fisheries, similar to those in actual operation in that province, and which have proved so onerous to the fishermen of the United States; and that efforts, it is understood, are still making to induce the other colonies to unite with Nova Scotia in this restrictive system. Some of the provisions of her code are of the most extraordinary character. Among these is one which declares that any foreign vessel *preparing* to fish within three miles of the coast of her Majesty's dominions in America shall, together with her cargo, be forfeited; that in all cases of seizure, the owner or claimant of the vessel, &c., shall be held to prove his innocence, or pay treble costs; that he shall be forced to try his action within three months, and give one month's notice at least to the seizing officer, containing everything intended to be proved against him, before any suit can be instituted; and also prove that the notice has been given. The seizing officer, moreover, is almost wholly irresponsible, inasmuch as he is liable to no prosecution if the judge certifies that there was probable cause; and the plaintiff, if successful in his suit, is only to be entitled to *two pence damages without costs*, and the defendant fined *not more than one shilling*. In short, some of these rules and regulations are violations of well established principles of the common law of England, and of the principles of the just laws of all civilized nations, and would seem to have been designed to enable her Majesty's authorities to seize and confiscate with impunity American vessels, and embezzle indiscriminately the property of American citizens employed in the fisheries on the coasts of the British provinces.

It may be proper, also, on this occasion, to bring to the notice of her Majesty's government the assertion of the provincial legislature "*that the Gut or Strait of Canso is a narrow strip of water, completely within and dividing several counties of the province,*" and that the use of it by the vessels and citizens of the United States is in violation of the treaty of 1818. This strait separates Nova Scotia from the island of Cape Breton, which was not annexed to the province until the year 1820. Prior to that, in 1818, Cape Breton was enjoying a government of its own, entirely distinct from Nova Scotia, the strait forming the line of demarcation between them, and being then, as now, a thoroughfare for vessels passing into and out of the Gulf of St. Lawrence. The union of the two colonies cannot, therefore, be admitted, as vesting in the province the right to close a passage which has been freely and indisputably used by the citizens of the United States since the year 1783. It is impossible, moreover, to conceive how the use on the part of the United States of this right of passage, common, it is believed to all other nations, can in any manner conflict with the letter or spirit of the existing treaty stipulations. The undersigned would therefore fain hope that her Majesty's government will be disposed to meet, as far as practicable, the wishes of the American government, in accomplishing in the fullest and most liberal manner the objects which both governments had in view in entering into the conventional arrangement of 1818.

He has accordingly been instructed to bring the whole subject under the consideration of her Majesty's government, and to remonstrate on the part of his government against the illegal and vexatious

127 proceedings of the authorities of Nova Scotia against the citizens of the United States engaged in the fisheries, and to request that measures may be forthwith adopted by her Majesty's government to remedy the evils arising out of the misconstruction on the part of its provincial authorities of their conventional obligations, and prevent the possibility of the recurrence of similar acts.

The undersigned renews to Lord Palmerston assurances of his distinguished consideration.

A. STEVENSON.

No. 74.—1841, May 8: *Despatch from the Right Hon. Viscount Falkland to the Right Hon. Lord John Russell.*

No. 75. GOVERNMENT HOUSE: *Halifax, May 8th 1841.*

MY LORD, I have had the honour to receive your Despatch No. 45. date of 9th April 1841. transmitting a copy of a letter from the Under Secretary of State for Foreign Affairs, enclosing a note from the American Minister at the Court of St. James's, complaining of certain proceedings of the colonial authorities of Nova Scotia, towards the vessels and citizens of the Republic engaged in fishing on the coasts of the province, and desiring that I will make immediate inquiry into the allegations made by Mr. Stevenson, and forward to you a detailed report on the subject. I have lost no time in obeying your instructions and beg to submit the following observations for your consideration.—

Mr. Stevenson commences his representation by citing the first article of the Convention entered into between Great Britain and the United States on the 20th. October 1818, and signed at London; and having done so, he says,

Such are the stipulations of the Treaty, and they are believed to be too plain and explicit to leave room for misapprehension, or render the discussion of the respective rights of the two countries at this time necessary: indeed it does not appear that any conflicting questions of right between them have as yet arisen out of the differences of opinion regarding the *true intent and meaning* of the Treaty, it appears however that in the actual application of the provisions of the Convention, (committed on the part of Great Britain to the hands of subordinate agents, subject to, and controlled by local legislation) difficulties growing out of individual acts have unfortunately sprung up from time to time, among the most important of which have been recent seizures, of American vessels for supposed violations of the Treaty. These have been made it is believed, under colour of a provincial law of the 6th of Wm. 4th. cap: 8. passed doubtless with a view to restrict rigorously, if not intended to aim a *fatal blow at the fisheries* of the United States *on the coast of Newfoundland*. It also appears from information recently received by the Govt: of the United States, that the provincial authorities assume a right to exclude the vessels of the United States, from all their bays even including those of Fundy, and *Chaleurs*, and likewise to prohibit their approach within three miles of a line drawn from headland to headland, instead of from the indents of the shores of the province.

The difficulties which exist, and of which Mr. Stevenson complains, as growing out of "individual acts" are created by the difference of the interpretation put by the Nova Scotians and the Americans, upon "*the true intent and meaning*" of the Treaty referred to by his Excellency, and the Act of the Imperial Parliament 59: Geo 3rd. cap: 38, founded on that Treaty, and more fully referred to hereafter, and until formal adjudication resulting from the seizure, and prose-

cution of American vessels for abuse of the privilege ceded to them shall take place, and consecutive precedents for future guidance be thereby established, it appears probable that doubts may, and will arise, as to the interpretation to be borne by the said Treaty.—

It is true that some seizures have been made of American fishing vessels under the provincial Act 6th. Wm. 4th. referred to by Mr. Stevenson, but his Excellency has fallen into much misapprehension as to the character of this law, the extent of its operation, and the nature of the seizures made under it.—The Act recites the Convention and the Imperial Statute 59: Geo 3rd cap: 38, before mentioned, and in describing the encroachments on the coasts of the province, which it was its object to prevent, it will be found to be in perfect conformity with the letter, and spirit, of that Statute: while the provisions by which it seeks to effect the object in view, are *borrowed from imperial enactments relating to trade and navigation*:—*Its operation is limited* as of necessity, it must be, to *Nova Scotia* and therefore, it could *not* have been passed as is assumed by Mr. Stevenson, with a view to restrict or destroy the fisheries of the United States *on the coast of Newfoundland*, and for the same reason this Act does *not* affect the Bay of Chaleurs also mentioned by his Excellency.

In point of fact, I have not been able to learn that any seizures have been made when the vessels have not been within the distance prescribed by the Statute, or considered so to be; altho' it is true that the Bay of Fundy (as well as smaller bays on the coast of Nova Scotia), is thought by the law officers in the province to form part of the exclusive territory of the Crown, under the authority of a principle of the law of nations laid down by Grotius, and adopted by English jurists—vide Chitty's Commercial Law—vol i. page 90. extracts from which are contained in the paper marked No. 1, herewith transmitted.—

The complaint made that “the provincial authorities assume the right to prohibit the approach of American vessels, within
128 three miles of a line drawn from headland to headland, instead of from the indents of the shores of the province,” is another exemplification of the difference I have stated to exist in the interpretation put upon the treaty by the subjects of the two Governments, the following words of the Convention of 1818, cited by Mr. Stevenson,

“The United States renouncing any liberty before enjoyed by their citizens to take fish within three marine miles of any coasts, bays, creeks or harbours of the British dominions in America not included within the above limits.—*i. e.* Newfoundland and Labrador,” appearing to the authorities here to bear them out in the assumption of such right, whereas the citizens of the United States maintain the direct contrary.—

On this point the law officers of the Crown in the colony express themselves *very strongly* both on the general principle of international law and the letter and direct spirit of the Convention.—They deem it to be a settled rule, that the shore of a state lying on the sea is determined by a line drawn from the projecting headlands and *not* by following the indentations of the coast (vide Chitty—vol 1st. page 99 & 100. an extract from which is contained in the paper marked No 2. herewith transmitted.) and therefore think it a necessary con-

sequence that the three miles fixed upon by the Convention should always be measured from such a line. But they also say that the words of the Convention would put an end to the question could any be raised on the general rule.—

The language used in the Convention (1st Article) is, “Three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty’s dominions in America” and it is considered that three miles from a bay, creek, or harbour, must mean three miles from any part of it, and consequently from its entrance or mouth, or in other words, from a line drawn from its projecting headlands.—

The Convention however does not stop here, It provides that American fishermen *may* enter “*such bays or harbours*” for the purpose of shelter, repairing damages, and obtaining wood and water and “*for no other purpose whatever.*”—But they *shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.*”

This language is considered conclusive against any pretence that American fishermen should have the right to enter any bays or harbours in Her Majesty’s North American Colonies excepting only for shelter, repairing damages or providing wood and water.—Indeed the claim now set up there is reason to think is *new*, as in point of *practice* the American fishermen when questioned for being within the waters of this province, have uniformly resorted to the pretexts afforded by the Convention, viz: the want of shelter, repairs or wood, and water, and *never* it is believed have asserted the *right* to fish within the *bays or harbours* of the coasts.—

This question is of extreme importance to Nova Scotia, as from the indented nature of its coasts the claim set up by the American Minister would lead to results most injurious to the province.—

The right to resort to the ports of Nova Scotia for shelter, wood, and water, which Mr. Stevenson conceives has never been seriously disputed, has always been frankly conceded in cases of real distress, and unaffected calamity, but *never* when such right was supposed to be exercised for the purpose of evading the British commercial regulations.—Thus in the case of the “Nabby” seized in 1818 by H: M: ship *Saracen*, and prosecuted in the Admiralty Courts of Nova Scotia, it was decided, that vessels are bound to have a sufficient quantity of wood, water, and provisions, on board for the voyage in which they are engaged, a scarcity of either of these articles arising from *design*, or *neglect*, not necessarily opening British ports, to any adventurer seeking to contravene the law.—

The American Minister states in his Despatch that, “the fishermen of the United States believe, (and it would seem they are right in their opinion if uniform practice be evidence of correct construction.) that they can with propriety take fish anywhere on the coasts of the British provinces, if not nearer than three marine miles to land.”—

This from the general context of Mr. Stevenson’s note evidently means, within three miles of the indents of the shore, “the *uniform practice*” alluded to by that gentleman is a practice which has always been *resisted* by the authorities of this colony, altho’ it is difficult with an extended coast and inadequate means of protection entirely to *suppress* it.—

Mr. Stevenson goes on to say, that, "The construction which has been attempted to be put upon the stipulations of the Treaty by the authorities of Nova Scotia is directly in conflict with their object, and entirely subversive of the rights and interests of the citizens of the United States."

And again, "That some of the provisions of her code are of the most extraordinary character" and towards the conclusion of his communication, that,

Some of these rules and regulations are violations of well established principles of the common law of England, and of the principles of the just laws of all civilized nations, and would seem to have been designed to enable Her Majesty's authorities to seize, and confiscate with impunity, American vessels, and *embezzle indiscriminately the property of American citizens* employed in the fisheries on the coasts of the British provinces.

This is very strong language, and if justly applicable at all, is applicable to the Statute of the 59th: Geo: 3rd: passed by the Imperial Parliament one year after the signing of the Convention, and with the express design of carrying out its provisions.—

The words of the above Imperial Statute 59—Geo 3rd : cap 38. are,

And that it shall not be lawful for any person or persons not being a natural born subject of His Majesty, in any *foreign* ship, vessel, or boat, nor any person in any ship vessel or boat, other than such as shall be navigated according to the law of the United Kingdom of Great Britain and Ireland to fish for, or to take, dry, or cure any fish of any kind whatever, within three marine miles of any coasts, bays, creeks or harbours whatever, in any part of His Majesty's dominions in America not included within the limits specified and described in the first article of the said Convention; and that if any such foreign ship vessel, or boat, or any persons on board thereof, shall be found *fishing or preparing to fish*, within such distance of such coasts, bays, creeks, or harbours, within such parts of His Majesty's dominions in America out of the said limits as aforesaid; all such ships, vessels, and boats, together with their cargoes, and all guns, ammunition, tackle, apparel, furniture, and stores, shall be forfeited and shall and may be seized, taken, sued for, prosecuted, recovered, and condemned, by *such and the like ways, means, and methods*, and in the *same courts* as ships vessels or boats may be forfeited, seized, prosecuted and condemned for any offence against any laws relating to the revenue of customs or the *laws of trade and navigation under any Act, or Acts of the Parliament of Great Britain*, or of the United Kingdom of Great Britain and Ireland, provided that nothing in said Act contained shall apply, or be construed to apply, to the ships or subjects of any prince potentate, power, or state, in amity with His Majesty, who are entitled by Treaty with His Majesty to any privilege of taking, drying, or curing fish, on the coast, in the bays, creeks, or harbours or within the limits in that Act described.

Thus the very words "*preparing to fish*" so strongly animadverted on by Mr. Stevenson are copied from an *Imperial Act which has been twenty three years in force*, and which, in as much as it has relation to American interests of the greatest importance, and sprung out of a Convention concluded with a view to the establishment of those interests could not but be well known to the Government of the United States.—

The 8 section of the 6th: of Wm. 4th: which provides that the owner of the vessel seized shall be held to prove his innocence does *not* involve the payment of treble costs in case of failure, and Mr. Stevenson is, as I am assured by the Crown officers here, in error with respect to the interpretation he has given to it.—

Mr. Stevenson objects to the seizing officer being "liable to no prosecution if the Judge certifies that there is probable cause of seizure" and complains that, "the plaintiff if successful in his suit is

only entitled to 2d damages, without costs, and the defendant can be fined no more than one shilling.”—

This is an imperfect statement of the clause, inasmuch as the plaintiff is entitled to recover the value of his goods, but in case probable cause, is certified, he can only in *addition* recover two pence damages.—The provision was however *transcribed* from the *Imperial Statute* of the 6th Geo: 4th cap: 114.—entitled “An Act to regulate the trade of the British possessions abroad,” and therefore, if it be in reality “*a violation of the well established principles of the common law of England, and of the principles of the just laws of all civilized nations,*” has been long submitted to by *British* subjects, and *could not* have been designed by the Assembly of Nova Scotia, “to enable Her Majesty’s authorities to seize and confiscate with impunity American vessels, and embezzle indiscriminately the property of American citizens.”—

Her Majesty’s exclusive property and dominion, in the Strait of Canso is deemed maintainable upon the principles of international law, already referred to, and which it is considered will apply equally, whether the shores on each side form parts of the *same* province, or of *different* provinces, *belonging to Her Majesty*.—This strait is very narrow, not exceeding in some parts one mile in breadth, as may be seen on the Admiralty charts, and its navigation, is not necessary for communication with the space beyond, which may be reached by going round the Island of Cape Breton.—

Having noticed successively the allegations of the American Minister, I may be permitted to make one or two remarks on the general tenor of his Excellency’s communication, which goes to charge the Legislature of Nova Scotia, with a design to subvert the rights, and interests, of the citizens of the United States, in contravention of the Treaty of 1818.—

It appears to me that the Provincial Legislature cannot fairly be accused of any such intention. It is manifest that neither the Statute of the Imperial Parliament, nor that of the Colonial Legislature, can extend the terms of the Treaty *itself*, or render them more comprehensive, its true construction according to the law of nations, must govern those to be affected by it, and the colonists aware of this, and conceiving themselves wronged by the interpretation given to the treaty by their neighbours of the United States, have long been, and now are, as my Despatch No: 69: date April 28th 1841.—will have informed your Lordship, anxious to obtain the opinions of the most eminent jurists on the subject, not seeking for any forced construction of the Treaty to give them privileges not contemplated at its execution, but merely to protect themselves from that which, be they in error or not; they *now* deem an infringement of their rights.—The whole course of their legislation appears to prove this:—In the laws they have made for the protection of their fisheries, which are in no case more extensive than the Imperial Statute 59: Geo: 3rd.—there is not only nothing *new*, but they have endeavoured as I have shown to adopt on all occasions the principles of Imperial legislation and have copied even the words of Imperial Acts.—

I have now I trust established that if the interpretation put on the Treaty by the inhabitants of Nova Scotia is an incorrect one they are sincere in their belief of the justice, and truth, of that interpretation, and are most anxious to have it tested by capable authorities, and further, that if the laws passed by the Provincial Legislature are

really of the oppressive nature they are asserted to be by Mr. Stevenson they were enacted in the belief that the framers of them were doing nothing more than carrying out the views of the Home Government as to the mode in which the colonists should protect their own dearest interests.—I inclose a copy of a proclamation, containing the Act of 6th of Wm. the 4th of which Mr. Stevenson complains, 130 and any alteration in its provisions, should such be deemed necessary, may be made early in the next session of the Pro: Parliament.—

With regard to the Convention of 1818, it is I think apparent, (from the history of the transaction as given by Mr. Rush in his Memoirs chap: 19 page 400.—) that at the time it was concluded the American Plenipotentiaries *acting on wrong information derived from their own fishermen, believed*, that in renouncing for ever the liberty of fishing within three miles of any part of the coasts of British America, where the right of fishing is not guaranteed to them by the terms of the said Convention, they did *not* in reality relinquish the advantages to be derived from these fisheries, *for they supposed the whole fishing ground on the coast of Nova Scotia to extend to a greater distance than three miles from the land.*

The Plenipotentiaries however acted on bad information, and were mistaken, beyond three miles from the land, very few, if any herring or mackerel, the chief objects of pursuit are to be caught, and the natives of the United States are now consequently disappointed, and discontented, at not continuing to enjoy that wh. they had as they *conceived only apparently* covenanted to give up.—Mr. Rush in his Memoirs page 400. cap: 19. claims credit for his astuteness in regard to this arrangement and the introduction into the Treaty of a clause not found in the British contre-projet in the following words,

“It was by *our* act that the United States renounced the right to the fisheries not guaranteed to them by the Convention.—That clause did not find a place in the British contre-projet. We deemed it proper under a threefold view: first, to exclude the implication of the fisheries secured to us being a new grant: secondly, to place the rights secured and renounced on the same footing of permanence; thirdly, that it might expressly appear that our renunciation was *limited to three miles fm the coasts.*” *This last point we deemed of the more consequence from our fishermen having informed us that the whole fishing ground on the coasts of Nova Scotia extended to a greater distance than “three miles from the land: whereas along the coasts of Labrador it was almost universally close in with the coast.”—*

Whatever the true construction of the Treaty may be, and I cannot but conceive that that construction must be ascertained, not by negotiation, but in the courts of law, Her Majesty’s subjects in this province will willingly abide by it, and in like manner I cannot doubt but that any course Her Majesty’s Govt: may deem it expedient to follow with regard to the above Treaty will be cheerfully acquiesced in by the people of Nova Scotia who feel assured that in a matter of such vital importance to their future prosperity, the conduct of the mother country will be guided by principles of equity and a due regard to the interests of her offspring wherever those interests ought in justice to be upheld.

I have the honour to be My Lord,
your Lordship’s, obdt: humble servt:

FALKLAND:

The Lord John Russell,
&c &c &c

No. 75.—1843, August 10: *Letter from Mr. Everett (United States Minister at London) to Lord Aberdeen (British Foreign Secretary).*

46 GROSVENOR PLACE, August 10, 1843.

The undersigned, envoy extraordinary and minister plenipotentiary of the United States of America, has the honour to transmit to the earl of Aberdeen, her Majesty's principal Secretary of State for foreign affairs, the accompanying papers relating to the seizure on the 10th of May last, on the coast of Nova Scotia, by an officer of the provincial customs, of the American fishing schooner *Washington*, of Newburyport, in the State of Massachusetts, for an alleged infraction of the stipulations of the convention of the 20th of October, 1818, between the United States and Great Britain.

It appears from the deposition of William Bragg, a seaman on board the *Washington*, that at the time of her seizure she was not within ten miles of the coast of Nova Scotia. By the first article of the convention above alluded to, the United States renounce any liberty heretofore enjoyed or claimed by their inhabitants to take, dry, or cure fish on or within three marine miles of any of the coast of her Majesty's dominions in America, for which express provision is not made in the said article. This renunciation is the only limitation existing on the right of fishing upon the coasts of her Majesty's dominions in America, secured to the people of the United States by the third article of the treaty of 1783.

The right, therefore, of fishing on any part of the coast of Nova Scotia, at a greater distance than three miles, is so plain that it would be difficult to conceive on what ground it could be drawn in question had not attempts been already made by the provincial authorities of her Majesty's colonies, to interfere with its exercise. These attempts have formed the subject of repeated complaints on the part of the government of the United States, as will appear from several notes addressed by the predecessor of the undersigned to Lord Palmerston.

131 From the construction attempted to be placed, on former occasions, upon the first article of the treaty of 1818, by the colonial authorities, the undersigned supposes that the "*Washington*" was seized because she was found fishing in the Bay of Fundy, and on the ground that the lines within which American vessels are forbidden to fish, are to run from headland to headland, and not to follow the shore. It is plain, however, that neither the words nor the spirit of the convention admits of any such construction; nor, it is believed, was it set up by the provincial authorities for several years after the negotiation of that instrument. A glance at the map will show Lord Aberdeen that there is, perhaps, no part of the great extent of the sea coasts of her Majesty's possessions in America, in which the right of an American vessel to fish can be subject to less doubt than that in which the "*Washington*" was seized.

For a full statement of the nature of the complaints which have, from time to time, been made by the government of the United States against the proceedings of the colonial authorities of Great Britain, the undersigned invites the attention of Lord Aberdeen to a note of Mr. Stevenson, addressed to Lord Palmerston on the 27th March,

1841. The receipt of this note was acknowledged by Lord Palmerston on the 2d of April, and Mr. Stevenson was informed that the subject was referred by his lordship to the Secretary of State for the colonial department.

On the 28th of the same month Mr. Stevenson was further informed by Lord Palmerston, that he had received a letter from the colonial department, acquainting his lordship that Mr. Stevenson's communication would be forwarded to Lord Falkland with instructions to inquire into the allegations contained therein, and to furnish a detailed report upon the subject. The undersigned does not find on the files of this legation any further communication from Lord Palmerston in reply to Mr. Stevenson's letter of the 27th March, 1841, and he believes that letter still remains unanswered.

In reference to the case of the *Washington* and those of a similar nature which have formerly occurred, the undersigned cannot but remark upon the impropriety of the conduct of the colonial authorities in undertaking, without directions from her Majesty's government, to set up a new construction of a treaty between the United States and England, and in proceeding to act upon it by the forcible seizure of American vessels.

Such a summary procedure could only be justified by a case of extreme necessity, and where some grave and impending mischief required to be averted without delay. To proceed to the capture of vessels of a friendly power for taking a few fish within limits alleged to be forbidden, although allowed by the express terms of the treaty, must be regarded as a very objectionable stretch of provincial authority. The case is obviously one for the consideration of the two governments, and in which no disturbance of a right exercised without question for fifty years from the treaty of 1783, ought to be attempted by any subordinate authority. Even her Majesty's government, the undersigned is convinced, would not proceed in such a case to violent measures of suppression, without some understanding with the government of the United States, or, in the failure of an attempt to come to an understanding, without due notice given of the course intended to be pursued.

The undersigned need not urge upon Lord Aberdeen the desirableness of an authoritative intervention on the part of her Majesty's government to put an end to the proceedings complained of. The President of the United States entertains a confident expectation of an early and equitable adjustment of the difficulties which have been now for so long time under the consideration of her Majesty's government. This expectation is the result of the President's reliance upon the sense of justice of her Majesty's government, and of the fact, that, from the year 1818, the date of the convention, until some years after the attempts of the provincial authorities to restrict the rights of American vessels by colonial legislation, a *practical* construction was given to the first article of the convention, in accordance with the obvious purport of its terms and settling its meaning as understood by the United States.

The undersigned avails himself of this opportunity to tender to Lord Aberdeen the assurance of his distinguished consideration.

EDWARD EVERETT.

No. 76.—1843, *October 17: Despatch from the Right Hon. Viscount Falkland to the Right Hon. Lord Stanley.*

No. 185. GOVERNMENT HOUSE HALIFAX.

October 17. 1843

MY LORD, I have had the honour to receive your Lordship's Despatch, No. 132, enclosing the copy of a letter from Mr. Addington, covering the copy of a note from Mr. Everett, the American Minister in London, complaining of the seizure, in the month of May last, by an officer of the Provincial Custom House in Nova Scotia, of an American fishing schooner the "Washington" for an alleged infraction of the stipulations of the Convention of the 20th. of October 1818 between Great Britain and the United States, and desiring that I would make a full report of the circumstances attending the transaction.—

In obedience to your Lordship's commands, I herewith transmit a report of the Attorney General of Nova Scotia, (see paper 132 No. 1) explaining the grounds on which the above vessel was captured, and setting forth the reasons which induced me, in accordance with the advice of the Provincial Crown Officers, not to interfere to prevent her condemnation.—

I likewise forward (see paper No. 2) a copy of a Despatch, numbered 75, dated May 8. 1841, and addressed by me to Lord John Russell, on the occasion of the letter sent by Mr. Stevenson to Lord Palmerston on the 27th March 1841, (to which letter Mr. Everett alludes in his communication to your Lordship dated 10th August 1843) the perusal of which will apprise you of the footing on which matters stood with regard to American fishermen tresspassers on these coasts, up to that period, since which no reference has been made to the subject by either the British, or, in as far as I am aware, the American Government:—The House of Assembly of Nova Scotia however, anxious to set at rest by means of a legal determination a question likely to engender unpleasant feelings between Her Majesty's subjects of this province and their neighbours of the United States, have never ceased from their endeavours to obtain a judicial decision as to the interpretation to be given to the terms of the Convention of 1818: but unwilling to proceed with precipitation in a case in which some of the most important interests of this colony are involved, and in which therefore it was natural to suppose the judgments of the local authorities might be in some degree biased,—the house requested that I would obtain; through your Lordship's predecessor the opinion of the Crown Officers of England as to the several points on which the Provincial Legislature and the citizens of the United States are at issue.—I, in consequence, begged, in my Despatch No. 69, dated 28th April 1841, that Lord John Russell would allow a case stated, and therewith forwarded, to be submitted to the Attorney and Solicitor General, which being done, your Lordship in your Despatch, No. 86, dated 28 November 1842, inclosed an opinion signed 'J. Dodson' and, 'Thomas Wilde,' directly confirmatory of the interpretation put on the words of the treaty by the Assembly; and on the capture of the Washington, the captor having an interest in the result, and being resolved to stand all the consequences of his acts, as he believed himself supported by the opinion above referred to, I, after consulting the Provincial Crown Officers decided on allowing

the law to take its course in the hope that the question might be adjudicated on and finally determined.

It is worthy of remark that the American Government, or even any American citizen, can settle the point in dispute at any time, by appealing to the Courts of Law; but the trespassers on our fishing grounds prefer invoking the protection of their ambassador, and charging the provincial authorities with impropriety of conduct, which impropriety, if any exists, is, in the present instance at least, solely attributable to the reliance of those authorities on the opinion of the English Crown Officers.—

Mr. Everett says “it is believed that no such construction as that now sought to be put on the terms of the Convention was set up by the provincial authorities for several years after the negotiation of that instrument.” But his Excellency is mistaken on this point, as I have already shown, in the Despatch, No. 75, which accompanies this.—

Mr. Everett complains of “the harsh measure of proceeding to the capture” of the vessels of a friendly power for taking a few fish within limits alleged to be forbidden, *although allowed by the express terms of the treaty,* thus assuming the point at issue, in contradiction to the judgment of Dr. Dodson, and Sir Thomas Wilde.

In conclusion I deem it my duty, as the advocate of the interests of the province of Nova Scotia, to state to your Lordship in the most forcible terms that the cession of the right of fishery, to the extent claimed by the American Minister (that is to say within the headlands of the bays and harbours of Nova Scotia when those bays or harbours shall exceed three miles in depth) would, although apparently treated by his Excellency as a matter of small moment, be nearly destructive of a branch of commerce the prosperity of which is of the utmost importance to the welfare of this colony, and, that such a measure would be viewed with extreme apprehension by all classes of its inhabitants.

I have the honour to be, my Lord,

Your Lordship's most obedient humble servant

FALKLAND:

The Lord STANLEY,
&c &c &c

No. 77.—1844, April 15: Letter from Lord Aberdeen to Mr. Everett.

FOREIGN OFFICE, April 15, 1844.

The note which Mr. Everett, envoy extraordinary and minister plenipotentiary of the United States of America, addressed to the undersigned, her Majesty's principal Secretary of State for foreign affairs, on the 10th of August last, respecting the seizure of the American fishing vessel *Washington* by the officers of Nova Scotia, having been duly referred to the colonial office, and by that office to the governor of Nova Scotia, the undersigned has now the honor to communicate to Mr. Everett the result of those references.

The complaint which Mr. Everett submits to her Majesty's government is that, contrary to the express stipulations of the convention concluded on the 20th of October, 1818, between Great Britain and the United States, an American fishing vessel was seized by

133 the British authorities for fishing in the Bay of Fundy, where Mr. Everett affirms that, by the treaty, American vessels have a right to fish, provided they are at a greater distance than three marine miles from the coast.

Mr. Everett, in submitting this case, does not cite the words of the treaty, but states in general terms that, by the first article of said treaty the United States renounce any liberty heretofore enjoyed or claimed by their inhabitants to take, dry, or cure fish on or within three miles of any of the coasts of her Majesty's dominions in America. Upon reference, however, to the words of the treaty, it will be seen that American vessels have no right to fish, and indeed are expressly debarred from fishing in any bay on the coast of Nova Scotia.

The words of the treaty of October, 1818, article 1. run thus: "And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to *take*, dry, or cure fish, on or *within three marine miles* of any of the coasts, *bays*, creeks or harbours of his Britannic Majesty's dominions in America, not included within the abovementioned limits, [that is, Newfoundland, Labrador, and other parts separate from Nova Scotia:] provided, however, that the American fishermen shall be *admitted to enter* such bays or harbors for the purpose of shelter," &c.

It is thus clearly provided that American fishermen shall not take fish within three marine miles of any bay of Nova Scotia, &c. If the treaty was intended to stipulate simply that American fishermen should not take fish within three miles of the coast of Nova Scotia, &c., there was no occasion for using the word "*bay*" at all. But the proviso at the end of the article shows that the word "*bay*" was used designedly; for it is expressly stated in that proviso, that under certain circumstances the American fisherman may enter *bays*, by which it is evidently meant that they may, under those circumstances, pass the sea-line which forms the entrance of the bay. The undersigned apprehends that this construction will be admitted by Mr. Everett.

That the *Washington* was found fishing within the Bay of Fundy is, the undersigned believes, an admitted fact, and she was seized accordingly.

The undersigned requests Mr. Everett to accept the assurances of his high consideration.

ABERDEEN.

EDWARD EVERETT, Esq.

No. 78.—1844, May 25: *Letter from Mr. Everett to Lord Aberdeen.*

GROSVENOR PLACE, May 25, 1844.

The undersigned, Envoy Extraordinary and Minister Plenipotentiary of the United States of America, had the honor duly to receive the note of the 15th of April, addressed to him by the Earl of Aberdeen, her Majesty's principal Secretary of State for Foreign Affairs, in reply to the note of the undersigned of the 10th of August last, relative to the seizure of the American vessel, the *Washington*, for having been found fishing within the limits of the Bay of Fundy.

The note of the undersigned, of the 10th of August last, although its immediate occasion was the seizure of the *Washington*, contained

a reference to the correspondence between Mr. Stevenson and Viscount Palmerston on the subject of former complaints of the American Government, of the manner in which the fishing vessels of the United States had in several ways been interfered with by the provincial authorities, in contravention as is believed, of the treaty of October, 1818, between the two countries. Lord Aberdeen's attention was particularly invited to the fact that no answer as yet had been returned to Mr. Stevenson's note to Lord Palmerston, of 27th March, 1841, the receipt of which and its reference to the Colonial department were announced by a note of Lord Palmerston of the 2d April. The undersigned further observed that on the 28th of the same month Lord Palmerston acquainted Mr. Stevenson that his lordship had been advised from the Colonial office, that "copies of the papers received from Mr. Stevenson would be furnished to Lord Falkland, with instructions to inquire into the allegations contained therein, and to furnish a detailed report on the subject"; but that there was not found on the files of this legation any further communication from Lord Palmerston on the subject.

The note of Lord Aberdeen, of the 15th of April last, is confined exclusively to the case of the *Washington*; and it accordingly becomes the duty of the undersigned again to invite his lordship's attention to the correspondence above referred to between Mr. Stevenson and Lord Palmerston, and to request that inquiry may be made, without unnecessary delay, into all the causes of complaint which have been made by the American Government against the improper interference of the British colonial authorities with the fishing vessels of the United States.

In reference to the case of the *Washington*, Lord Aberdeen, in his note of the 15th of April, justifies her seizure by an armed provincial vessel, on the assumed fact that, as she was found fishing in the Bay of Fundy, she was within the limits from which the fishing vessels of the United States are excluded by the provisions of the convention between the two countries of October 1818.

The undersigned had remarked in his note of the 10th of August last, on the impropriety of the conduct of the colonial authorities in proceeding in reference to a question of construction of a treaty pending between the two countries, to decide the question in their own favor, and in virtue of that decision to order the capture of the vessels of a friendly State. A summary exercise of power of this

kind, the undersigned is sure would never be resorted to by her
 134 Majesty's government, except in an extreme case, while a negotiation was in train on the point at issue. Such a procedure on the part of a local colonial authority, is of course highly objectionable, and the undersigned cannot but again invite the attention of Lord Aberdeen to this view of the subject.

With respect to the main question of the right of American vessels to fish within the acknowledged limits of the Bay of Fundy, it is necessary, for a clear understanding of the case, to go back to the treaty of 1783.

By this treaty it was provided that the citizens of the United States should be allowed "to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use, (but not to dry or cure the same on that island) and also on the coasts, bays and creeks of all other of his Britannic Majesty's dominions

in America, and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors and creeks of Nova Scotia, Magdalen islands and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement without a previous agreement for that purpose with the inhabitants, proprietors or possessors of that ground."

These privileges and conditions were in reference to a country of which a considerable portion was then unsettled, likely to be attended with differences of opinion as to what should, in the progress of time, be accounted a settlement from which American fishermen might be excluded. These differences in fact arose, and by the year 1818 the state of things was so far changed that her Majesty's government thought it necessary in negotiating the convention of that year, entirely to except the province of Nova Scotia from the number of the places which might be frequented by Americans as being in part unsettled, and to provide that the fishermen of the United States should not pursue their occupation within three miles of the shores, bays, creeks and harbors of that and other parts of her Majesty's possessions similarly situated. The privilege reserved to American fishermen by the treaty of 1783, of taking fish in all the waters and drying them on all the unsettled portions of the coast of these possessions was accordingly by the convention of 1818 restricted as follows:

The United States hereby renounce for ever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbors of his Britannic Majesty's dominions in America, not included within the above mentioned limits; provided, however, that the American fishermen shall be admitted to enter such bays or harbors for the purpose of sheltering and repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever.

The existing doubt as to the construction of the provision arises from the fact that a broad arm of the sea runs up to the northeast, between the provinces of New Brunswick and Nova Scotia. This arm of the sea being commonly called the Bay of Fundy, though not in reality possessing all the characters usually implied by the term "bay," has of late years been claimed by the provincial authorities of Nova Scotia to be included among "the coasts, bays, creeks and harbors forbidden to American fishermen."

An examination of the map is sufficient to show the doubtful nature of this construction. It was notoriously the object of the article of the treaty in question to put an end to the difficulties which had grown out of the operations of the fishermen from the United States along the coasts and upon the shores of the settled portions of the country, and for that purpose to remove their vessels to a distance not exceeding three miles from the same. In estimating this distance, the undersigned admits it to be the intent of the treaty, as it is itself reasonable, to have regard to the general line of the coast; and to consider its bays, creeks and harbors, that is, the indentations usually so accounted, as included within that line. But the undersigned cannot admit it to be reasonable, instead of thus following the general directions of the coast, to draw a line from the southwestern-most point of Nova Scotia to the termination of the northeastern boundary between the United States and New Brunswick, and to consider the arms of the sea which will thus be cut off,

and which cannot, on that line be less than sixty miles wide, as one of the bays on the coast from which American vessels are excluded. By this interpretation the fishermen of the United States would be shut out from the waters distant, not three, but thirty miles from any part of the colonial coast. The undersigned cannot perceive that any assignable object of the restriction imposed by the convention of 1818 on the fishing privilege accorded to the citizens of the United States by the treaty of 1783 requires such a latitude of construction.

It is obvious that (by the terms of the treaty) the furthest distance to which fishing vessels of the United States are obliged to hold themselves from the colonial coasts and bays, is three miles. But, owing to the peculiar configuration of these coasts, there is a succession of bays indenting the shores both of New Brunswick and Nova Scotia, within the Bay of Fundy. The vessels of the United States have a general right to approach all the bays in her Majesty's colonial dominions, within any distance not less than three miles—a privilege from the enjoyment of which they will be wholly excluded—in this part of the coast, if the broad arm of the sea which flows up between New Brunswick and Nova Scotia, is itself to be considered one of the forbidden bays.

Lastly—and this consideration seems to put the matter beyond doubt—the construction set up by her Majesty's colonial authorities, would altogether nullify another, and that a most important stipulation of the treaty, about which there is no controversy, viz: the privilege reserved to American fishing vessels of taking shelter and repairing damages in the bays within which they are forbidden to fish. There is, of course, no shelter nor means of repairing damages for a vessel entering the Bay of Fundy, in itself considered. It is necessary, before relief or succor of any kind can be had, to traverse that broad arm of the sea and reach the bays and harbors, properly so called, which indent the coast, and which

135 are no doubt the bays and harbors referred to in the convention of 1818. The privilege of entering the latter in extremity of weather, reserved by the treaty, is of the utmost importance. It enables the fishermen, whose equipage is always very slender (that of the Washington was four men all told) to pursue his laborious occupation with comparative safety, in the assurance that in one of the sudden and dangerous changes of weather so frequent and so terrible on this iron bound coast, he can take shelter in a *neighbouring* and friendly port. To forbid him to approach within thirty miles of that port, except for shelter in extremity of weather, is to forbid him to resort there for that purpose. It is keeping him at such a distance at sea as wholly to destroy the value of the privilege expressly reserved.

In fact it would follow, if the construction contended for by the British colonial authorities were sustained, that two entirely different limitations would exist in reference to the right of shelter reserved to American vessels on the shores of her Majesty's colonial possessions. They would be allowed to fish within three miles of the place of shelter along the greater part of the coast; while in reference to the entire extent of shore within the Bay of Fundy, they would be wholly prohibited from fishing along the coast, and would be kept

at a distance of twenty or thirty miles from any place of refuge in case of extremity. There are certainly no obvious principles which render such a construction probable.

The undersigned flatters himself that these considerations will go far to satisfy Lord Aberdeen of the correctness of the American understanding of the words "Bay of Fundy," arguing on the terms of the treaties of 1783 and 1818. When it is admitted that, as the undersigned is advised, there has been no attempt till late years to give them any other construction than that for which the American government now contends, the point would seem to be placed beyond doubt.

Meantime Lord Aberdeen will allow that this is a question, however doubtful, to be settled exclusively by her Majesty's government and that of the United States. No disposition has been evinced by the latter to anticipate the decision of the question; and the undersigned must again represent it to the Earl of Aberdeen as a matter of just complaint and surprise on the part of his government, that the opposite course has been pursued by her Majesty's colonial authorities, who have proceeded (the undersigned is confident without instructions from London), to capture and detain an American vessel on a construction of the treaty which is a matter of discussion between the two governments, and while the undersigned is actually awaiting a communication on the subject promised to his predecessor.

This course of conduct, it may be added, objectionable under any circumstances, finds no excuse in any supposed urgency of the case. The Washington was not within three times the limit admitted to be prescribed in reference to the approach of American vessels to all other parts of the coast, and in taking a few fish, out of the abundance which exists in those seas, she certainly was inflicting no injury on the interests of the colonial population which required this summary and violent measure of redress.

The undersigned trusts that the Earl of Aberdeen, on giving a renewed consideration to the case, will order the restoration of the Washington, if still detained, and direct the colonial authorities to abstain from the further capture of the fishing vessels of the United States under similar circumstances, till it has been decided between the two governments whether the Bay of Fundy is included among "the coasts, bays, creeks and harbors" which American vessels are not permitted to approach within three miles.

The undersigned requests Lord Aberdeen to accept the assurances of his distinguished consideration.

EDWARD EVERETT.

The Earl of Aberdeen, &c., &c.

No. 79.—1844, July 5: *Extract from Letter from Mr. Calhoun (United States Secretary of State) to Mr. Everett.*

[No. 97.]

DEPARTMENT OF STATE,
Washington, July 5, 1844.

SIR: I have the honour to acknowledge the receipt of your despatches to No. 147, inclusive.

The President is perfectly satisfied with the manner in which you have presented the case of the American vessel *Washington*, seized by British colonial authorities for having been found fishing within the Bay of Fundy, and with the argument on the main question contained in your note to the Earl of Aberdeen of the 25th of May last, involving the interpretation to be given to the provisions of the convention of 1818. * * *

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136 No. 80.—1844, *September 17: Despatch from the Right Hon. Viscount Falkland (Lieutenant-Governor of Nova Scotia) to the Right Hon. Lord Stanley (British Colonial Secretary).*

No. 271. GOVERNMENT HOUSE HALIFAX 17th September 1844.

MY LORD, I have had the honour to receive your despatch, No. 176, date 28 July 1844, enclosing a letter from Mr. Addington, covering a further representation from the Minister of the United States at London upon the seizure of the American fishing vessel "*The Washington*," in which his Excellency complains of the alleged strained interpretation of the Convention of 1818, by which American vessels are excluded from fishing in the Bay of Fundy.—Your Lordship likewise informs me that Lord Aberdeen is well disposed, on mature consideration, to relax the strict rule which has hitherto been declared applicable to American vessels found fishing within the limits of the Bay (but without renouncing the right of Great Britain to consider the Bay of Fundy as distinguished from the ocean) provided the fishermen of the United States do not approach within three miles of any inlet within the bay, or within three miles of the coast, and you do me the honour to require my unreserved opinion upon Lord Aberdeen's proposal.—

With regard to the seizure of "*The Washington*" I have already in my despatch No. 185, date 17 October 1843, explained the grounds of her capture, and the reasons which induced me, in accordance with the advice of the provincial Crown officers, to refrain from interfering to prevent her condemnation.—

Mr. Everett complains that the provincial authorities captured and detained "*The Washington*" while a negotiation between the Governments of the United States and Great Britain on the point at issue, namely the right of American fishermen to fish in the waters of the Bay of Fundy, *was in train*, and undetermined; but it is manifest that if the American fishermen had acted in accordance with the rule here laid down by their minister, and abstained from exercising the right they claim until it was decided that they actually possessed it, no such act as that against which they now protest could have been committed.—

In respect to the expediency of relaxing the strict rule which has hitherto been declared applicable to American vessels found fishing within the limits of the Bay of Fundy, I have found it difficult to arrive at a conclusion, because although some members of the Executive Council believe, with myself, that such a concession, *provided it led to no other* of a like nature, would not be productive of injury

to Nova Scotia, and might in fairness be granted, other members of the board, among whom is the Attorney General, entertain a strong opinion to the contrary.—

When however I perceive that Mr. Everett, in his note of the 25th May 1844, addressed to Lord Aberdeen admits that (in estimating the distance of three miles from the shore within which American fishermen are not permitted to approach) it is “the intent of the treaty, as it is in itself reasonable to have regard to the general line of the coast and to consider its bays creeks and harbours, that is the indentations so accounted, as included within that line,” which I take to be an acquiescence in the opinion of Messrs Dodson and Wilde, that the distance within which American fishermen must not approach is three miles from a line drawn from headland to headland, taking the general configuration of the coast; I cannot but conceive that a great portion of what I have contended for, (in my despatch No 75, date May 8th 1841, addressed to Lord John Russell) on the part of the province, is conceded, and it is therefore my unreserved opinion, provided always that this interpretation of Mr. Everett’s phraseology be correct, that that which is now asked by the Americans may be granted, without evil consequences, if due care be taken that no further pretensions can hereafter be founded on the concession.

The difficulties to be apprehended in future, if the arguments of the American minister are yielded to on the present occasion, are embodied in a paper which I enclose drawn up by the Attorney General, to which I beg very earnestly that your Lordship and Lord Aberdeen will direct your particular attention.—

I regret much that the course which I view as unobjectionable, in this matter will not be so regarded by the provincial Legislature, and I feel very sensibly that while the Americans seek for every advantage to be obtained by exercising the rights of fishery on the coasts of Nova Scotia, the produce of the labour of the *provincial fisherman* is excluded from the markets of the United States by prohibitive duties. This consideration induces me to submit to your Lordship whether an opportunity of strongly urging on the Government of the United States the immediate diminution of these duties is not afforded by the present negotiation.

I have the honour to be, my Lord,

your Lordship’s most obedient, humble servant,

FALKLAND:

The Right Honble The LORD STANLEY

&c &c &c

137 No. 81.—1844, September 17: Memorandum by the Attorney General of Nova Scotia.

Memorandum on the Seizure of the American schooner Washington for fishing in the Bay of Fundy and on the Questions raised in the American Minister’s Note of 25th May 1844 vindicating the Right of American Subjects to fish in that Bay.

His Excellency the American minister considers the Bay of Fundy as not included in the term “bays” in the treaty entered into at London on the 20th October 1818, because of its size and situation,—of its containing other bays and harbours within it,—and because

if excluded from it American vessels could not use for shelter &c. those other bays, and harbours.—Had the treaty of 1818 used only the word “coasts” it is presumed it would under general international law have excluded approach within three miles of any line to be drawn from the headlands of the coast;—not the outer points of each harbour and inlet—but the extremities of the coast in its main features and general configuration.—

The treaty was however, specific, and excluded bays creeks and harbours by name, probably to prevent dispute as the treaty of 1783 had used these words in conjunction with the word “coasts” in defining the privilege then granted.

Under the word “*coasts*” and still more emphatically under the term “*bays*” it is conceived the American fishermen are excluded from the Bay of Fundy.

The American minister has failed to advert to the fact that the Bay of Fundy after entering Her Majesty’s possessions, is encircled and enclosed therein and terminates in the heart of the country.—

If the term *coasts* in international law embraces a large expanse of water stretching into and forming one with the Atlantic ocean, and which every passing ship may find occasion to use as part of the highway of nations and defined only by an imaginary line drawn from two far separated promontories or headlands, it is not a little difficult to exclude from its import an inlet of water, tho’ considerable in size, confined and situated as the Bay of Fundy is.

If, however the term “*coasts*” did not operate to exclude the American fishermen from the Bay of Fundy, the word “bays” used in the treaty it is conceived must, if any language can do so short of an identical designation by name.—

For there is not only nothing in the size or situation of these waters to exclude them from the distinctive term “bay,” but no other general term could be used with equal, or with any propriety.—

The alterations in the stipulations of the two treaties, reasoned upon by the American minister, had it is believed not the limited cause or end which his Excellency has suggested—namely, to avoid disputes which had arisen under the former treaty as to what should be esteemed *unsettled* portions of Her Majesty’s North American provinces.

The treaty of ’83 gives permission to fish on the coasts of Nova Scotia without reference to their settlement or non settlement. The distinction regarding the settlement of the country applied only to the privilege of curing fish on the shores, and any disputes arising from this cause would have been prevented by withdrawing this latter privilege alone; but the treaty of 1818 went further and withdrew the privilege of fishing also, about which no such dispute existed or could arise.—The occasion and object of the treaty in this particular therefore was much more extensive than his Excellency has supposed. We must believe it was designed to give to the inhabitants of these British North American provinces the exclusive right to take the fish which entered their waters over which the British Crown could exercise control; Hence the restriction within three marine miles, the limit of British authority.—

This object would be better advanced by including the Bay of Fundy within the prohibition than most of the bays besides, about which no dispute is now raised.—

The Bay of Fundy being completely interterritorial, and receiving the fresh water from a large portion of both provinces was an obvious appendage of the territory surrounding it; and would naturally be deemed the inheritance of its inhabitants while it furnished the congenial resort for the most valuable sorts of fish:—whereas such bays as open into the ocean in a more broad and expansive manner would afford less appearance of exclusive property and be of less value as fishing ground.—

As a large portion of the reasoning in his Excellency's note is drawn from the assertion that a succession of bays indent the shores of the Bay of Fundy, it may, in passing, be not inexpedient to observe that, as the mode in which the distance across the Bay of Fundy is spoken of is calculated to convey an exaggerated notion of its general width, so the description of the configuration of its shores is not appropriate. So far from those shores being indented by a succession of bays, there are exceedingly few indentations approaching to this character, or having the attributes of a harbour between the Gut of Annapolis on the Nova Scotia side, and St. John Harbour on the New Brunswick shore, and the termination of the bay in the channel and basin of Mines on one side and in Chignecto Bay on the other.

His Excellency argues largely on the assumption that “the vessels of the United States have a general right to approach *all* the bay's in Her Majesty's colonial dominions within any distance not less than three miles,” and thence concludes that the Bay of Fundy is
 138 not a bay from which they are excluded by the treaty, because such exclusion would prevent their approaching within three miles of the bays within its limits.—

This argument if correct would prove a great deal, because it applies equally to other bays and harbours:—

For instance, Bedford Basin lying above the harbour of Halifax is unquestionably a bay or harbour within the terms of the treaty.—The American fishermen it is said has a right to approach *all* our bays within three miles, and the treaty puts bays and harbours on the same footing—therefore it would follow he has a right to approach within three miles of Bedford Basin and consequently to fish within Chebucto Head and the mouth of Halifax Harbour, keeping, as he may, more than three miles distant from any shore or from the basin.—

This argument however it is believed inverts the case.—

The American fisherman is excluded by the formal agreement of his own Government from fishing within three miles of any of the coasts, bays &c. of Her Majesty's dominions in America not excepted in the treaty; and he has no such privilege affirmatively granted as the argument assumes. The sole question seems very evidently to be whether the Bay of Fundy be within the meaning of the treaty and there appears no reason for assuming that the determination of it can be affected by the fact that it contains interior bays or harbours.

The concluding argument of the American minister and one which he declares puts the matter beyond doubt, is that as the American fisherman has the privilege reserved of seeking shelter &c: in the bays and harbours from which he is excluded for the purposes of fishing; and the Bay of Fundy not affording the accommodations designated in the treaty, it follows, that this bay is not one from which he is

excluded—in other words, that the American fisherman may fish in any bay which does not afford him shelter from storms, and accommodation for repairing damage, and procuring wood and water.

This argument seems inconsistent with the ordinary and acknowledged rules of construction; The portion of the treaty under consideration was not made for the purpose of granting the privilege of shelter &c. to American fishermen; Its *primary* object was to exclude them from fishing in certain parts of Her Majesty's North American dominions; The proviso guards against this exclusion being extended to another and different object,—the privilege of shelter &c; and was intended to protect this privilege just as far as the clause of exclusion might have been liable to affect it, but not to limit the subject matter itself of the exclusion. The construction seems simply to be that in distress the fisherman may use *any* of the bays in Her Majesty's possessions according to *his* necessity, and *their* capacity of relief.

This argument also appears to prove too much.—

The majority of our bays are *in themselves* as little adapted as the Bay of Fundy for shelter or repairing damages &c.

If the argument is good at all it is applicable to those bays as well as to the Bay of Fundy:

But this would lead to incongruity in the application of the treaty.—

For as this construction of the American minister depends on a strained meaning put upon the word "*such*" in the proviso, if this mode of interpretation should be pursued with a like verbal severity, bays, not affording accommodation for shelter &c. being mentioned in the proviso would not be included in the American relinquishment of claim to fish, but "*coasts*" not being mentioned in the proviso would be included; And thus those bays may be used for the purposes of fishing at the distance of three miles from the shores (and it is doubtful whether the argument would not over ride even this limitation) when the adjacent open sea board is protected against American fishing.

His Excellency complains that exclusion from the Bay of Fundy keeps the American fishermen at such a distance from the harbours within it as prevents their use of them for shelter in time of necessity.

But if the Bay of Fundy be within the relinquishments by Americans the fisherman is not privileged to pursue his occupation within it, and has nothing to fear from its "*iron bound coasts*" or to depend upon from its harbours.—

The storm finds him on other shores in the vicinity of other harbours.—

So far from the construction contended for by the British Colonial Authorities leading as is alleged to two entirely different limitations in reference to the right of shelter, it alone gives, as it is humbly conceived, perfect uniformity and consistency in the interpretation alike of the relinquishment and the reservation.

The American Minister condemns, as his predecessor in yet stronger language did, the conduct of the colonial authorities in enforcing their construction of the treaty by the capture of an American fisherman, and places in contrast the forbearance of the United States, by which, as his Excellency says, no disposition had been evinced to an-

ticipate the decision of the question under negotiation between the two countries:—

But seeing that the American fisherman was permitted to carry into practical effect the construction of the treaty favourable to his own interest by fishing in the Bay of Fundy the colonial authorities have not been able to discover on the part of the United States that forbearance which challenges the commendation of his Excellency, nor the exercise of a reciprocity with which the province was called to be content.

Before acting on their own view of the subject the Provincial Assembly obtained thro' Her Majesty's Government the favourable opinion of the first law officers of the Crown on the general question on a case in which the Bay of Fundy was specially stated to be one of the bays in which American subjects conducted the fishery regarding which their opinion was sought.—

The treaty sanctioned rights in which the inhabitants of this colony are deeply interested; The Imperial Statute 59. Geo. 3 chap. 33. 139 and the Colonial Act 6. Wm. 4 chap. 8. specially confirmed by His late Majesty, directed the mode in which these rights were to be guarded from invasion.—

In seizing the Washington and bringing her to adjudication the seizing officers but sought the decision of a competent legal tribunal having jurisdiction over the cause on her liability to forfeiture.

The ability and integrity of the Judge who presides in the Vice Admiralty Court at Halifax offered sufficient security for a sound and impartial judgment and an appeal to the highest appellate court in the realm afforded the means of the fullest investigation and the most authoritative determination. It has been occasion of regret that the Government of the United States in a matter of so much importance had not seen it fit to meet the question in a mode that would have insured the most perfect consideration of the argument on both sides, and the decision of a tribunal having constitutional authority to adjudicate upon and determine the questions raised.—

In conclusion it is humbly urged upon the consideration of Her Majesty's Government that the Bay of Fundy furnishes very valuable and productive fisheries of herring, mackerel and shad as well as cod and Her Majesty's Government cannot appreciate too highly the importance and value set by the Legislature and people of Nova Scotia upon the exclusion of American fishermen from the fisheries in the Bay of Fundy.—

Any concession on this point would be viewed with feelings of deep regret and disappointment in this colony—heightened by the consideration that the arguments urged by the American minister altho' now confined to the fisheries in the Bay of Fundy are calculated to be pressed to consequences yet more extended; and little hope will be entertained, should they be allowed to be successful now, but that as occasion may offer these arguments will be renewed and directed to other attacks upon the system under which the fisheries of this province can only be protected from injury by the American fishermen.—

It is conceived that the American Government has little claim at present to urge their construction of the treaty as being sound and correct in law, from having failed to sanction and use the opportunity of competent legal investigation and decision, afforded by this province; and that the colony may with propriety solicit from Her Maj-

esty's Ministers, to withhold any concessions either on the ground of favour or of right until the points in question shall have received a full judicial investigation and decision.

In seeking the preservation of every right in favour of the colony and its trade and fisheries in a matter of so deep interest as that under consideration which the treaty of 1818, will legally sustain, the province is well warranted by the policy pursued by the American Government in protecting their own fisheries by the imposition of prohibitory duties which exclude the produce of the British fisheries from the extensive markets of the United States and give to the fisherman of that country an advantage more than commensurate with the benefits which the Nova Scotia fishermen derive from all the advantages they enjoy.—

The mischiefs attendant on the interference of the Americans with the fisheries in the Bay of Fundy are so great and the fisheries are of so large importance and value to the inhabitants of that part of the province as to demand for the subject the fullest investigation, and lead to the hope that Her Majesty's Government will not yield to the claims of the American Minister until the case in all its bearings shall be fully exhibited and substantiated on the part of the people of these provinces, so deeply interested in its results.—The schools of fish enter the Bay of Fundy for the purpose of passing into the basin and river of Annapolis the basin of Mines and Colchester Bay and Chignecto Bay and other inlets at the head of the Bay of Fundy and the various rivers that fall into these basins and inlets. There the inhabitants follow the shore fishery and take herring alewives mackerel salmon and shad sometimes in quantities sufficient for considerable exportation but always, when the fisheries are not injured by foreign intrusion, to an extent most beneficial and necessary for their own consumption; and under regulations calculated to prevent the fish from being driven from their natural resort to the rivers.—

The American fishermen on the contrary intercept and destroy or disperse the schools on their approach to the shores by means of seines of great size—sometimes hardly less than a mile in length managed between two vessels, or by means of gigging, as it is called, which is conducted by trailing lines with a multitude of hooks attached thro' the schools of fish by which many are captured but more are mangled and mutilated.—

The consequence has been that the fish having been driven from their resort to the shores and inlets the fisheries have at times been nearly destroyed, and the foreign fisherman forced for want of success to discontinue his visits to the Bay.—The effect has been seen in the revival of the fishery until again checked by the return of the former causes: and the diminished quantities now caught compared with what it is known the people were many years ago in the habit of taking, may be traced to the abiding effects of these causes.—

Besides this consideration it is worthy of continual remembrance in treating of this subject that the licensed introduction of the American fishermen into the Bay of Fundy is equivalent to his unlicensed but active and extensive intrusion on the coasts and in the basins and mouths of the rivers to take bait and fish; The one is the inevitable and the very injurious concomitant of the other. When the American fishermen shall be at liberty to enter the Bay of Fundy to fish, there will exist no means within the reach of the Provincial Government

or the people to watch and guard against his further intrusion and the concession sought by the American Minister may be considered practically as nearly equivalent to placing the whole fishery at the control of the American fishermen.—

Last season notwithstanding the example made in the case of the Washington, vessels from the American lines ventured so far as
140 to enter the basin of Mines and with long seines swept the mouths of the rivers, and immediately completed their fares from the schools of fish that were entering.—

The facts connected with the fisheries in the Bay of Fundy practically show that it is indeed well entitled, to be treated as a bay within the objects of the Treaty.—

The question then is, whether the claims of the foreign fisherman shall be permitted to prevail over the rights of Her Majesty's subjects as regards the fish passing thro a bay surrounded by Her Majesty's territory on their way to their accustomed and natural places of resort within that territory where they form a considerable element in the means of subsistence provided by Providence for its inhabitants.—

On a subject of so much moment and viewed with so lively an interest by the people of this province Her Majesty's Government is humbly but most urgently besought to withhold the concession required by the American Minister.—If the construction his Excellency has attempted to put on the Treaty shall be judicially decided to be correct it will be the duty of the colonies to submit.—If otherwise it is hoped a boon will not be conferred on foreigners to which they have no title and which they can only enjoy, as the people of this country believe, at the expense and to the deep and lasting injury of Her Majesty's loyal subjects.—

Halifax Nova Scotia 17th. Septr. 1844

J. W. JOHNSTON
Atto. Gen.

No. 82.—1844, October 9: *Letter from Mr. Everett to the Earl of Aberdeen.*

GROSVENOR PLACE, October 9, 1844.

The undersigned, envoy extraordinary and minister plenipotentiary of the United States of America, has the honor to transmit to the Earl of Aberdeen, Her Majesty's principal Secretary of State for foreign affairs, the accompanying papers relating to the capture of an American fishing vessel the "Argus," by a government cutter from Halifax, the "Sylph," on the 6th of July last.

In addition to the seizure of the vessel, her late commander, as Lord Aberdeen will perceive from his deposition, complains of harsh treatment on the part of the captors.

The grounds assigned for the capture of this vessel are not stated with great distinctness. They appear to be connected partly by the construction set up by Her Majesty's provincial authorities in America, that the line within which vessels of the United States are forbidden to fish, is to be drawn from headland to headland, and not to

follow the indentations of the coast, and partly with the regulations established by those authorities, in consequence of the annexation of Cape Breton to Nova Scotia.

With respect to the former point, the undersigned deems it unnecessary, on this occasion, to add anything to the observations contained in his note to Lord Aberdeen. of the 25th of May, on the subject of limitations of the right secured to American fishing vessels by the treaty of 1783 and the convention of 1818, in reply to the note of his lordship of the 15th of April on the same subject. As far as the capture of the *Argus* was made under the authority of the Act annexing Cape Breton to Nova Scotia, the undersigned would observe that he is under the impression that the question of the legality of that measure is still pending before the judicial committee of her Majesty's privy council. It would be very doubtful whether rights secured to American vessels under public compacts could, under any circumstances, be impaired by acts of subsequent domestic legislation; but to proceed to capture American vessels, in virtue of such acts, while their legality is drawn in question by the home Government, seems to be a measure as unjust as it is harsh.

Without enlarging on these views of the subject, the undersigned would invite the attention of the Earl of Aberdeen to the severity and injustice which in other respects characterise the laws and regulations adopted by her Majesty's provincial authorities against the fishing vessels of the United States. Some of the provisions of the provincial law, in reference to the seizures which it authorizes of American vessels, were pronounced, in a note of Mr. Stevenson to Viscount Palmerston of the 27th of March, 1841, to be "violations of well-established principles of the common law of England, and of the principles of the just laws of well civilized nations;" and this strong language was used by Mr. Stevenson under the express instructions of his government.

A demand of security to defend the suit from persons so little able to furnish it as the captains of small fishing schooners, and so heavy that, in the language of the Consul at Halifax, "it is generally better to let the suit go by default," must be regarded as a provision of this description. Others still more oppressive are pointed out in Mr. Stevenson's note above referred to, in reference to which the undersigned finds himself obliged to repeat the remark made in his note to Lord Aberdeen of the 10th of August, 1843, that he believes it still remains unanswered.

It is stated by the captain of the "*Argus*" that the commander of the Nova Scotia schooner by which he was captured said that he was within three miles of the line beyond which, "on
141 their construction of the treaty, we were a lawful prize, and that he seized us to settle the question."

The undersigned again feels it his duty, on behalf of his government, formally to protest against an act of this description. American vessels of trifling size, and pursuing a branch of industry of the most harmless description which, however beneficial to themselves, occasions no detriment to others, instead of being turned off the debatable fishing ground—a remedy fully adequate to the alleged evil—are proceeded against as if engaged in the most undoubtful infractions of municipal law or the law of nations; captured and sent into port, their crews deprived of their clothing and personal

effects, and the vessels subjected to a mode of procedure in the courts which amounts in many cases to confiscation; and this is done to settle the construction of a treaty.

A course so violent and unnecessarily harsh would be regarded by any government as a just cause of complaint against any other with whom it might differ in the construction of a national compact. But when it is considered that these are the acts of a provincial government, with whom that of the United States has and can have no intercourse, and that they continue and are repeated while the United States and Great Britain, the only parties to the treaty the purport of whose provisions is called in question, are amicably discussing the matter, with every wish, on both sides, to bring it to a reasonable settlement, Lord Aberdeen will perceive that it becomes a subject of complaint of the most serious kind.

As such, the undersigned is instructed again to bring it to Lord Aberdeen's notice, and to express the confident hope that such measures of redress as the urgency of the case requires will, at the instance of his lordship, be promptly resorted to.

The undersigned avails himself of this opportunity to renew to the Earl of Aberdeen the assurance of his distinguished consideration.

EDWARD EVERETT.

The EARL OF ABERDEEN, &c., &c., &c.

No. 83.—1845, March 10: Letter from Lord Aberdeen to Mr. Everett.

FOREIGN OFFICE, March 10, 1845.

The undersigned, her Majesty's principal Secretary of State for Foreign Affairs, duly referred to the Colonial Department the note which Mr. Everett, Envoy Extraordinary and Minister Plenipotentiary of the United States of America, did him the honor to address to him on the 25th of May last, respecting the case of the "Washington," fishing vessel, and on the general question of the right of the United States fishermen to pursue their calling in the Bay of Fundy; and having shortly since received the answer of that department, the undersigned is now enabled to make a reply to Mr. Everett's communication, which he trusts will be found satisfactory.

In acquitting himself of this duty, the undersigned will not think it necessary to enter into a lengthened argument in reply to the observations which have at different times been submitted to her Majesty's government by Mr. Stevenson and Mr. Everett, on the subject of the right of fishing in the Bay of Fundy, as claimed in behalf of the United States' citizens. The undersigned will confine himself to stating that after the most deliberate reconsideration of the subject, and with every desire to do full justice to the United States, and to view the claims put forward on behalf of United States' citizens in the most favorable light, her Majesty's government are nevertheless still constrained to deny the right of United States' citizens, under the treaty of 1818, to fish in that part of the Bay of Fundy which, from its geographical position, may properly be considered as included within the British possessions.

Her Majesty's government must still maintain, and in this view they are fortified by high legal authority, that the Bay of Fundy is rightfully claimed by Great Britain as a Bay within the meaning of

the treaty of 1818. And they equally maintain the position which was laid down in the note of the undersigned, dated the 15th of April last, that, with regard to the other bays on the British American coasts, no United States' fisherman has, under that convention, the right to fish within three miles of the *entrance* of such bays as designated by a line drawn from headland to headland at that entrance.

But while her Majesty's government still feel themselves bound to maintain these positions as a matter of right, they are nevertheless not insensible to the advantages which would accrue to both countries from a relaxation of the exercise of that right; to the United States as conferring a material benefit on their fishing trade; and to Great Britain and the United States, conjointly and equally, by the removal of a fertile source of disagreement between them.

Her Majesty's government are also anxious, at the same time that they uphold the just claims of the British crown, to evince by every reasonable concession their desire to act liberally and amicably towards the United States.

The undersigned has accordingly much pleasure in announcing to Mr. Everett, the determination to which her Majesty's government have come to relax in favor of the United States fishermen, that right which Great Britain has hitherto exercised, of excluding those fishermen from the British portion of the Bay of Fundy, and they are prepared to direct their colonial authorities to allow henceforward the United States fishermen to pursue their avocations in any part of the

Bay of Fundy, provided they do not approach, except in the cases specified in the treaty of 1818, within three miles of the *entrance* of any bay on the coast of Nova Scotia or New Brunswick.

In thus communicating to Mr. Everett the liberal intentions of her Majesty's government, the undersigned desires to call Mr. Everett's attention to the fact that the produce of the labor of the British colonial fishermen is at the present moment excluded by prohibitory duties on the part of the United States from the markets of that country; and the undersigned would submit to Mr. Everett that the moment at which the British government are making a liberal concession to United States' trade, might well be deemed favorable for a counter concession on the part of the United States to British trade, by the reduction of the duties which operate so prejudicially to the interests of the British colonial fishermen.

The undersigned has the honor to renew to Mr. Everett, the assurances of his high consideration.

ABERDEEN.

No. 84.—1845, *March 25: Extract from Letter from Mr. Everett to Mr. Calhoun.*

[No. 278.]

LONDON, *March 25, 1845.*

SIR: You are aware that the construction of the first article of the convention between Great Britain and the United States, of 1818, relative to the right of fishing in the waters of the Anglo-American dependencies, has long been in discussion between the two governments. Instructions on this subject were several times addressed by Mr. Forsyth to my predecessor, particularly in a despatch of the 20th

of February, 1841, which formed the basis of an able and elaborate note from Mr. Stevenson to Lord Palmerston, of the 27th of the following month. Mr. Stevenson's representations were acknowledged, and referred by the Colonial Office to the provincial government of Nova Scotia; but no other answer was returned to them.

The exclusion of American fishermen from the waters of the Bay of Fundy was the most prominent of the grievances complained of on behalf of the United States. Having received instructions from the department in reference to the seizure of the "Washington" of Newburyport, for fishing in the Bay of Fundy, I represented the case to Lord Aberdeen in a note of the 10th of August, 1843. An answer was received to this note on the 15th of April following, in which Lord Aberdeen confined himself to stating that by the terms of the convention the citizens of the United States were not allowed to fish within three miles of any bay upon the coast of the British American colonies, and could not, therefore, be permitted to pursue their avocation within the bay of Fundy. I replied to this note on the 25th of May following, and endeavoured to show that it was the spirit and design of the first article of the convention of 1818 to reserve to the people of the United States the right of fishing within three miles of the coast. Some remarks on the state of the controversy at that time will be found in my despatch, No. 130, of the 26th of May last.

On the 9th of October last, in obedience to your instructions, No. 105, I addressed a note to Lord Aberdeen in reference to the case of the "Argus" of Portland, which was captured while fishing on St. Anne's bank, off the northeastern coast of Cape Breton. The papers relative to this case left the precise grounds of the seizure of the "Argus" in some uncertainty. It was, however, sufficiently apparent that they were, to some extent at least, similar to those for which the "Washington" had been captured.

I received a few days since, and herewith transmit a note from Lord Aberdeen, containing the satisfactory intelligence that after a reconsideration of the subject, although the Queen's government adhere to the construction of the convention which they have always maintained, they have still come to the determination of relaxing from it, so far as to allow American fishermen to pursue their avocations in the Bay of Fundy.

* * * * *

I thought it proper, in replying to Lord Aberdeen's note, to recognise in ample terms the liberal spirit evinced by her Majesty's government, in relaxing from what they consider their right. At the same time I felt myself bound to say that the United States could not accept as a mere favour what they had always claimed as a matter of right, secured by the treaty.

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No. 85.—1845, March 25: Letter from Mr. Everett to Lord Aberdeen.

GROSVENOR PLACE, March 25, 1845.

The undersigned, envoy extraordinary and minister plenipotentiary of the United States of America, has the honor to acknowledge the receipt of a note of the 10th instant from the Earl of

143 Aberdeen, her Majesty's principal Secretary of State for foreign affairs, in reply to the communication of the undersigned of the 15th of May last, on the case of the "Washington," and the construction given by the government of the United States to the convention of 1818, relative to the right of fishing on the coasts of Nova Scotia and New Brunswick.

Lord Aberdeen acquaints the undersigned, that, after the most deliberate reconsideration of the subject, and with every desire to do full justice to the United States and to view the claims put forward on behalf of their citizens in the most favorable light, her Majesty's government are nevertheless still constrained to deny the right of citizens of the United States, under the treaty of 1818, to fish in that part of the Bay of Fundy which from its geographical position may properly be considered as included within the British possessions; and also to maintain that, with regard to the other bays on the British American coasts, no United States fishermen has, under that convention, the right to fish within three miles of the entrance of such bay, as designated by a line drawn from headland to headland at that entrance.

Lord Aberdeen, however, informs the undersigned that, although continuing to maintain these positions as a matter of right, her Majesty's government are not insensible to the advantages which might accrue to both countries from a relaxation in its exercise; that they are anxious, while upholding the just claims of the British crown, to evince by every reasonable concession their desire to act liberally and amicably towards the United States; and that her Majesty's government have accordingly come to the determination "to relax in favor of the United States fishermen the right which Great Britain has hitherto exercised of excluding those fishermen from the British portion of the Bay of Fundy, and are prepared to direct their colonial authorities to allow, henceforward, the United States fishermen to pursue their avocations in any part of the Bay of Fundy, provided they do not approach, except in the cases specified in the treaty of 1818, within three miles of the entrance of any bay on the coast of Nova Scotia or New Brunswick."

The undersigned receives with great satisfaction this communication from Lord Aberdeen, which promises the permanent removal of a fruitful cause of disagreement between the two countries, in reference to a valuable portion of the fisheries in question. The government of the United States, the undersigned is persuaded, will duly appreciate the friendly motives which have led to the determination on the part of her Majesty's government announced in Lord Aberdeen's note, and which he doubts not will have the natural effect of acts of liberality between powerful states, of producing benefits to both parties, beyond any immediate interest which may be favorably affected.

While he desires, however, without reserve, to express his sense of the amicable disposition evinced by her Majesty's government on this occasion in relaxing in favor of the United States the exercise of what, after deliberate reconsideration, fortified by high legal authority, is deemed an unquestioned right of her Majesty's government, the undersigned would be unfaithful to his duty did he omit to remark to Lord Aberdeen that no arguments have at any time been adduced to shake the confidence of the government of the

United States in their own construction of the treaty. While they have ever been prepared to admit, that in the letter of one expression of that instrument there is some reason for claiming a right to exclude United States fishermen from the Bay of Fundy, (it being difficult to deny to that arm of the sea the name of "bay," which long geographical usage has assigned to it,) they have ever strenuously maintained that it is only on their own construction of the entire article that its known design in reference to the regulation of the fisheries admits of being carried into effect.

The undersigned does not make this observation for the sake of detracting from the liberality evinced by her Majesty's government in relaxing from what they regard as their right; but it would be placing his own government in a false position to accept as mere favor that for which they have so long and strenuously contended as due to them under the convention.

It becomes the more necessary to make this observation, in consequence of some doubt as to the extent of the proposed relaxation. Lord Aberdeen, after stating that her Majesty's government felt themselves constrained to adhere to the right of excluding the United States Fishermen from the Bay of Fundy, and also with regard to other bays on the British American coasts, to maintain the position that no United States fishermen has, under that convention, the right to fish within three miles of the *entrance* of such bays, as designated by a line drawn from headland to headland at that entrance, adds, that "while her Majesty's government still feel themselves bound to maintain these positions as a matter of right, they are not insensible to the advantages which would accrue to both countries from the relaxation of that right."

This form of expression might seem to indicate that the relaxation proposed had reference to both positions; but when Lord Aberdeen proceeds to state more particularly its nature and extent, he confines it to a permission to be granted to "the United States fishermen to pursue their avocations in any part of the Bay of Fundy, provided they do not approach except in the cases specified in the treaty of 1818, within three miles of the *entrance* of any bay on the coast of Nova Scotia and New Brunswick," which entrance is defined, in another part of Lord Aberdeen's note, as being designated by a line drawn from headland to headland.

In the case of the "Washington," which formed the subject of the note of the undersigned of the 25th May, 1844, to which the present communication of Lord Aberdeen is a reply, the capture complained of was in the waters of the Bay of Fundy; the principal portion of the argument of the undersigned was addressed to that part of the subject; and he is certainly under the impression that it is the point of greatest interest in the discussions which have been hitherto carried on between the two governments, in reference to the United States' right of fishery on the Anglo-American coasts.

In the case, however, of the "Argus," which was treated in the note of the undersigned of the 9th of October, the capture was in the waters which wash the north-eastern coast of Cape Breton, a portion of the Atlantic ocean intercepted indeed between a

144 straight line drawn from Cape North to the northern head of Cow bay, but possessing none of the characters of the bay, (far less so than the Bay of Fundy,) and not called a "bay" on any map which the undersigned has seen. The aforesaid line is a degree

of latitude in length; and as far as reliance can be placed on the only maps (English ones) in the possession of the undersigned on which this coast is distinctly laid down, it would exclude vessels from fishing grounds which might be thirty miles from the shore.

Lord Aberdeen, in his note of the 10th instant, on the case of the "Argus," observes that, "as the point of the construction of the convention of 1818, in reference to the right of fishing in the Anglo-American dependencies by citizens of the United States, is treated in another note of the undersigned of this date, relative to the case of the 'Washington,' the undersigned abstains from again touching on that subject."

This expression taken by itself would seem to authorize the expectation that the waters where these two vessels respectively were captured would be held subject to the same principles, whether of restriction or relaxation, as indeed all the considerations which occur to the undersigned as having probably led her Majesty's government to the relaxation in reference to the Bay of Fundy, exist in full and even superior force in reference to the waters on the north-eastern coast of Cape Breton, where the "Argus" was seized. But if her Majesty's provincial authorities are permitted to regard as a "bay" any portion of the sea which can be cut off by a direct line connecting two points of the coast, however, destitute in other respects of the character usually implied by that name, not only will the waters on the north-eastern coast of Cape Breton, but on many other parts of the shores of the Anglo-American dependencies where such exclusion has not yet been thought of, be prohibited to American fishermen. In fact, the waters which wash the entire south-eastern coast of Nova Scotia, from Cape Sable to Cape Canso, a distance on a straight line of rather less than three hundred miles, would in this way constitute a bay, from which United States fishermen would be excluded.

The undersigned, however, forbears to dwell on this subject, being far from certain, on a comparison of all that is said in the two notes of Lord Aberdeen of the 10th instant, as to the relaxation proposed by her Majesty's government, that it is not intended to embrace the waters of the northeastern coasts of Cape Breton, as well as the Bay of Fundy.

Lord Aberdeen, towards the close of the note in which the purpose of her Majesty's government is communicated, invites the attention of the undersigned to the fact that British colonial fish is, at the present time, excluded by prohibitory duties from the markets of the United States, and suggests that the moment at which the British government are making a liberal concession to United States trade, might be deemed favourable for a counter concession on the part of the United States to British trade, by the reduction of duties which operate so prejudicially to the interests of British colonial fishermen.

The undersigned is of course without instructions which enable him to make out any definite reply to this suggestion. It is no doubt true, that the British colonial fish, as far as duties are concerned, enters the United States market, if at all, to some disadvantage. The government of the United States, he is persuaded, would gladly make any reduction in these duties which would not seriously injure the native fishermen; but Lord Aberdeen is aware that the encouragement of this class of the seafaring community has ever been considered, as well in the United States as Great Britain, as resting on peculiar grounds of expediency. It is the great school not only of the com-

mercial but of the public marine, and the highest considerations of national policy require it to be fostered.

The British colonial fishermen possess considerable advantages over those of the United States. The remoter fisheries of Newfoundland and Labrador are considerably more accessible to the colonial than to the United States fishermen. The fishing grounds on the coasts of New Brunswick and Nova Scotia, abounding in cod, mackerel and herring, lie at the doors of the former; he is therefore able to pursue his avocation in a smaller class of vessels, and requires a smaller outfit; he is able to use the net and the seine to great advantage in the small bays and inlets along the coast, from which the fishermen of the United States, under any construction of the treaty, are excluded. All or nearly all the materials of ship building, timber, iron, cordage and canvas are cheaper in the colonies than in the United States, as are salt, hooks and lines. There is also great advantage enjoyed in the former in reference to the supply of bait and curing the fish. These, and other causes, have enabled the colonial fishermen to drive those of the United States out of many foreign markets, and might do so at home but for the protection afforded by the duties.

It may be added that the highest duty on the kinds of fish that would be sent to the American market, is less than a half-penny per pound, which cannot do more than counter-balance the numerous advantages possessed by the colonial fishermen.

The undersigned supposes, though he has no particular information to that effect, that equal or higher duties exist in the colonies on the importation of fish from the United States.

The undersigned requests the Earl of Aberdeen to accept the assurance of his high consideration.

EDWARD EVERETT.

145 No. 86.—*1845, April 21: Letter from the Earl of Aberdeen to Mr. Everett.*

FOREIGN OFFICE, April 21, 1845.

The undersigned, Her Majesty's principal Secretary of State for Foreign Affairs, has the honour to acknowledge the receipt of the two notes which Mr. Everett, envoy extraordinary and minister plenipotentiary of the United States of America, addressed to him on the 25th ultimo and on the 2d instant, relative to the case of the *Argus*, and that of the Washington, United States' fishing vessels.

Those notes have been brought under the consideration of Her Majesty's Secretary of State for the colonies, and the undersigned postpones, therefore, replying to their contents, until he shall have become acquainted with the results of that reference.

In the meantime, however, the undersigned thinks it expedient to guard himself against the assumption of Mr. Everett, that it may have been his intention by his note of the 10th ultimo, to include other bays on the coasts of the British North American provinces, in the relaxation which he therein notified to Mr. Everett, as to be applied henceforward to the Bay of Fundy. That note was intended to refer to the Bay of Fundy alone.

The undersigned avails himself of this opportunity to renew to Mr. Everett the assurances of his high consideration.

ABERDEEN.

No. 87.—1845, *April 23: Letter from Mr. Everett to Mr. Buchanan*
(*United States Secretary of State*).

[No. 305.]

LONDON, *April 23, 1845.*

SIR: With my despatch, No. 278, of 25th March, I transmitted the note of Lord Aberdeen, of the 10th of March, communicating the important information that this government had come to the determination to concede to American fishermen the right of pursuing their occupation within the Bay of Fundy. It was left somewhat uncertain by Lord Aberdeen's note whether this concession was intended to be confined to the Bay of Fundy, or to extend to other portions of the coast of the Anglo-American possessions, to which the principles contended for by the government of the United States, equally apply, and particularly to the waters on the northeastern shores of Cape Breton, where the "Argus" was captured. In my notes of the 25th ultimo and 2d instant, on the subject of the "Washington" and the "Argus," I was careful to point out to Lord Aberdeen that all the reasons for admitting the right of Americans to fish in the Bay of Fundy, apply to those waters, and with superior force, inasmuch as they are less landlocked than the Bay of Fundy, and to express the hope that the concession was meant to extend to them, which there was some reason to think, from the mode in which Lord Aberdeen expressed himself, was the case.

I received last evening, the answer of his lordship, informing me that my two notes had been referred to the colonial office, and that a final reply could not be returned till he should be made acquainted with the result of that reference, and that, in the meantime, the concession must be understood to be limited to the Bay of Fundy.

The merits of the question are so clear that I cannot but anticipate that the decision of the colonial office will be in favour of the liberal construction of the convention. In the meantime I beg leave to suggest, that in any public notice which may be given that the Bay of Fundy is henceforth open to American fishermen, it should be carefully stated that the extension of the same privilege to the other great bays on the coasts of the Anglo-American dependencies, is a matter of negotiation between the two governments.

I am, sir, with great respect, your obedient servant,

EDWARD EVERETT.

JAMES BUCHANAN, Esq.
Secretary of State.

No. 88.—1845, *May 19: Despatch from the Right Hon. Lord Stanley*
to the Right Hon. Viscount Falkland.

VISCOUNT FALKLAND.

No 225

DOWNING ST, *19th May/45.*

MY LORD, H. M. Govt having frequently had before them the complaints of the Minister of the U. States in this country on account of the capture of vessels belonging to fishermen of the U. States by the provincial cruisers of N. Scotia & N. Brunswick for alleged

146 infractions of the Convention of the 20th Oct 1818 between G. Britain & the U. States, I have to acquaint your Lordship that, after mature deliberation, H. M. Govt deem it advisable for the interests of both countries to relax the strict rule of exclusion exercised by G. Britain over the fishing vessels of the U. States entering the bays of the sea on the B. N. American coasts. H. M. Govt therefore henceforward propose to regard as bays, in the sense of the treaty, only those inlets of the sea which measure from headland to headland at their entrance the double of the distance of 3 miles, within which it will still be prohibited to the fishing vessels of the United States to approach the coast for the purpose of fishing. I transmit to your Lordship herewith the copy of a letter, together with its enclosures, which I have received from the Foreign Office upon this subject, from which you will learn the general views entertained by H. M. Govt as to the expediency of extending to the whole of the coasts of the British possessions in N. America, the same liberality with respect to U. States fishing boats as H. M. Govt have recently thought fit to apply to the Bay of Fundy; and I have to request that your Lordship would inform me whether you have any objections to offer, on provincial or other grounds, to the proposed relaxation of the construction of the Treaty of 1818 between this country and the U. States.

I have &c

STANLEY.

No. 89.—1845, June 16: *Report from Attorney-General of Nova Scotia to the Lieutenant-Governor enclosed in No. 91, Appendix, p. 150.*

HALIFAX 16th June 1845

MY LORD Agreeably to your Excellency's desire, I have the honour to report such suggestions as appear to arise from the despatch of the Right Hon Secretary of State for the Colonies, dated the 19th May last No. 225 and the correspondence accompanying it of the United States minister at London and Her Majesty's Government on the subject of the fisheries on the coasts of Her Majesty's North American provinces.

The concession of a right to fish in the Bay of Fundy has been followed by the anticipated consequence—the demand for more extended surrenders based upon what has been already gained; and it is to be feared that the relaxations now contemplated, if carried into effect, will practically amount to an unrestrained licence to the American fishermen:—When their right to fish within the larger bays or at the mouth of the smaller inlets, shall be established, the ease with which they may run into the shores whether to fish or for obtaining bait, or drawing off the schools of fish, or for smuggling, and escape before detection under any guards which it is within the means of the province to employ, will render very difficult the attempt to prevent violations of the remaining restrictions—while in the case of seizures, the facilities for evasion and excuse, which experience has shown to be under any circumstances, ever ready, will be much enlarged—An instance has just occurred which illustrates this apprehension and the observations to the same effect contained in the report I had the honour to make your Excellency, on the 17th September last.

An American fisherman on the 5th of this month was seized in the Bay of Fundy at anchor, inside of the lighthouse at the entrance of Digby Gut about one quarter of a mile from the shore, with nets on deck still wet and with the scales of herrings attached to the meshes and having fresh herring on board.—

The excuse sworn to is that rough weather had made a harbour necessary, that the nets were wet from being recently washed but that the fish were caught while the vessel was beyond three miles from the coast.

Hence will be extended and aggravated all the mischiefs to our fisheries from the means used by the Americans in fishing, as “by jigging,” drawing seines across the mouth of the river and other expedients from their practice of drawing the schools from the shore by baiting and above all from their still more pernicious practice of throwing the garbage upon the fishing grounds and along the shore.—

Every facility afforded the American fishermen to hold frequent, easy and comparatively safe intercourse with the shore, extends another evil, perhaps more serious in its results the illicit traffic carried on under cover of fishing in which not only the revenue is defrauded and the fair dealer discountenanced—but the coasts are filled with noxious or useless articles in exchange for the money or fish of the settlers in the remote harbours, among which may be mentioned the poisonous rum and gin and manufactured teas of which already too much is introduced into the country; and from this intercourse when habitual and established from year to year, the moral and political sentiments of our population cannot but sustain injury.—

In the argument of the American minister, his Excellency appears to assume that the question turns on the force of the word “bay” and the peculiar expression of the treaty in connexion with that word.—

But although it was obviously the clear intention of its framers, to keep the American fisherman at a distance of three marine miles, from the “*bays, creeks, and harbours*,” there does not therefore arise any just reason to exclude the word “*coasts*,” used in the same connexion in the treaty, from its legitimate force and meaning—

147 and if it be an admitted rule of general law, that the outline of a coast is to be defined, not by its indentations, but by a line from its principal headlands, then waters altho’ not known under the designation, nor having the general form of a bay, may yet be within the exclusion designed by the treaty.—

His Excellency the American minister complains of “the essential injustice” of the law of this province under which the fisheries are attempted to be guarded, and declares that it, possesses none of the qualities of the law of civilized states but its forms.”

His Excellency in using this language, possibly supposed the Colonial Act attempted to give a construction to the treaty of 1818, or originated the penalty and mode of confiscation, of which he so much complains. But had his Excellency examined the Act of this province he has so strongly stigmatized, he would have discovered that as regards the limits within which foreign fishermen are restricted from fishing, the Colonial Legislature has used but the words of the treaty itself—And a comparison of the Provincial Act with an Act of the Imperial Parliament the 59th Geo. 3: cap 38—will show that as regards the description of the offence; the confiscation

of the vessel and cargo, and the mode of proceeding, the Legislature of Nova Scotia has in effect only declared, what was already and still is, the law of the realm under Imperial enactments.

Mr. Everett adverts to what he considers "the extremely objectionable character of the course pursued by the provincial authorities in presuming to decide for themselves a question under discussion between the two Governments."

But it is submitted, that if the American Government controverted the construction given to the treaty, the course which made confiscation dependent on a judicial trial and decision, was neither presumptuous nor inexpedient, nor could the necessity of security for £60 or the risk of costs in case of failure, offer any serious impediment to the defence, in a matter which the Government of the United States deems of great national importance.—If on the other hand the American fisherman could only claim the relaxation of the treaty as construed in England and Nova Scotia, as matter of favour, the presumption would rather seem to lie on the side that insisted on exercising the privilege before the boon was conferred.—

In any view of the matter as the American fisherman was never meddled with until he had voluntarily passed the controverted limit, it seems difficult to comprehend why the American minister's proposition might not stand reversed, with more propriety than it exhibits in its present form: For his Excellency's regrets might not unreasonably it would seem, have been expressed at "the extremely objectionable course pursued by American subjects in presuming to decide for themselves a question under discussion between the two Governments" by fishing upon the disputed grounds, and thereby reducing the provincial authorities to the necessity of vindicating their claim, or seeing it trampled on, before the sanction had been obtained either of legal decision or diplomatic arrangement.

When Mr. Everett says that the necessity of fostering the interests of their fishermen, rests on the highest grounds of national policy, he expresses the sentiment felt in Nova Scotia, as regards the provincial welfare in connexion with this subject:—The Americans are fortunate in seeing the principle carried into practice; for the encouragement afforded to their fishermen by the Government of the United States is not small, and its strenuous persevering and successful efforts to extend their fishing privileges on Her Majesty's coasts, but too practically evince its desire and ability to promote this element of national and individual prosperity.—As far as I can learn a liberal tonnage bounty is given on their fishing craft, and a bounty per barrel on the pickled fish cured—thus guarding the fishermen against serious loss in case of the failure of his voyage—and he is, I believe, further favoured by privileges allowed on the importation of salt and other articles—while a market is secured him at home, which ensures him a profitable reward for the fruit of his labours, by a protecting duty of five shillings per quintal on dry fish, equal to fifty per cent of its value—and from two to one dollars per barrel on pickled fish, according to the different kinds, equal to at least 20 per cent of their values.

The duty on American fish imported into the colonies is much less—and the British colonial fisherman is unsustained by bounties—; but the chief drawback to his success is the want of certain and stable

markets; those on which he is chiefly dependent being very limited and fluctuating.—

In the contrast therefore between the advantages of the colonial and American fishermen, the extensive home market of the latter independently of the encouragement he receives from bounties and other sources, much more than compensates, I believe for any local conveniences enjoyed by the former.—

The colonists cannot understand the principle on which *concession* in any form should be granted to the American people, in a case avowedly touching, “the highest grounds of national policy” even although concession did not involve consequences, at [as] it unhappily does in the present case, *both immediate and remote, most injurious to British colonial interests.*—

The strong and emphatic language of the treaty of 1818 is that “the United States renounce for ever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays or creeks, or harbours of His Britannic Majesty’s dominions in America, not included within the above mentioned limits.—Provided however that the American fishermen, shall be admitted to enter such bays and harbours for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever.—But they shall be under such restrictions as may be necessary, to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.—”

If this national contract does not exclude the Americans from fishing within the *indentations* of our coasts, and from our *bays and harbours*, then the people of Nova Scotia would not complain of their exercise of a right so acquired, while the treaty continued in force.—

But we believe it does exclude them—and we ask a judicial
148 inquiry and determination before these valuable rights are relinquished. The highest law opinions in England have justified that belief.—Her Majesty’s Government in theory avows and maintains it.

The compact was a reciprocal one and had the treaty in this particular been (as it was not) hard and unfavourable to the United States, there were doubtless to be found other portions of it at least equally unfriendly to British interests.—

I repeat, my Lord, we cannot understand why the Americans should not be held to their bargain nor can we perceive the principle of justice or prudence which would relax its terms in favour of a foreign people whose means and advantages already preponderate so greatly; and that, without reciprocal concessions, and at the expense of Her Majesty’s colonial subjects, whose prosperity is so deeply involved in the promotion and enlargement of this important element of their welfare.—

If the present concessions to the United States are hoped to end and quiet the controversy between their fishermen and this province, there is too much reason to fear, the expectations will end in disappointment; and that increased and not diminished occasions of collision will be the result from the greater encouragement that will be afforded for violation of the treaty under the modified conditions proposed to be imposed on the American fishermen, and the increased

facilities for evasion and falsehood—and it may safely be asserted from a knowledge of the subject and the parties—that unless the British Government are content to maintain the strict construction of the treaty as a mere question of past contract and right, whatever that construction may be, the encroachment of the American fishermen will not cease, nor collision end, until they have unlimited licence over the whole shore of Nova Scotia.—

It is hoped my Lord that if any arrangement such as in [is] contemplated, should be made, its terms may clearly express, that the American fishermen are to be excluded from fishing &c within three miles of the *entrance* of the bays and inlets, in which they are not to be permitted to enter.—

There seems some doubt on this point in the language of Lord Stanley's despatch and the making the criterion of the bays &c to be the width of the double of three marine miles, would strengthen such a doubt—by giving the appearance that the shores of these bays &c and of the general coast were to be considered in the same light.

To avoid such a construction, no less than to abridge the threatened evil, the suggestion made to your Lordship by Mr. Stewart, that the width of those bays, creeks, and inlets, should be more than the double of three marine miles, say *three or four times more*.

I have the honour to be

Your Lordship's most obedt servt.

J. W. JOHNSTON.

To His Excellency The Right Hon. VISCOUNT FALKLAND

Lieut. Governor, &c &c &c

No. 90.—1845, June 21: *Despatch from Lieut.-Governor Sir W. M. G. Colebrooke to Lord Stanley.*

No. 50.

FREDERICTON N. B. June 21st 1845

MY LORD, Referring to my Despatch No. 48 dated the 13th instant and in reference to your Lordship's Despatches No. 288 of the 30th of March and No. 298 of the 19th of May in the last of which you have requested to be informed of any objections on provincial or other grounds to the proposed relaxation of the construction of the Treaty of 1818 with the United States, by the extension to their fishing boats of the privilege accorded to them in the Bay of Fundy, along the whole of the coasts in North America, allowing them to enter the bays of the sea, measuring from headland to headland, at their entrance the double of the distance of three miles within which they would still be prohibited to approach the coast for the purpose of fishing, I have the honour to report to your Lordship that having brought the subject under consideration in the Executive Council a Minute has been recorded copy of which I herewith enclose, from which your Lordship will observe that serious objections are entertained to the proposed concession as well from the increased difficulties which would occur in protecting the British fisheries, and in guarding against collisions with the provincial fishermen, as in protecting the provincial revenue from the smuggling for which great facilities would thus be given.—

As it has not been the practice in this province to employ colonial armed vessels from a conviction that the duty of protecting the

fisheries is more safely entrusted to Her Majesty's navy by which disputes are more likely to be prevented, I recommend under any circumstances that provision should be made for the constant employment of a vessel in the Bay of Fundy during the fishing season, and also of one on the northern coasts.—

As Mr. Simonds is about to proceed to England I have on
149 the suggestion of the Council entrusted him with a duplicate of this Despatch, and I can confidently refer to him for such further information as your Lordship may desire to receive on the subject.

I have the honour to be my Lord

Your Lordship's most obt. humble servant

W. M. G. COLEBROOKE

The Right Honorable LORD STANLEY

&c &c &c

[Enclosure in above Despatch Dated June 21st 1845.]

IN COUNCIL 20th June 1845

His Excellency the Lieutenant Governor brought under the consideration of the Board Lord Stanley's Despatch No. 298 dated May 19th 1845 relative to a relaxation of the Regulations under the Convention of 1818 in reference to fishing vessels belonging to the United States of America with enclosures stating that the Government have deemed it advisable to admit, American fishing vessels into the different bays on the British American Coasts and requesting to be informed whether there are any objections to the measure on provincial or other grounds.—

Whereupon—The Council are decidedly of opinion that the admission of the Americans into Miramichi Bay and Chaleur Bay and a participation in its fisheries will be attended with a ruinous effect on the fishing trade of the province, especially with regard to that branch of it, carried on in Chaleur Bay by far the most valuable fishing ground on these coasts.—That little doubt can be entertained that such a concession will result in depriving us of this valuable source of trade now rapidly increasing in that part of the province.—That it is obvious that the unlimited command of capital and other advantages possessed by an old and populous country like the United States must render competition on the part of this young colony hopeless.—

That past experience has fully shown that with such advantages they have been enabled to carry on their fisheries on so extensive a scale and with such overwhelming numbers that they have invariably succeeded in expelling our fishermen from those coasts where they have had any pretext or sufficient inducement for encroachment.—

That hitherto it was on the superior natural advantages presented by our own coasts—especially those of Gaspé Bay that the enterprise of our fishermen could mainly rely and on [one] of the difficulties against which they had to contend and by no means the least injurious to their interests was being excluded by the high protective duties of such a country as the United States where the consumption of fish by an extensive slave population might otherwise have afforded a remunerating market.—

That the admission of the Americans into Chaleur Bay would give them a complete command over the herring, the salmon—and the cod fisheries of that Bay from its mouth to within three miles of its head where the inshore and deep sea fisheries are alike carried on, and where its most valuable fishing grounds are beyond the prescribed distance—

That it would be attended with the sacrifice of the capital of those establishments already formed one of which, a company in London has recently embarked two hundred thousand pounds—

That the fishermen and other persons employed are exclusively occupied in carrying on these fisheries by which they are maintained—

That some idea may be formed of the extensive population thus occupied, when the houses of Robins and one or two others employ several thousand persons, who should these fisheries be abandoned would be thus left destitute of the means of support.—

That so far would the introduction of the Americans into this Bay, from which they have hitherto been excluded, be from removing the collisions and complaints already existing, that it would augment them to an extent hardly to be contemplated from the increase of conflicting interests and the struggle between the fishermen of the two countries for the best fishing ground—

That until our fishermen were driven off their grounds and compelled to abandon their fisheries by the superior power and number of the Americans collisions of a serious character not unattended perhaps with fatal consequences might be apprehended as it could hardly be supposed that they would submit to relinquish to the Americans those benefits to be derived from the fisheries on which their means of subsistence depend—nor can it be supposed that a concession of this kind made at the expense of the colonists and without any corresponding benefit to be conferred on them or for any purpose of national policy would be viewed but with feelings of deep hostility and regret by the inhabitants of this province especially when it is considered with what jealousy they have ever been excluded from fishing on the American coast—

That the facilities thus afforded of carrying on an illicit trade on our coast in American spirits, articles of American manufacture and other contraband goods would be increased to such a degree as to be entirely beyond the means of this province to control and would be attended with a serious diminution of our revenue and other most injurious effects.—

The treasurer has already reported that the smuggling in the Bay of Fundy will be greatly increased and the revenue injuriously affected by the admission of the Americans to fish in that Bay and it is much to be apprehended that these encroachments on the limits prescribed to them will lead to collisions with our fishermen even to a greater extent than heretofore of which serious complaints have been already made and which the employment of armed vessels

by the colonies and even by the mother country would be inadequate to prevent.—These concessions will be nationally injurious to the extent that these fisheries have heretofore proved, to be a valuable nursery for seamen and will be so cultivated by the United States—

Extract from the Minutes

(Signed) W. H. ODELL

The Council also beg to recommend that the Honourable Charles Simonds on his proceeding to England be requested to wait on the Right Honourable Lord Stanley and to bring fully under his Lordship's consideration, the ruinous effects that will result to our fisheries and other important interests of this province by admitting the subjects of the United States to fish in the Bay of Miramichi, the Bay of Chaleur and other Bays on the North American coasts from which they have hitherto been excluded by the treaties subsisting between Great Britain and the United States and also that he be requested to communicate with His Excellency the Lieutenant Governor on the subject—

Extract from the Minutes

(Signed) W. H. ODELL.

Extract of a Letter from Beverley Robinson Esqr Provincial Treasurer to Alfred Reade Esqr Provincial Secretary dated St. John N. B. June 17th, 1845.

As regards importations from the United States I very much fear that the admission of American fishermen into the Bay of Fundy will so greatly increase the facilities for illicit traffic that the honest importer will be no longer able to compete with the horde of smugglers by whom we have reason to dread we will be overrun.—

(Signed) B. ROBINSON, P.T.

No. 91.—1845, July 2: *Despatch from the Right Hon. Viscount Falkland to the Right Hon. Lord Stanley.*

No. 331.

GOVERNMENT HOUSE HALIFAX 2nd July 1845.

MY LORD, I lose no time in replying to your Lordship's Despatch, No. 225 date 19 May, desiring me to inform you whether I have any objections to offer on provincial or other grounds to a further relaxation of the construction of the Treaty of 1818 between Great Britain and the United States; such relaxation, I learn from the above despatch, going to the extent of allowing to American fishing vessels free ingress, with liberty to fish therein, to all inlets of the sea which measure from headland to headland at their entrance more than the double of three miles, and still continuing to prohibit United States fishing vessels to fish within any bays which do not measure that distance at the entrance or to enter therein except under circumstances and for purposes provided for by the above treaty.

In my former correspondence, see No. 75, date May 8, 1841, addressed to your Lordship's predecessor, and No. 185, date 17 October 1843 addressed to your Lordship I have very fully explained that, as the advocate of the interests of the province, over the administration of the affairs of which I have now for some time presided, I should deeply lament any relaxation of the construction of the Treaty which would admit of American fishing vessels carrying on their operations within three marine miles of a line drawn from headland to headland of the various bays on the coast of Nova Scotia;—nor, as governor of the colony, do I now retract that opinion:—but, as in matters of this nature, much technical knowledge as well as verbal accuracy is required in treating of details, I have directed the Attorney General to prepare a report on this subject, which I herewith send, recommending it to your Lordship's particular attention, and to which I have only to add that I am convinced such a relaxation of the construction of the treaty of 1818 as is apparently contemplated by Lord Aberdeen, would, if carried into effect except in as far as regards the Bay of Fundy, produce very deep rooted dissatisfaction both here and in New Brunswick, and cause much injury to a very large and valuable class of Her Majesty's subjects.

Whether the arguments so strongly urged in the inclosed Report ought to give way to considerations of *national interest*, which H. M. Government may deem involved in the question, I do not venture to pronounce, but I earnestly hope that if any further privileges injurious to the *local interests* of the inhabitants of this colony are accorded to the fishermen of the United States, some such compensating advantages as are pointed out in my despatch No. 271 of the 17th

Sept. 1844 will be demanded and obtained for the fishermen of Nova Scotia, and I take the liberty of again requesting your Lordship to bring this important point under the notice of the Secretary of State for Foreign Affairs.

I have the honour to be my Lord,
your Lordship's most obedient humble servant

FALKLAND:

The LORD STANLEY
&c &c &c

No. 92.—1845, *September 17: Despatch from the Right Hon. Lord Stanley to the Right Hon. Viscount Falkland.*

DOWNING ST. 17th Sept 1845.

LORD FALKLAND

MY LORD, Her Majesty's Government have attentively considered the representations contained in your Despatches Nos. 324 & 331, of the 17th June and 2nd July, respecting the policy of granting permission to the fishermen of the U. States to fish in the Bay of Chaleurs and other large bays of a similar character on the coasts of N Brunswick and Nova Scotia, and, apprehending from your statements that any such general concession would be injurious to the interests of the British North American Provinces we have abandoned the intention we had entertained upon the subject, and shall adhere to the strict letter of the Treaties, which exist between Great Britain and the U: States relative to the fisheries in North America, except in so far as they may relate to the Bay of Fundy which has been thrown open to the Americans under certain restrictions. In announcing this decision to you I must at the same time direct your attention to the absolute necessity of a scrupulous observance of those Treaties on the part of the colonial authorities, and to the danger which cannot fail to arise from any over-strained assumption of the power of excluding the fishermen of the U: States from the waters in which they have a right to follow their pursuits. The case of the "Argus" is an exemplification of my meaning—that vessel having been seized by a provincial revenue cruiser, under the plea of illegal encroachment, in a spot where she was not within three miles of the shore, and where there does not appear to have been any pretence for asserting that she was within any bay, or in unlawful propinquity to any bay on the coast of Nova Scotia. I transmit herewith to your Lordship the copy of the opinion^a delivered upon the case of the "Argus" by the Queen's Advocate, and have to direct your Lordship to adopt such measures as may appear to you to be expedient for affording reparation to the parties who have been injured in the transaction.

I have, &c.

STANLEY.

No. 93.—1847, *December 7: Extract from Message of President of the United States on the Opening of Congress, Washington, December 7, 1847.*

* * * * *

A state of war abrogates Treaties previously existing between the belligerents, and a Treaty of Peace puts an end to all claims for indemnity, for tortious acts committed under the authority of one government against the citizens or subjects of another, unless they are provided for in its stipulations. A Treaty of Peace which would terminate the existing war, without providing for indemnity, would enable Mexico, the acknowledged debtor, and herself the aggressor in the war, to relieve herself from her just liabilities. By such a

^a Sept 9th 1845.

Treaty, our citizens, who hold just demands against her, would have no remedy either against Mexico or their own government. Our duty to these citizens must for ever prevent such a Peace, and no Treaty which does not provide ample means of discharging these demands can receive my sanction.

* * * * *

152 No. 94.—1852, July 6: *Extract from newspaper, enclosed in No. 100, Appendix, p. 168, being official publication of Mr. Daniel Webster, United States Secretary of State.*

THE AMERICAN FISHERIES.

[From The Boston Courier of Monday.]

DEPARTMENT OF STATE WASHINGTON, *July 6th, 1852.*

Information of an official character has been received at this Department to the following effect:

The late Ministry of England was opposed to the granting of bounties on principle, and in consequence it steadily refused to give the necessary assent to Acts of the Colonial Legislatures granting bounties to the fisheries. The colonies complained severally of this interference with their local affairs; and they further complained that the Government declined to enforce the provisions of the Fishery Convention of 1818, and thereby permitted American fishermen to encroach upon the best fishing grounds, from which, under the legal construction of the Treaty, they ought to be excluded.

With the recent change of Ministry in England has occurred an entire change of policy. The present Secretary of State for the Colonies, Sir John Pakington, has addressed a circular letter to the Governors of the several North American Colonies, an extract from which is as follows:

“DOWNING STREET, *May 28, 1852.*

“Among the many pressing subjects which have engaged the attention of Her Majesty's Ministers since their assumption of office, few have been more important in their estimation than the questions relating to the protection solicited for the fisheries on the coasts of British North America.

“Her Majesty's Government have taken into their serious consideration the representations upon this subject contained in your despatches noted in the margin, and have not failed to observe that whilst active measures have been taken by certain colonies for the purpose of encouraging their fisheries, and of repelling the intrusion of foreign vessels, it has been a subject of complaint that impediments should have been offered by the policy of the Imperial Government to the enactment of bounties, considered by the local Legislatures essential for the protection of this trade. Her Majesty's Ministers are desirous of removing all grounds of complaint on the part of the colonies, in consequence of the encroachments of the fishing vessels of the United States upon those waters from which they are excluded by the terms of the Convention of 1818, and they therefore intend to dispatch as soon as possible a small naval force of steamers or other small vessels to enforce the observance of that Convention.”

This announcement is accompanied by the following, as to the bounties:

“With regard to the question of promoting the fisheries of the British Colonies by the means of bounties, Her Majesty's Government, although desirous not to sanction any unnecessary deviation from that policy which regulates the commerce of this country, are still disinclined to prevent those colonies, by the interposition of Imperial authority—and especially pending the negotiation with the United States of America for the settlement of the principles on which the commerce with the British North American Colonies is hereafter to be carried on—from adopting the policy which they may deem most conducive to their own prosperity and welfare.”

"The vessels of war mentioned in the above circular despatches are expected to be upon the coasts of British North America during the present month, (July), when, no doubt, seizures will begin to be made of American fishing vessels, which in the autumn pursue their business in indents of the coast, from which it is contended they are excluded by the Convention of 1818.

"Meantime, and within the last ten days, an American fishing vessel, called the 'Coral,' belonging to Machias, in Maine, has been seized in the Bay of Fundy, near Grand Manan, by the officer commanding Her Majesty's cutter 'Netley,' already arrived in that bay, for an alleged infraction of the Fishing Convention; and the fishing vessel has been carried to the Port of St. John, New Brunswick, where proceedings have been taken in the Admiralty Court, with a view to her condemnation and absolute forfeiture.

"Besides the small naval force to be sent out by the Imperial Government, the colonies are bestirring themselves also for the protection of their fisheries. Canada has fitted out an armed vessel to be stationed in the Gulf; and this vessel has proceeded to the fishing grounds, having on board not only a naval Commander and crew, with power to seize vessels within limits, but also a stipendiary magistrate and civil police, to make prisoners of all who are found transgressing the laws of Canada, in order to their being committed to jail in that colony for trial.

"The Colony of Newfoundland has fitted out an armed vessel for the purpose of resisting the encroachments of French fishing vessels on the coast of Labrador; but, when ready to sail from their port, the Governor of that colony, acting under Imperial instructions, refused to give the Commander of this colonial vessel the necessary authority for making prize of French vessels found trespassing. This is an extraordinary circumstance, especially when
153 taken in connexion with the fact that the like authority to seize American fishing vessels, under similar circumstances has never been refused to the cruisers of any of the North American Colonies.

"The Colony of Nova Scotia has now four armed cruisers, well manned, on its coasts, ready to pounce upon any American vessels which may, accidentally or otherwise, be found fishing within the limits defined by the Crown Officers of England.

"New Brunswick has agreed with Canada and Nova Scotia to place a cutter in the Bay of Fundy to look after American fishermen there; and at Prince Edward Islands Her Majesty's steam frigate 'Devastation' has been placed under the instructions of the Governor of that colony."

The first Article of the Convention between the United States and Great Britain of the 20th October, 1818, is in these words:

Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof to take, dry, and cure fish on certain coasts, bays, harbours, and creeks of His Britannic Majesty's dominions in America, it is agreed between the High Contracting Parties that the inhabitants of the said United States shall have for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of said Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands; and also on the coasts, bays, harbours, and creeks from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belleisle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company; and that the American fishermen shall also have liberty for ever to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland, here above described, and of the coast of Labrador; but so soon as the same or any portion thereof shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce for ever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America, not included within the abovementioned limits: Provided, however, that the American fishermen shall be admitted to enter such bays or harbours, for the purpose of shelter, and of repairing dam-

ages therein, of purchasing wood and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

It would appear that, by a strict and rigid construction of this Article, fishing vessels of the United States are precluded from entering into the bays or harbours of the British Provinces, except for the purposes of shelter, repairing damages, and obtaining wood and water. A bay, as is usually understood, is an arm or recess of the sea, entering from the ocean between capes or headlands; and the term is applied equally to small and large tracts of water thus situated. It is common to speak of Hudson's Bay, or the Bay of Biscay, although they are very large tracts of water.

The British authorities insist that England has a right to draw a line from headland to headland, and to capture all American fishermen who may follow their pursuits inside of that line. It was undoubtedly an oversight in the Convention of 1818 to make so large a concession to England, since the United States had usually considered that those vast inlets or recesses of the Ocean ought to be open to American fishermen, as freely as the sea itself, to within three marine miles of the shore.

In 1841 the Legislature of Nova Scotia prepared a case for the consideration of the Advocate General, and Attorney General of England, upon the true construction of this Article of the Convention. The opinion delivered by these officers of the Crown was:

That by the terms of the Convention American citizens were excluded from any right of fishing within three miles from the coast of British America, and that *the prescribed distance of three miles is to be measured from the headlands or extreme points of land next the sea, of the coast or of the entrance of bays or indents of the coast, and consequently that no right exists on the part of American citizens to enter the bays of Nova Scotia, there to take fish, although the fishing, being within the bay, may be at a greater distance than three miles from the shore of the bay; as we are of opinion that the term "headland" is used in the Treaty to express the part of the land we have before mentioned, including the interior of the bays and the indents of the coast.*

It is this construction of the intent and meaning of the Convention of 1818 for which the colonies have contended since 1841, and which they have desired should be enforced. This the English Government has now, it would appear, consented to do, and the immediate effect will be, the loss of the valuable fall-fishing to American fishermen; a complete interruption of the extensive fishing business of New England, attended by constant collisions of the most unpleasant and exciting character, which may end in the destruction of human life, in the involvement of the Government in questions of a very serious nature, threatening the peace of the two countries. Not agreeing that the construction thus put upon the treaty is conformable to the intentions of the Contracting Parties, this information is, however, made public, to the end that those concerned in the American fisheries may perceive how the case at present stands, and be upon their guard. The whole subject will engage the immediate attention of the Government.

DANIEL WEBSTER, *Secretary of State.*

- 154 No. 95.—1852, July 17: *Letter enclosed in No. 100, Appendix, p. 168, from Mr. Daniel Webster (United States Secretary of State) to Mr. Crampton, British Minister at Washington.*

Private

FRANKLIN, July 17th, 1852.

MY DEAR MR. CRAMPTON: The threatened interruption by force of that enjoyment of the fisheries which the fishing vessels of the United States have so long practised and possessed, without interruption or molestation is a serious affair, and, I fear, full of danger.

I wish to see you as soon as you can possibly come north. If I am not in Boston at the Revere House please proceed immediately to Marshfield bringing with you as many of your adjuncts as you please.

I have recommended to the President that we take up the whole subject of the fisheries and the Canada trade at once as matter of negotiation.

You will see in the Boston papers of Monday an official publication by me: is it not possible for you to prevail with the provincial authorities to institute no hostile proceedings against American fishing vessels till longer notice be given and until you and I may have conferred together on the subject.

I am anxious to see you at once.

On receipt of this inform me by telegraph when you can be in Boston. I am with great regard

Your's always truly

(Signed)

DANIEL WEBSTER.

JOHN F. CRAMPTON Esqr
&c. &c. &c.

- No. 96.—1852, July 20: *Letter from Mr. Crampton to the Earl of Malmesbury (British Foreign Secretary).*

Confidential.

No. 105.

WASHINGTON, 20th July, 1852.

MY LORD: I have the honour to inclose the copy of a private letter which I this morning received from Mr. Webster, who is now in New Hampshire, upon the subject of the measures lately taken by Her Majesty's Government for the better protection of the British fisheries on the coast of North America.

I also inclose an extract from a newspaper, containing a copy of the official publication in regard to this subject which has been made by Mr. Webster, and which is alluded to in his letter.

Your Lordship will perceive from a perusal of these documents that Mr. Webster feels a good deal of apprehension as to the effects which may arise from the sudden interruption of the enjoyment by American fishermen of certain privileges in regard to the British fisheries which, he states, have long been tacitly permitted without molestation on the part of the British authorities; and 2ndly, (as he remarks in the latter part of his official publication), from the different construction which he seems to give to the provisions of

the Convention of 1818 from that adopted by Her Majesty's Government, in regard to the conditions by which the privilege of fishing is limited by that Treaty; which difference, he thinks, may give rise not only to collision between the British provincial authorities and American citizens, but involve the two Governments in questions of a serious nature.

With regard to Mr. Webster's, suggestion that I should prevail upon the provincial authorities not to institute what he denominates "hostile proceedings" against American fishing vessels till longer notice be given, I do not of course consider myself competent to recommend to the Governors of Her Majesty's North American Colonies the suspension of measures which have been taken under instructions from Her Majesty's Government, and the adoption of which I had myself duly announced to the Government of the United States. I thought it right however to address a letter, a copy of which I have the honour to inclose, to the Governor General of Canada, to the Lieutenant Governors of the other North American Provinces, and to Vice Admiral Sir George Seymour, informing them of the view taken of the matter by the United States Government, in order that they might be prepared to take such precautions as, in their judgment, might seem fit, to prevent the occurrence of those collisions and difficulties which the United States Government apprehends.

The intention expressed by Mr. Webster of recommending to the President that the whole subject of the fisheries and of reciprocity of trade between the United States and the North American Colonies should be taken up with a view to its definitive settlement by negotiation, has rendered me still more desirous that none of those difficulties or collisions should occur; for the question of reciprocity of trade the decision of which has so long been desired both by the Imperial and the Provincial Governments, and which is now under the consideration of Congress with I fear, very little prospect of being
 155 speedily decided, might, by such a negotiation, (which the Government of the United States has hitherto declined to enter upon), be now brought to a prompt and satisfactory conclusion.

I have informed Mr. Webster, in reply to his invitation, that I will immediately repair to Boston, and I propose to leave Washington for that purpose to-morrow morning.

In the meantime, I have had this day, at his own request, a conversation upon this subject with the President of the United States.

Mr. Fillmore urged me strongly to proceed to Boston with a view of devising, with Mr. Webster, some means by which collision between our respective citizens and subjects, or misunderstanding between our Governments might be avoided until such time as the point in regard to which such collisions might arise, should be settled.

We had been examining the Convention of 1818, he said, and although he contested the construction put by the British Law Officers upon the clause regarding the limits assigned, within which American fishermen could not legally carry on their operations, he nevertheless admitted that the wording of the passage, which he thought somewhat obscure, countenanced to a certain degree that construction. With regard to the opinion of the Law Officers of the Crown by which this construction was maintained, he remarked, however, that it seemed

to him singular that they adverted to expressions as being used in the Treaty which were nowhere to be found in it: he alluded to that part of the opinion where it is said, "as we are of opinion that the term headland *is used in the Treaty* to express the part of the land we have before mentioned including the interior of the bays and "indents of the coast." Now, said Mr. Fillmore, there is no such term as headland in the Treaty at all, which would look as if the opinion had been drawn up without reference being made to the text of the Convention of 1818. He also remarked that as well as he had been able to ascertain the fact, the Government of the United States had, on various previous occasions, contested the construction maintained by the opinion in question.

Mr. Fillmore concluded by saying that he had been strongly urged to send some vessels of war to the fishing grounds in question for the purpose of protecting American interests there, but that he had hitherto declined doing so from his apprehension of the consequences of such a measure so long as the two Governments were not agreed as to the rights which each sought to define and to assert. What he would propose was that Mr. Webster and myself should make some temporary arrangement of the matter until the true sense of the Treaty should be determined by the two Governments between themselves, or, if necessary, be referred to the decision of some friendly Power, and he suggested that such an arrangement might be effected by each party's abstaining for the present to take any measures in assertion of their supposed right,—that is to say, that the British authorities on the sea board should refrain from molesting any American fishing vessel which might be found to be carrying on its operations within the prescribed distance of three miles, as this is understood by the British construction of the Treaty, but at the same time without the prescribed distance, as understood by the American construction: while the United States Government, on the other hand, should take every means in their power to prevent their own citizens from fishing within the prescribed distance as understood by the British construction, until such time as the question as to which construction ought to prevail, should be determined on, or until the question should be otherwise disposed of by treaty or mutual legislation.

I have the honour to be, with the greatest respect, my Lord,

Your Lordship's most obedient humble servant,

JOHN. F. CRAMPTON.

The Right Honorable, Earl of Malmesbury.

&c. &c. &c.

• P.S. New York. 22nd July, 1852. I open this despatch to inclose the copy of a publication which has been made by Mr. Webster of a despatch from Mr. Everett to Mr. Buchanan dated London, 26th April 1845, which bears upon the point in question in regard to the fisheries. It would appear from this that the United States Government did not, at the time that despatch was written, demand as a right the privileges they now contend for, and that consequently they did not contest the construction of the Treaty then and now held by Her Majesty's Government.

J F C

No. 97.—1852, *July 20: Letter from Mr. Fillmore (President of the United States) to Mr. Daniel Webster.*

WASHINGTON CITY. *July. 20th. 1852.*

MY DEAR SIR: Your note of the 17th. dated at Franklin came to hand this morning, inclosing a copy of your's of the same day to Mr. Crampton, and Mr. Hunter has shown me your telegraphic despatch of yesterday, requesting him to ask me whether it was not best to send one of our naval ships to Newfoundland to look after the disturbances among the fishermen. I have also perused your article in the Boston Courier of yesterday, and sincerely hope that these difficulties will not prove as serious as you seem to anticipate. I have seen Mr. Crampton who informs me that he will leave for Boston to-morrow morning, for the purpose of having a consultation with you
 156 upon the subject of the fisheries. He informs me also, that he has addressed a circular to the several Governors of the British Provinces of North America advising moderation and forbearance upon this subject. I doubt not that when you and he meet, you will be able to agree upon some line of proceeding that will allay the present excitement and prevent any bloodshed. I would suggest that you unite in a publication in which you should express your regrets that any misunderstanding had arisen between our fishermen engaged in the fisheries at Newfoundland, and the colonial subjects of Great Britain; that the differences of opinion which have arisen between the two Governments, in reference to their respective rights under the Convention of 1818, have called the attention of both Governments to the subject, and that together with the subject of reciprocal trade between Her Majesty's Provinces of North America and the United States, will doubtless become the immediate subject of negotiation between the two countries; that in the meantime and until these matters can be amicably adjusted, you both concur in the opinion that under the Treaty of 1818 our citizens had the unquestioned right of fishing on the Southern and Western shore of the Island of Newfoundland, lying between the Islands of Ramea on the south and the Island of Quiperon on the north, and of entering upon any unoccupied lands upon the shore of said island between Cape Ray and said Island of Ramea, for the purpose of drying and curing fish; and also of fishing upon the shores of the Magdalen Islands; and with regard to all the rest of the Island of Newfoundland, and the other islands and mainland of Nova Scotia and New Brunswick, the English Government, so far as they have not conceded it to the French, have the exclusive right of fishing in all the waters adjacent to such islands or mainland and within three marine miles of the shore; but as for those waters in the several bays and harbours which are more than three marine miles from the shore of such bay or harbour upon either side, and within three marine miles of a straight line drawn from one headland to the other of such bay or harbour, that you as the Representative of the United States conceived that our fishermen have the right under the Treaty to fish therein, but the British Government having held that by a true construction of the Treaty such right belonged exclusively to British subjects; and as those waters were thus in dispute between the two nations, you respectively advised the citizens and subjects of both countries not to

attempt to exercise any right that either claimed within the disputed waters until this disputed right could be adjusted by amicable negotiation.

I perceive by the papers that your publication in the Boston Courier is somewhat misunderstood, and has consequently created unnecessary alarm; and some such joint publication as I have suggested above will, I think, quiet the apprehensions of the country, and be generally acquiesced in and obeyed by the parties engaged in the fisheries. I do not, of course, intend to indicate the precise words of such a declaration, as I write in much haste, and you are much more competent to prepare the article than I am. As to the subjects of negotiation, beyond those growing out of the construction of the Treaty of 1818, I will write you more fully hereafter. I do not know whether our citizens engaged in the fisheries seek for anything more than what they would obtain under the Treaty of 1818 if it received the construction for which we contend. If they do, then that will be one additional subject of negotiation; the right of navigating the St. Lawrence and the Welland Canal will of course be another; but the reciprocal trade between us and the British Provinces is one which I greatly prefer should be settled by legislation. If however that cannot be done, it may be best to settle it by a treaty for a limited time. But, as I said before, I will write you more fully upon this subject when I have had more time for reflection.

I have seen the Secretary of the Navy, who says the Mississippi steam frigate, Captain Mc Cluney is now at New York and could be sent to the Banks of Newfoundland, if desired. She is however, as you are aware intended as the flag-ship of Captain Perry and of course will soon be wanted for that expedition. I thought however I would wait until you and Mr. Crampton had settled upon something definite, from which proper instructions might be drawn before I ordered the vessel to proceed to that destination. Regretting that this unfortunate business compels you to leave the mountains and valleys of your native State, but hoping that it will detain you but a short time

I remain, truly & sincerely yours

(Signed)

MILLARD FILLMORE.

The Honourable, DANIEL WEBSTER.

Secretary of State.

Boston. Massts.

No. 98.—1852, August 2: *Letter from Mr. Crampton to the Earl of Malmesbury.*

Confidential.

No. 107.

MARSHFIELD, MASS., August 2nd. 1852.

MY LORD: I have been at this place, (Mr. Webster's country residence) since the date of my last despatch (No. 106 of the 26th ultimo), and I have had several conversations with Mr. Webster on the subject of the late measures of Her Majesty's Government for the better protection of the British fisheries.

157 I observe with satisfaction that Mr. Webster now clearly perceives and fairly admits the correctness of the construction of the Convention of 1818 maintained by Her Majesty's Government. The opinion of the Queen's Advocate and of the Attorney General is, Mr. Webster said, "undoubtedly right":—and he afterwards informed me that the President, from whom he had just received a letter on the subject, now concurred in that opinion.

Mr. Webster remarked however that he thought that more had been conceded on the part of the United States by the Convention of 1818 strictly interpreted, than had been intended, or ought to have been conceded: and that at all events a very important American interest had grown up under its practical operation:—an interest which was now threatened with destruction by a strict enforcement of its provisions, and one which the American Government could not, if it would, abandon. Any injury which should be now inflicted upon that interest by the measures contemplated by Her Majesty's Government, would not fail to excite an angry feeling on the part of the inhabitants of the new England States against the neighbouring British Colonies, which he was most anxious to prevent: He felt therefore, he said, most desirous that the whole matter might now be taken up by negotiation, and he read to me a letter addressed to the President of the United States, in which he recommends the adoption of this course in preference to a settlement of the matter by legislation, stating his apprehension that the arrangement of the matter by the latter mode, though preferable on some accounts, might be subjected to indefinite delay.

Congress in the meantime has at length taken a step towards the settlement of the question of reciprocal trade with the British North American Colonies by the Committee of Commerce of the House of Representatives bringing up a report on this subject by which a comprehensive measure for this purpose is recommended. I fear however at this late period of the session and in the midst of other pressing business, and also perhaps in the presence of the feeling which has been got up in regard to the measures of Her Majesty's Government for protecting the fisheries, which measures are represented as meant to constrain the United States to negotiate with us "under duress," there is but little prospect of the immediate success of this measure.

Mr. Webster informs me that the President, in consideration of the strong feeling which exists upon this subject at Washington, and the loud calls which were made for such a measure, has instructed Commodore Perry to proceed to the Gulf of St. Lawrence, in the steam frigate "Mississippi" for the protection of American fishing vessels there. I could not learn what were the exact instructions given to Commodore Perry, but as the United States Government does not now seem to differ with Her Majesty's Government as to the construction of the Convention of 1818, I should suppose that these would not be of a nature to produce collision or disagreement between the American naval forces and the naval forces of Her Majesty or the Colonial authorities.

With regard to the suggestion contained in the letter of the President to Mr. Webster, a copy of which I had the honour to inclose in my despatch No. 106 of the 26th ultimo, that Mr. Webster and myself should unite in a joint publication for the purpose of allaying the

present excitement in regard to this subject, Mr. Webster has, upon consideration, judged it expedient to abstain for the present from taking this step, as one likely to produce fresh discussion on the subject without leading to any definite result. I entirely agree with him in this opinion; the more so that the excitement in question has already very much diminished, and that a very general impression prevails that the question is now under discussion between the two Governments, with a view to its settlement upon a satisfactory basis. My present visit to Mr. Webster has, I believe, tended to strengthen this impression.

I have the honour to be, with the greatest respect, My Lord,
Your Lordship's most obedient humble servant,

JOHN F CRAMPTON

The Right Honorable EARL OF MALMESBURY,

&c. &c. &c.

Foreign Office.

No. 99.—1852, August 3: *Debate in the Senate of the United States on North American Fisheries. Speeches of Mr. Cass of Michigan and Mr. Davis of Massachusetts.*

A message having been received from the President, in relation to the fisheries on the coasts of the British possessions, with accompanying documents, and Mr. CASS having moved to refer the same to the Committee on Foreign Relations—

Mr. CASS said:

MR. PRESIDENT: I have looked with some care into this question of the fisheries since it was first brought before us, and as there seems to me to be some important errors prevalent, I desire to take this opportunity, before the just cause of our country is prejudged, to correct them.

158 The ocean which unites, while it separates the nations of the earth, is at once their common highway, and a liquid field, whose abundant supply of food for man is among the most wonderful and beneficent dispensations of nature. No nation can appropriate it to itself. For the purpose of mutual convenience and of proper internal police, it seems to have been understood that the authority of every country may control the shores of the ocean within one marine league, or three miles of its coasts. But within this distance vessels may navigate the seas, though they ought not to violate the municipal laws passed for revenue and for other proper purposes.

When the United States asserted their independence, and entered into negotiations with England for its recognition, the question of the fisheries was one of the most important, whose adjustment was required by the relations existing between the two countries. England contended that we were in the condition of any other foreign Power, and that, consequently, we had no rights but such as every nation possessed by virtue of its sovereignty. Our revolutionary patriots contended, and justly and successfully, that the colonists were among the first to carry on the fisheries—that they did their full share, and more, too, in defending and acquiring them from the French; and that, as a portion of the common empire, which possessed them, they had a right to enjoy their just proportion, as well

when separated as while united. And we learn, both from the traditional accounts and from diplomatic and historical documents, that in the very darkest period of the struggle there was no wavering upon this point, but that our conscript fathers held on to it with as much tenacity as their Roman predecessors held on to the rights and honour of Rome when the enemy was at the gates of the capitol. That sturdy patriot, John Adams, told the story in his old age—and an eventful one it is—valuable both as an encouragement and as an example. It is contained in a letter to William Thomas, dated—

MONTEZILLO, *August 10, 1822.*

DEAR SIR: The grounds and principles on which the third Article of the Treaty of '83 was contended for on our part, and finally yielded on the part of the British, were these: first, that the Americans and the adventurers to America were the first discoverers and the first practisers of the fisheries; secondly, that New England, and especially Massachusetts, had done more in defence of them than all the rest of the British Empire; that the various projected expeditions to Canada, in which they were defeated by British negligence—the conquest of Louisburg in '45—the subsequent conquest of Nova Scotia, in which New England had expended more blood and treasure than all the rest of the British Empire—were principally effected with a special view to the security and protection of the fisheries; thirdly, that the inhabitants of the United States had as clear a right to every branch of the fisheries, and to cure fish on land, as the inhabitants of Canada or Nova Scotia; that the citizens of Boston, New York, or Philadelphia, had as clear a right to those fisheries, and to cure fish on land, as the inhabitants of London, Liverpool, Bristol, Glasgow, or Dublin; fourthly, that the third Article was demanded as an ultimatum, and it was declared that no Treaty of Peace should ever be made without that Article. And when the British Ministers found that peace could not be made without that Article, they consented—for Britain wanted peace, if possible, more than we did; fifthly, we asked no favour, we requested no grant, and would accept none. We demand it as a right, and we demanded an explicit acknowledgment of that right as an indispensable condition of peace.

The war of 1812, and the peace that followed it, left this important right in a disputed and precarious condition. No arrangement could be made at Ghent in relation to it; and the effort was closed by the peremptory declaration made on the 10th of November, 1814, by the American to the British Commissioners,

that they were not authorized to bring into discussion any of the rights or liberties which the United States have heretofore enjoyed in relation thereto, [the fisheries.] From their nature, and from the peculiar character of the Treaty of 1783, by which they are recognised, no further stipulation has been deemed necessary by the Government of the United States to entitle them to the full enjoyment of all of them.

After the Peace, during some years difficulties and troubles arose, threatening serious consequences, from the almost hostile pretensions of the parties, that finally led to the negotiations of Messrs. Gallatin and Rush, which terminated in the existing Convention of 1818.

There were strange claims in those days as well as now. An effort was made to exclude us from coming within twenty leagues of the colonial coasts; though the act was finally disavowed by the British Government, wherever the design may have originated.

And Mr. Monroe said, in his instructions to the Commissioners at Ghent, that the Administration "had information, from a quarter deserving attention," that a demand would be made to surrender our right to the fisheries, to abandon all trade beyond the Cape of Good Hope, and to cede Louisiana to Spain.

"These rights," said the Secretary, by order of the firm and patriotic Madison, "must not be brought into discussion. If insisted on, your negotiation will cease."

And even after the Convention, a claim was made to run a line from Cape Granby to Cape North, across the whole northeast coast of Cape Breton, not less than one hundred miles, including within the *tabooed* region, numerous bays and harbours.

The history of that period of pretension teaches lessons that no independent State, mindful of its own self-respect, or solicitous of the respect of the world, should forget or disregard. Those were the days of impressment, when British officers took whom they pleased from American ships, and when two great belligerents, animated with the spirit of the highwayman, robbed us of our property wherever they could find it on the ocean, each alleging as its justification that the other had set the example. Hereafter let us meet the first
 159 intentional insult or injury—by intentional, I mean one directed or justified by a foreign Power—let us meet it as it should be met, by the armed hand, and by the whole force of the nation. Submission and acquiescence will conduct us only to contempt and dishonour.

We learn from the Report of the Commissioners of 1818 that the important provisions in the present Convention were the result of an ultimatum submitted by them, and which was followed by an arrangement. That arrangement was in some respects different from the Treaty of 1783. By that Treaty the American fishermen were acknowledged to have the right to fish on the Grand Banks and all the other banks of Newfoundland, and also in the Gulf of St. Lawrence, and at all other places in the sea where the inhabitants of both countries were at any time before used to fish; and also on the coast of Newfoundland, and on the coasts, bays, and creeks of all the other colonial possessions; and the right to cure and dry fish on all the colonial coasts except Newfoundland.

The new Convention restricted the right to fish—that is, to fish within three marine miles of the coasts—to the lines and points enumerated in that instrument, and the right to dry fish on the coast of Labrador, and to a portion of the coast of Newfoundland, which was substituted for a more extended recognition in the original Treaty.

The consideration on the part of the United States for entering into this Convention, was the amicable arrangement of a perplexing and dangerous question, which, while it was open, was at any time liable to lead to war, and the security of a large portion of the rights claimed by them, which placed this great fishing interest in a prosperous condition. The consideration on the part of England, was the same permanent establishment of the amicable relations of the two countries, and the relinquishment, by the United States, of some part of what they had previously claimed. Each party, therefore, surrendered something to the other—rights and claims arising out of the relations they had previously occupied as portions of one common empire. But their rights as sovereign States, having no reference to previous connexion, were neither touched, nor designed to be touched, by this Convention. We did not ask of England, nor did she ask of us, the privilege of fishing in the ocean, three marine miles from each other's coasts. No treaty was needed for that purpose, nor did either

Government dream of it. What we wanted was the enjoyment of a right we had possessed since the settlement of the country, to fish near to the coast when necessary, without reference to the question of jurisdiction, and to dry the fish in proper places; and what England wanted, was to reduce these claims within the narrowest limits she could induce us to accept; and the result was the existing arrangement.

We did not get the right to fish on the ocean from England, nor from any other earthly power. We got it from Almighty God, and we mean to hold on to it, through the whole extent of the great deep, now in the days of our strength, as our fathers held on to it in the days of our weakness. Should we abandon this attribute of independence, even in any extremity which human sagacity can foresee, we should prove recreant both to the glories of the past and to the hopes of the future, to the deeds of our fathers and to the just expectations of our children. I know but little of the character of my countrymen, if they would not reject with indignation, any proposition thus to tarnish their history, and to write their own dishonour upon it.

What, then, I repeat, have we secured by the Convention? The right to take fish within three miles, and the right to come ashore to dry them, and the right of shelter in certain coasts, harbours, creeks, and bays. In what bays do we possess rights?—for there arises the controversy.

This word "bay," as a geographical designation, is very indefinite in its application. Neither the form, size, nor position of the various expanses of water to which it is applied has any such strict relation as to give to the term a fixed definition. We have designated that great interior sea, under the Arctic circle, named from the enterprising mariner, Hudson, as a bay, though with its various indentations it extends through twenty degrees of latitude, and as many of longitude. And the few miles at the mouth of the North River, forming the harbour of New York, is equally entitled to the same appellation. Baffin's Bay is another prodigious indentation of the ocean, covering, with Davis's Straits as far as Cape Farewell, a greater area than the Gulf of Mexico and the whole Caribbean Sea. The Bay of Biscay—whose headlands, according to the new doctrine, may be said to be near Brest, as my honourable friend from Louisiana [Mr. SOULE] well knows, on the northeast, and Corunna on the southwest, giving an arc of near five hundred miles—is another of these mighty sheets of water with a comparatively humble name; and so is the Bay of Fundy, though less, and the Bay of Chaleur, from both of which we are sought to be excluded. The same uncertainty prevails as to gulfs and seas; for we have them of all sizes and forms, from the great Gulf of Guinea and the Mediterranean Sea down to the Gulf of Patras, and to the far-famed but diminutive Marmora, renowned in history, but insignificant in geography.

Now, Sir, it is preposterous to run a line from one projecting point of these vast expansions to the other, and claim for the State which holds the coast, even if it is the whole of it, exclusive jurisdiction over great arms of the ocean, with the right to prevent any other nation from enjoying them, either for the purpose of fishing or of navigation.

That there are many land-locked indentations which constitute portions of the territory of the country whose coasts surround them, is indisputable. It is not necessary to enter into the public law, made since by general consent, which regulates that subject. No doubt cases may arise where rights are claimed and resisted, which are not easy of adjustment in consequence of the absence of fixed principles. When such controversies arise, they must take their own course of settlement.

But, independent of these general considerations, applicable to the larger bays and gulfs of the fishing region, there are others which fix the meaning of the word 'bay,' as employed in the Convention, beyond reasonable doubt or dispute, beyond all cavil, but a determination to resort to interest rather than to reason for the signification of a term. The Convention, by indicating the use of the bays, sufficiently indicates their nature. They are for the purpose of affording *shelter*, &c. Now, what shelter can the storm-beaten mariner find in the Bay of Fundy or in the Gulf of St. Lawrence? Both of these seas are among the most dangerous that our hardy seamen are compelled to encounter, whatever may be their pursuits, or wherever they may range the ocean. They are proverbially perilous and deceitful, and the right to find shelter upon these tempestuous waves would not be worth the paper on which it might be written.

The "Montreal Herald," indeed, in a late number, while accusing the American of standing "upon any advantages they may possess," cuts this Gordian knot with great ease by the discovery and annunciation that "there is, after all, no real ground for considering this as an 'insult; for the bays and straits where the British men-of-war are stationed are as exclusively British as the British Channel.'" Quite cool, this claim over the great highway which separates France from England, twenty-one miles broad in its narrowest part. This is going backward, indeed—to the days of Selden, the advocate of this pretension, and to the reign of Charles, who hoped to establish it. The knowledge and the modesty of the editor are equally commendable.

The bays of the Convention are classed with harbors and creeks—a classification significative of the object. They are defined as bays "of His Britannic Majesty's Dominions," over which the British Government has jurisdiction, as it has over the land that encircles them. That such was the understanding of our negotiators is rendered clear by the terms they employ in their report upon this subject. They say, "it is in that point of view that the privilege of entering the ports for shelter is useful," &c. Here the word "ports" is used as a descriptive word, embracing both the bays and harbours within which shelter may be legally sought, and shows the kind of bays contemplated by our framers of the Treaty. And it is not a little curious that the Legislature of Nova Scotia have applied the same meaning to a similar term. An Act of that province was passed March 12, 1836, with this title: "An Act relating to the Fisheries in the Province of Nova Scotia and the Coasts and Harbours thereof," which Act recognizes the Convention, and provides for its execution under the authority of an Imperial statute. It declares that harbours shall include bays, ports, and creeks. Nothing can

show more clearly their opinion of the nature of the shelter secured to the American fishermen.

The general views of Messrs. Rush and Gallatin are shown in the following extract from their report, and I introduce it because it has an important bearing upon the whole subject before us:

Messrs. Gallatin and Rush to the Secretary of State, October 20, 1818.

It will also be perceived that we insisted on the clause by which the United States renounced their right to the fisheries relinquished by the Convention, that clause having been omitted in the first British counter-projet. We insisted on it with the view—1st. Of preventing any implication that the fisheries secured to us were a new grant, and of placing the permanence of the rights secured and of those renounced precisely on the same footing. 2d. Of its being expressly stated that our renunciation extended only to the distance of three miles from the coast. This last point was the more important, as, with the exception of the fishery in open boats within certain harbours, it appeared from the communication above-mentioned that the fishing-ground on the whole coast of Nova Scotia is more than three miles from the shores; whilst, on the contrary, it is almost universally close to the shore on the coast of Labrador. It is in that point of view that the privilege of entering the ports for shelter is useful, and it is hoped that with that provision a considerable portion of the actual fisheries on that coast (of Nova Scotia) will, notwithstanding the renunciation, be preserved.

Now, Sir, it appears to me, on a careful review of this whole question, that the conduct of England is equally unfriendly and unjust. Indeed, I find it difficult—I might almost say impossible—to ascertain her true motive or the length to which she is prepared to go; and more especially so, since her Government at home and her officers abroad have heralded her proceedings to the world, the instructions of the Secretary of State and the orders of the Admiral having been fully communicated through the medium of the press, and are now on their way through Christendom. Where her prudence, after these disclosures, will prompt her to stop, or how far in this dangerous career her pride, or whatever other motive dictates her course, may impel her onward, I am at a loss to conjecture. Nations, before they take such ground, and take it so openly, should be very sure of their rights, and fixed in their determination to maintain them. Mr. Monroe was equally puzzled in 1815, under not dissimilar circumstances, and I commend to attention the remarks in his letter to Mr. Adams of July 21 of that year.

It can scarcely be presumed that the British Government, after the result of the late experiment, in the present state of Europe, and under its other engagements, can seriously contemplate a renewal of hostilities. But it often happens with nations, as well as with individuals, that a just estimate of its interests and duties is not an infallible criterion of its conduct. We ought to be prepared at every point to guard against such an event. You will be attentive to circumstances, and give us timely notice of any danger which may be menaced.

When the honourable Senators from Maine and Massachusetts [Mr. HAMLIN and Mr. DAVIS] attributed the course of England in this matter to a design to effect a reciprocity arrangement for her colonies by a manifestation of energy and display of force, I could not concur with them at all in the opinion. I thought it was impossible that England would hazard such an experiment upon our forbearance, not to say timidity. I could not believe that any British

161 statesman could so far mistake our national character as to suppose that such a course would extort our consent to any measure, whether obnoxious or not. I thought we had lived in the world so long, and grown to be one of its great Powers, under circumstances so often requiring energy and resolution, that no nation would regulate its demands against us upon the presumption, even if they were made with boldness, they would be granted with the alacrity of fear.

I am well aware that England, and other Powers, indeed, have measured their own rights for themselves, and have compelled reluctant States to do them justice. And this is justifiable where the demand is incontestable, and voluntary satisfaction becomes hopeless. But this generally occurs with comparatively small States; for with powerful ones such a course would be the signal of war. But I did not believe we were in this category in the estimation of the British Administration, nor that the experiment would ever be made of firing a gun on the Potomac in time of peace, to secure any demand whatever, because such an act had succeeded on the Tagus. I do not mean that the display of an unusual force in neighbouring waters is as indicative of a belligerent attitude as would be its appearance upon our own coast; but it is well calculated to give offence, especially when coupled with the avowed determination of so turning the circumstances as to procure commercial arrangements, which it is not certain we shall ever make.

Now, Sir, recent statements in the colonial papers justify the conjecture of the Senators from Maine and Massachusetts, and indicate pretty clearly one of the objects of this new movement. I will refer to some of them:

[From the New Brunswick.]

We have no doubt but an attempt will be made by the American Government to obtain a modification of the strict letter of the Fishery Treaty between Great Britain and the United States; but failing, as we believe they will, in this, they will then offer, as an equivalent, reciprocity in certain articles of domestic growth and produce for the privilege of fishing within the prescribed limits. The unlimited sway which American fishermen have heretofore enjoyed along our coasts, left them little or nothing to wish for; and when these colonies wished a reciprocity in some of their staple articles, they were treated with the utmost indifference. Our neighbours had so long trampled upon our privileges, that they imagined they had a perfect right to our fishing-grounds for their benefit. Did they possess such a valuable source of wealth, British subjects would not be permitted to take a single fish. The strictest *surveillance* would be exercised to keep off all intruders.

[From the St. John Morning News.]

The recent movements of the British with respect to the American fishermen, have caused some sensation in the United States, and serious troubles between the two Governments are anticipated, consequent upon the strict interpretation of the Fishery Treaty by Earl Derby's Government. It is not at all improbable that the determination of the Ministry to enforce the Treaty has been conceived with a view to the success of the negotiations for reciprocal free trade, and that the American Government will be glad to make terms.

[From the Montreal Herald.]

THE FISHERIES RECIPROCITY.—The Americans are always disposed to stand upon any advantages they may possess, and refuse to yield favours to others, even when themselves likely to gain by the bargain, without a distinct and apparent compensation. When, after abolishing the differential duties, we asked the small return of reciprocity in raw materials, we were immediately met by the question, What have you got to give in return? The fisheries were suggested by the Americans as something that might be thrown in on our side; but eventually they seem to have become impressed with the conviction that, as they were enjoying them without any formal concession of privilege, they might as well still refuse what the colonies asked. It was quite time to show them that we had something which we could withhold as well as they; and though we know not whether the desire to obtain reciprocity has not been one of the grounds for the present somewhat sudden action on the part of the Imperial Government, we hold that such a desire would be a perfectly legitimate ground for such action.

I understand, also, that similar views were expressed in Parliament during some recent allusion to this subject. I trust, for the permanent welfare of both countries, that this effort, as a compulsory means of effecting a diplomatic arrangement, will be abandoned.

Apart from this conjecture—for it is only such—what does England intend to do? I see it stated in many of our journals, as a reason for sitting still, that we do not know what is the *exact* object

of England. Well, Sir, that is precisely one of our most serious grounds of complaint. A great movement is going on in a part of the ocean where we have immense interests at stake. A powerful armament has arrived there; rumours are rife that a new policy is to be adopted; the British Minister here, and the British Secretary of State, and the British Admiral, talk of our "encroachments"; and the whole tenor of the preparations show that what is thus termed is to be resisted; and yet we have no information, official or even authentic, as to what England designs to do. A very able and respectable journal of this city, which I generally read with pleasure, and often with profit (the *Intelligencer*), and for whose editors I have much personal regard, gives us the following information:

162 Nor has the present proceeding by the British authorities been so sudden, or so entirely without notice, as seems to be supposed. We are informed, upon the best authority, that about the 7th of this month the Minister of Great Britain notified our Government that measures had been adopted by the British Government to prevent the repetition of the complaints which had so frequently been made of the encroachments of vessels belonging to citizens of the United States and of France upon the fishing-grounds reserved to Great Britain by the Convention of 1818; that urgent representations had been addressed to the Government of Great Britain by the Governors of the British North American Provinces in regard to those encroachments, to the effect that the colonial fisheries were most seriously prejudiced; and that directions had been given by the Lords of the Admiralty for stationing off New Brunswick, Nova Scotia, Prince Edward's Island, and in the Gulf of St. Lawrence, such a force of small sailing vessels and steamers as should be deemed sufficient to prevent further infractions of the Treaty.

The Minister of Great Britain at the same time also informed our Government that it was the command of his Government that the officers employed upon this service should be specially enjoined to avoid all interference with vessels of friendly Powers, except when they were in the act of violating existing treaties; and on all occasions to avoid giving ground of complaint by the adoption of harsh or unnecessary proceedings where circumstances compelled the arrest or seizure of such vessels.

I have no doubt but this is substantially correct. Now, I disagree with the *Intelligencer* as to the use or friendly spirit of this communication. What does it amount to as a correct means of judging the true state of things, either present or prospective? What are these "encroachments"? and what is this "infraction" thus to be forcibly prevented? Fair dealing requires we should be told; but the matter is involved in Delphic obscurity. Do these complaints, thus to be remedied by one of the parties alone, relate to palpable violations of the Treaty which our Government would not defend—such as fishing within the clearly excluded limits, attempts to smuggle, or other indefensible acts?—or do they relate to the large open bays, which we contend we have a right to enter, and which is, in fact, the only real subject in dispute?

Sir John Pakington, the British Secretary of State for the Colonies, in a letter to the Colonial Governors, employs the same word "encroachment," and leaves us equally in the dark as to its application. This is his letter:

Copy of a Letter from Sir John Pakington, Secretary of State for the Colonies, to the Governors of the British North American Colonies, dated

MAY 28, 1852.

Her Majesty's Ministers are desirous of removing all grounds of complaint on the part of the Colonies in consequence of the encroachments of the fishing vessels of the United States upon those waters from which they are excluded

by the terms of the Convention of 1818, and they, therefore, intend to dispatch, as soon as possible, a small naval force of steamers, or other small vessels, to enforce the observance of that Convention.

In the mean time, the Colonial papers are in raptures, looking forward to the advent of a golden age by the adoption of their construction of the Treaty, and by the determination of the Home Government to maintain it. There is a prodigious flourish of trumpets upon the occasion, and it is obvious that every colonist believes that this large force has been assembled for far more important purposes than to watch smugglers or the common trespasses of fishermen.

Now, what are these "encroachments," thus denominated and denounced by the British Government, and by their Representative here? There are not wanting the means of answering this question.

For a series of years the Colonial authorities have complained of our fishermen for fishing in all the large bays—in the Bay of Fundy, the Gulf of St. Lawrence, the Bay of Chaleur, and elsewhere. In 1842 these complaints assumed quite an imposing appearance, and a resolution passed the Legislature of Nova Scotia, embodying their supposed grievances in a distant form, with a view to decisive action. A case was stated by the Governor embracing all the points they contended for, which was transmitted to the Government, with a request that the opinion of the Advocate and of the Attorney General might be taken upon the various questions propounded. Among these questions was the following:

3d. Is the distance of three marine miles to be computed from the indents of the coast of British America, or from the extreme headlands, and what is to be considered a headland?

There are two curious facts in connection with this proceeding worthy of a passing notice.

The first is, that in the case stated by the Nova Scotia Government, it is asserted that, at the Peace of 1783, a Treaty was entered into between the United States of America and Great Britain, by which the people of the former country obtained the right "to take fish on the Grand Bank," &c. A greater historical error could hardly be committed in this matter, which the Treaty itself, as well as all contemporaneous accounts, contradicts. What influence the statement may have had upon the subsequent opinion, I know not. It certainly leaves but little respect for the careful action of those who prepared the document.

163 The second curious fact, though of a different nature, concerns the Governor—Lord Falkland—who gravely tells the Secretary of State, while sending him this paper, that "the people of the colony have not been wanting in efforts to repel the incursions of the NATIVES of the United States upon these fishing grounds," &c. This dignitary seems to have supposed that the aboriginal population yet possessed our country, as the term *native* is, by common consent, applied to the primitive inhabitants of a region.

The case thus stated was referred by the Home Government to the Advocate and Attorney General, who decided every point in favour of British, or, rather, of colonial interests. It is, probably, well for the peace of the two countries, if the course of England is to be guided by the views of these functionaries, that nothing more was asked; for I suppose a negative upon such questions of national

interest could have hardly been expected from these legal expounders. On the main point the following was the opinion:

2d. Except within certain defined limits to which the query put to us does not apply, we are of opinion that by the terms of the Treaty American citizens are excluded from the right of fishing within three miles of the coast of British America; and that the prescribed distance of three miles is to be measured from the headlands, or extreme points of land next the sea of the coast, or of the entrance of the bays, and not from the interior of such bays or inlets of the coast; and consequently that no right exists on the part of American citizens to enter the bays of Nova Scotia, there to take fish, although the fishing being within the bay, may be at a greater distance than three miles from the shore of the bay, as we are of opinion that the term headland is used in the Treaty to express the part of the land we have before mentioned, excluding the interior of the bays and the inlets of the coasts.

4th. By the Treaty of 1818 it is agreed that American citizens should have the liberty of fishing in the Gulf of St. Lawrence, within certain defined limits, in common with British subjects; and such Treaty does not contain any words negating the right to navigate the passage of the Gut of Canso, and therefore it may be conceded that such right of navigation is not taken away by that Convention; but we have now attentively considered the course of navigation to the Gulf, by Cape Breton, and likewise the capacity and situation of the passage of Canso, and of the British dominions on either side; and we are of opinion that, independently of treaty, no foreign country has the right to use or navigate the passage of Canso; and attending to the terms of the Convention relating to the liberty of fishery to be enjoyed by the Americans, we are also of opinion that that Convention did not, either expressly or by implication, concede any such right of using or navigating the passage in question. We are also of opinion that casting bait to lure fish in the track of any American vessels navigating the passage would constitute a fishing within the negative terms of the Convention.

This decision goes for the whole; but it is accompanied with two remarks little creditable to those high jurists-consults, and which shake our faith in their opinion.

The first is, that "the term HEADLAND is used in the Treaty to express the part of the land we have before mentioned," &c. Unfortunately for their accuracy and their reputation, the word headland is not to be found in the Treaty, from one end of it to the other.

The second drawback upon their intelligence is of a much graver nature, and utterly destroys all confidence in their views. They say, that "the prescribed distance of three miles is to be measured from the headlands, or extreme points of land next the sea of the coast, or of the entrance of the bays," &c. Here we have two kinds of headlands—one of the sea of the coast, and the other of the entrance of the bays. The former expression, if it means anything, means that from headland to headland along any coast, however straight and however unbroken such coast may be, resting upon the broad ocean itself, a line may be drawn, and exclusive jurisdiction claimed within it. This is more than the Nova Scotians asked, and more than the Law Officers of the English Crown could give. It is preposterous. The Bay of Fundy is not named specifically in this opinion, but it was evidently intended to embrace it. Now, this bay is not within the exclusive dominion of England, as part of the coast belongs to Maine; and it has no marked entrance, nor any distinct headlands on the northeastern side, being almost a straight line, both in Maine and New Brunswick. It wants all the characteristics of a bay, as defined in this opinion. It is, in fact, an open, exposed arm of the ocean, running along the coast of Maine more than one hundred miles. Geographers consider the Bay of Fundy as separated from

the Atlantic Ocean by a line from Cape Sable, on the southern coast of Nova Scotia, to the islands in the Penobscot Bay; and in the discussion respecting our northeastern boundary it was contended on the part of England that the rivers east of Penobscot Bay all emptied into the Bay of Fundy. This diagonal line would be little short of two hundred miles in length. It is impossible to be definite in such an inquiry; but these facts indicate the great extent of this oceanic indentation, and how far it is from being a sheltered sheet of water separated from the ocean and protected from it by marked projecting headlands. It averages probably about fifty miles in width, and includes within its circuit numerous bays, such as Penobscot Bay, Frenchman's Bay, Passamaquoddy Bay, and Machias Bay, in Maine, and the Bay of Mines, Chignecto Bay, and Bay Norte, in Nova Scotia and New Brunswick, together with several others. Such an expanse of water is geographically and politically a part of the Atlantic Ocean.

But, Sir, this is a strange way of settling great international questions of jurisdiction—by referring them to the decision of the Law Officers of a Government. Such questions involve the most important and delicate points of foreign intercourse, and should be the subject of negotiation, not of legal reference. We thus arrive, Sir, at what the British authorities consider the “encroachment” of our fishermen, and for which they have recently made provision. No doubt occasional infractions of the Treaty occur, which the ordinary
 164 force in those regions is competent to prevent or to punish.

No one defends such acts, nor will our Government make any reclamation in relation to them. But the complaint of throwing out offal and furnishing bait to the fish, and other grievances of a similar nature, are rather small matters to become the subject of controversy between two great nations. If the British colonists would imitate the industry, and skill, and enterprise of our fishermen, it would be far better for them than these eternal complaints because a neighbouring people seek to obtain a portion of that beneficent bounty which is offered to the human race. Their proximity to the places of fishing, and their possession of the whole coast, would give them advantages which ought to ensure their superior success, if they would put their shoulders to the wheel, instead of calling for help across the Atlantic. And, besides, the rigid pursuit of this object where our fishermen are concerned is in singular and unfriendly contrast with the conduct of the British Government towards the French and Dutch fishermen even in time of war. The former is marked with a spirit approaching persecution, while the latter is characterized by just moderation.

There is also a decided contrast between the force now employed and the force called out upon former and similar occasions. In 1817 one vessel only—the *Dee*—was ordered upon this kind of service, when strong remonstrances were made by the colonies.

In 1836 Lord Glenelgin informed the Governor of Nova Scotia, in answer to his representations, that the British Minister at Washington had been instructed to ask the friendly coöperation of the American Government, and that one small vessel would be sent to Nova Scotia, and another to “Prince Edward’s Island.” But times have changed. Whether the change is to go on remains to be seen. Certainly a just comity would have dictated a similar guarded course

under existing circumstances. Here is an active, powerful squadron close to our shores, and in waters where we have a deep interest, and to this day our Government learn nothing of the real designs of England. We have barren generalities leading to no useful results, and report tells us that seizures are daily making, and that many more are anticipated.

I have no doubt but that some of the Senators from the Eastern States will give to the Senate full statistical details of this important branch of national industry. I have been struck with its magnitude from a statement recently made in the papers, and which represents that we have 30,000 seamen, among the best in the world, and 2,000 vessels engaged in the various branches of the fisheries. This is an interest that no just Government can neglect, and one that would expose us to the severest reprehension of the American people should we neglect it.

The Gut of Canso, which is the passage from the main ocean to the Gulf of St. Lawrence, and which avoids a long detour round the Island of Cape Breton, is also to be shut to us, as is that great gulf itself, if the decision of the Law Officers of England is to be carried into effect. This pretension opens some of the gravest maritime questions as to narrow communications between various arms of the sea, and as to the right of jurisdiction over large expansions of the ocean. I shall leave them for other inquirers.

There are two episodes, if I may so term them, in this drama, which deserve a brief remark.

The first is the declaration of Lord Stanley, now Lord Derby, and the head of the British Ministry in 1852, in a letter to the Governor of Nova Scotia, acknowledging the receipt of the case stated for the consideration of the Advocate and Attorney General, and transmitting the decision of those officers. The whole subject was then before him, and he thus communicates the determination of the British Government:

We have, however, come to the conclusion, as regards the fisheries of Nova Scotia, that the precautions taken by the Provincial Legislature appear adequate, (alluding to the law before referred to;) and that such being practically acquiesced in by the Americans, no further measures are required.

Now, this is significant enough. The Home Government refuses to endorse the exorbitant demand of the Colonies, even fortified, as they are, by high legal opinions, and put the whole case upon the question of practical acquiescence of the Americans. Now, no one will contend that at any time—then, or before, or since—did our Government or citizens practically, or virtually, or in any other manner, acknowledge this pretension to exclude us from the great bays of that region; and of course such a claim is actually surrendered by the terms of the declaration. The second assurance is found in the admission of Lord Aberdeen to Mr. Averett [Everett], that the Bay of Fundy would not be shut to us; and more distinctly in the despatch of Lord Stanley to the Governor of Nova Scotia. Here it is:

To Sir William Colebrook.

DOWNING STREET, 30th March, 1845.

SIR: I have the honour to acquaint you, for your information and guidance, that Her Majesty's Government have had under their consideration the claim of the citizens of the United States to fish in the Bay of Fundy—a claim which

has hitherto been resisted, on the ground that that bay is included with the British possessions.

Her Majesty's Government feel satisfied that the Bay of Fundy has been rightly claimed by Great Britain as a bay, within the Treaty of 1818; but they conceive that the relaxation of the exercise of that right will be attended with mutual advantage to both countries—to the United States, as conferring a material benefit to the fishing trade, and to Great Britain and the United States conjointly and equally, by the removal of a fertile source of disagreement between them. It has accordingly been announced to the United States Government that American citizens would henceforward be allowed to fish in any part of the Bay of Fundy, provided they do not approach, except in cases specified in the Treaty of 1818, within three miles of the entrance of any bay on the coast of Nova Scotia or New Brunswick.

I have, &c.,

STANLY. [STANLEY.]

165 Now, Mr. President, I take it for granted, that no one who knows the course of British statesmen, and the instincts of the British people upon all questions touching territorial rights or interests, will doubt for an instant that this concession, as they call it, but recognition, as we consider it, was made in the conviction that the right was with us; at any rate, in the full persuasion that the pretension of England was so doubtful that they ought not to hold on to it. And as Mr. Everett justly remarks, the principle of this acquiescence applies with equal force to the other larger bays, and particularly to the great estuary of the St. Lawrence; and it is pretty clear that the British Ministers suffered themselves to be driven from their proper course in the application of their own principle elsewhere, in the other bays and waters, by the unreasonable clamour and remonstrances of the colonies.

Now, Sir, this acquiescence in our practical construction of the Treaty was an absolute surrender of the point in dispute; and it is too late in the day to recall the step. Nations cannot safely play the game of fast and loose, of give and take at pleasure, with one another, in the practical exposition of their conventional arrangements. It will not do. Nothing is gained; on the contrary, things are made worse by such temporary recognitions, to be resumed or changed when the opposite party is most strongly convinced by time and usage of its rights. England had just the same interest in our exclusion from the great arms of the ocean in 1842 which she has at this time; and her surrender of the point then implies her own views of the case, and the ten years which have since intervened, unquestioned, have been enough to place our rights beyond dispute.

An attempt has been made to show a difference between *our rights and liberties*—designations first used in the Treaty of 1783, and transferred from that instrument to the Convention of 1818—and thereby to establish the pretension that the one is more indefeasible than the other. And I regret to see, Sir, that this effort is countenanced by the views of some of our own journals—honestly I have no doubt, but erroneously I am satisfied. I do not suppose that an Englishman can be found from Johnny Groat's house to the Lands End who will not firmly believe in the claim of England in this case, as he believes it in all other cases. No man will accuse the English people of a want of patriotic ardour; and it is rare, indeed, that their demands upon foreign nations are not supported by the almost unanimous sentiment of the country. I wish we had a little more of this feeling—not enough to blind us to the truth, but enough to render it a source of congratulation to find our Government in the right. In

looking back upon our past history, I recollect no case where we have not found doubts and opposition among our own citizens in our controversies with foreign Powers. I hope this case will yet prove an exception, as the right is so manifestly with us, and that we shall be found united in feeling and in action. Such an exhibition of patriotism would be worth more and do more than "an army with banners."

Now, Sir, no man, it appears to me, can read the letter of Mr. John Quincy Adams to Lord Balhard, [*Sic.*] written, I believe, in 1816, without being satisfied that our claims are not in the least affected, either in their strength or duration, by the use of one or the other of those words, *rights* or *liberties*; and the subject is placed beyond dispute by Mr. John Adams in the letter to which I have already referred, and in which he explains the origin of the difference, and shows that it had no relation to the pretensions of the parties:

Further Extract from the letter of Mr. John Adams before referred to.

And the word "right" was in the Article as agreed to by the British Ministers, but they afterwards requested that the word "liberty" might be substituted instead of right. They said it amounted to the same thing; for *liberty* was *right*, and *privilege* was *right*, but the word *right* might be more displeasing to the people of England than *liberty*; and we did not think it necessary to contend for a word.

And I cannot refrain from asking the attention of the Senate to the able and interesting letter of Mr. Stevenson, then our Minister in England, to Lord Palmerston, dated March 27, 1841. It is written with great force and with a full knowledge of this whole subject, and Mr. Stevenson successfully combats what the Republic of this city well terms the *preposterous pretension of England*.

The danger and impropriety of transferring the course to be pursued in such delicate questions to the Colonial authorities, locally interested in the establishment of their own construction, is well shown in this letter; and I am glad to see that Mr. Webster, in some recent remarks at Marshfield, advances views similar to those of Mr. Stevenson. The Colonial Legislatures are authorized to pass laws, and to make regulations upon the matter, and these laws and regulations carefully follow the words of the Convention, but in their administration colonial interests are kept prominently in view, and the peace of two great countries is put to hazard by petty interests, as exemplified in the complaints about offal and fishing bait.

Mr. President, I said on a recent occasion, and I repeat emphatically, that I desire no war with England. Far from us and them—from the world, indeed—far be such a calamity. No two countries on earth have stronger inducements, moral and political, to remain in amity with each other than have the United States and England, and woe be to either of them which voluntarily changes the pacific relations that now hold them together. But, Sir, the way to avoid war is to stand up firmly but temperately for our clear rights. Submission never yet brought safety, and never will. To yield, when clearly right, is to abandon at once our interest and our honour, and to show to the world how the finger of scorn can be best pointed at us. I am one among the feeblest of the sentinels placed upon
 166 the watchtowers of the country, and perhaps the one among all others the tenure of whose interest in our common property is,

from my age, the most uncertain. But I shall not cease to raise my voice when I believe danger approaches, unmindful of the senseless charge so often made against me, that, because I am jealous of the honour and rights of my own country, I am therefore hostile to all others. I shall defend myself against no such clamour.

Mr. Davis, of Massachusetts.

Mr. Davis said: I propose to occupy only a brief period of the time of the Senate in the discussion of this question. I said, the other day, when this subject was under the consideration of the Senate, that I felt no peculiar degree of alarm; that I did not apprehend that hostilities would grow out of it; and that opinion remains unchanged. Nevertheless, I see much to object to in the course pursued by Great Britain. I see much that is irritating in its character, and well calculated to ripen a feeling of hostility.

But, before touching on the subject really under consideration, I wish to make one remark in regard to a topic connected with it—the proposition which comes from the Colonies for reciprocity of trade. It has been suggested by the Senator from Michigan, to whose patriotic sentiments I have listened with great pleasure, that the question as to the privileges of reciprocal free trade, might form a subject of negotiation between the two countries; but here, at the outset, I enter my protest against any such proceedings, so far as revenue is concerned, at any time, and under any circumstances which may exist. Is the Congress of the United States prepared to transfer the control of the revenues of the country to the treaty-making power? Are we prepared to transfer it to negotiators, and let them settle and determine what amount of revenue we are, from time to time, to raise for the uses of this country? A treaty is an irrevocable law; it is a law which cannot be modified at any time or under any circumstances, except by agreement of the Contracting Parties. In one year we may require 40,000,000 to meet the exigencies of the public service, and in the next year, we may want 80,000,000, in the transition state of our affairs which may exist from causes which cannot be anticipated. No man in his sober senses can suppose that the control of the revenue should be transferred to the treaty-making power. It would be an encroachment on the fundamental principle of the constitution itself. So jealous is that constitution of the money power of the country, that it does not even allow this body, in its legislative capacity, to originate a money bill.

Such, Sir, were the feelings and views of those who framed that instrument, and of the people who adopted it. And now, Sir, at this day, it seems to me the opinion can hardly be entertained anywhere, and under any circumstances, that the revenues of the country are to be transferred to, and disposed of, by the treaty-making power. But, Sir, I will not trouble you on that point. I only wish to say, that whenever such a treaty comes here, it will never meet with my approbation.

As to these fisheries, in regard to which negotiation is appropriate, I think this whole matter is to be explained as a stroke of policy. It may be a dangerous step to be taken by the British Government, and

the Colonies may be playing a game which will not advance materially the interests they have in view. I think that very probable; but I am not alone in entertaining the opinion that the motive at the bottom of the whole transaction is a motive of policy.

Well, Sir, is it justifiable? Is the course pursued one that can be maintained anywhere, or by any process of reasoning? Mr. President, I think that the last class of men in this country which a politic nation, about to enter into hostilities, would disturb, is the class of fishermen; and a bolder stroke of policy could not be executed by a Government about to make war upon the United States, than to say to these fishermen, "war or no war, you may carry on your business at your pleasure, and you shall not be disturbed." Can Great Britain maintain the ground which has been pointed out by the Senator from Michigan, [Mr. CASS]? Can she maintain the construction of the Treaty which is said to be given to it by the Law Officers of the British Government? I say unhesitatingly that she cannot, if I understand correctly her position. I admit that the terms of the Treaty are capable of such a construction as they have given to it; but I say it is open to another construction, quite different, and that all contemporaneous authorities concur in establishing the other construction as the true one.

It is to this point that I invite the particular attention of the Senate, and I shall occupy but a few moments in considering it. The doctrine laid down by these Law Officers, as is alleged, is, that Great Britain may stretch a line from headland to headland, and that all the waters within these headlands, are waters within the jurisdiction of the Colonial or the Imperial Government.

Now, I apprehend, if the Senate will give me their attention while I analyse the terms of the Treaty, which are very brief, they will be satisfied that no such construction can be maintained. What, then, are the terms of the Treaty? They commence in the First Article by pointing out certain coasts, and certain portions of the territory of these colonies which are to be left open to American fishermen, freely to fish therein.

What is the rest of the Article? In order that I may not make any mistake in quoting any part of it, I will read from the Treaty itself. After running through that portion to which I have alluded, the Article proceeds thus:

And that the American fishermen shall also have liberty for ever to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same or any portion thereof shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground.

167 The right, then, is to take, dry, and cure fish in certain coasts, bays, harbours, and creeks of Her Britannic Majesty's Dominions in America. But that portion of the Treaty, to which I wish to invite the attention of the Senate more particularly, is the renunciation. It is in these words:

And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's Dominions in America not included within the above-mentioned limits.

They renounced the right to take fish within three miles of any of the coasts, bays, creeks, or harbours of Her Britannic Majesty's Dominions. Now comes the proviso to the renunciation:

Provided, however, that American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter, repairing of damages therein, of purchasing wood, and obtaining water, and for no other purpose whatever.

That is what is renounced. The Envoys inform you that they choose to renounce the rights which were given up, and they chose to do it distinctly and in detail, that it might be known what was surrendered at the time. The true question is, What do they renounce by the language they use? I know that in using these terms they are excluded from the coasts, bays, harbours, and creeks; and the British Government raise a question of construction, namely, that we cannot fish within three miles of any of these bays; that we are excluded to a distance of three miles, not only from the coast, but also from these bays, including, in that term, Fundy and other large bays.

But, Sir, analyze the Article a little further, and you will ascertain what the terms of the exclusion are, and what they apply to. You have a right to come within three marine miles of the coasts, within three marine miles of the bays, and within three marine miles of the harbours and creeks. What, then, is meant by the word 'bays'? The latter part of the proviso which I have just read explains the whole of it. They have a right "to enter." "To enter" what? "To enter such bays," &c., undoubtedly referring to the bays mentioned in the former part of the Article—the bays renounced. And for what purpose have they this right to enter such bays? Why, Sir, they have a right to enter them for the purposes of shelter, and of obtaining wood and water, and for the purchase of bait. All these things are enumerated in the Treaty itself, and they have a right to enter all such bays for such purposes—that is, all the bays renounced. Now, let me ask if the Bay of Fundy is a bay to enter for shelter, or for wood, or water, or bait? No, Sir. And are these great open seas from headland to headland, in the Gulf of St. Lawrence (where I understand they have stretched a line, and forbid vessels to enter within these headlands, and thereby excluded them from some of the most important fisheries in that gulf), places where vessels are to enter for the purpose of obtaining bait, and shelter, and wood, and water? Sir, the term "such bays," and the uses to be made of the privilege, show most clearly and distinctly what the purposes and intentions were—and these were not the waters renounced by the term "bays." Then, in conformity with all this, we have the contemporaneous practical construction of this Treaty. These open bays were all enjoyed by the fishermen of the United States from the making of this Treaty, for more than twenty years, without any serious interruption or complaint, and they enjoyed this right practically as a construction acceded to on all hands. They were permitted to fish everywhere, except within three miles of the coast, being excluded only from the coast and the small bays and harbours of the coast. These were the bays renounced, and none others. All else were left open to the fishermen.

Now, this construction put upon the Treaty contemporaneous with its execution, and its continuance for twenty years, undisturbed,

seems to me to stamp it with a decided character of authority. The Treaty is capable of that construction without any violation to language, and no other fair or just construction, can be put upon it. Now, is it to be pretended, after all this has happened, that under the opinion of the Law Officers of the Crown, lines are to be stretched from headland to headland across the Bay of Fundy, and across certain portions of the Gulf of St. Lawrence, of still more doubtful character, and that our fishermen are to be excluded from grounds which they have always occupied? No, Sir. It is a stringent, unfair, and unjust construction given to the instrument, and moreover, it is one which, in my opinion, the people of this country never will acquiesce in.

The term "bay" is exceedingly indefinite in its application to the waters of the ocean; take, for instance, Hudson's Bay and Baffin's Bay, which are parts of the great ocean, and compare the use of the term applied to such waters, with its application to those indentations of the coast which serve as harbours of refuge, and are properly so called. There is also the Bay of Fundy, a large body of water, from which our fishermen are now sought to be excluded, but in which they have the right of fishing at the distance of three miles from the British coast, not only in accordance with the terms of the Convention, but also by another right, which was pointed out by the Senator from Michigan—the right of coterminous proprietorship; it having the coast of Maine on the one side, and the coast of Nova Scotia on the other, as forming the headlands of that bay. It flows along the coast of the United States for a considerable distance, and, therefore, even under the British construction, our fishermen are entitled to fish there. This language of the British authorities is much less applicable to the Bay of St. Lawrence, for that is as much a part of the open ocean as the Gulf of Mexico. The headlands are a little nearer together, it is true, but it is as much a part of the open sea as any of those which all nations have a right to enjoy.

Now, to undertake to shut our fishermen out from that gulf, 168 is a very singular, and stringent, and, in my apprehension, a very unjustifiable construction to the Treaty. I do not desire to enter into a discussion of this matter at length. This, it seems to me, is not the fit or proper occasion for that. But, nevertheless, as it is open to inquiry, and as the main point in controversy is the construction of this Treaty, and as I have not seen precisely this view given to it, I thought that I would make these statements, that the attention of the Senate might be drawn to it; and if it is drawn to it, and the construction which I have given is taken in connexion with the contemporaneous construction given at the time, together with the use of the fisheries for so long a time, I think the Senate will conclude that my construction is the true one.

If Great Britain wants a war, undoubtedly she can have it; but I do not believe she wants any such thing. But I do not believe she will maintain the position she has assumed, nor do I believe she will maintain her pretensions to an extent to violate and break up the pacific relations which now exist between us. I do not think she will do it; I hope not, at least.

No. 100.—1852, August 9: Letter from Mr. Crampton to the Earl of Malmesbury.

Confidential.

No. 115.

WASHINGTON, 9th August 1852.

My LORD: I left Marshfield on the 5th instant and arrived here on the evening of the 6th.

Mr. Webster having been earnestly requested by the President to repair immediately to Washington, would have accompanied me had not the delicate state of his health and the inclemency of the weather induced him to put off his journey to the following day. He will probably arrive here in a day or two.

At Mr. Webster's suggestion I immediately waited upon the President of the United States, who, Mr. Webster said, evidently felt a good deal of uneasiness respecting the view taken in the Senate of the fishery question, as evinced by a debate which took place on the 3rd instant, in regard to the President's message on that subject.

I have the honour to inclose herewith two extracts of the "National Intelligencer" containing a report of this debate and a notice of the message, which has not yet been printed.

Mr. Fillmore's tone and manner in a long and confidential conversation which I had with him on the subject of the fisheries, was frank and conciliatory. I remarked however with regret that, contrary to what I had been led to expect from my conversations with Mr. Webster at Marshfield, he did not seem to concur in the construction of the Convention of 1818 as regards the definition of bays, laid down in the opinion of the Advocate General and Attorney General of 30th of August 1841, but seemed rather disposed to adopt the view taken of that point by General Cass and Mr. Davis in the debate to which I have alluded. I say "rather disposed" because Mr. Fillmore in avowing his impression of the correctness of that view, frankly admitted that he had not yet sufficiently examined all the documents relating to the subject, and more particularly the opinion of the Law Officers of the Crown referred to, of which he requested me to furnish him with a copy *in extenso*.

I remarked to Mr. Fillmore that I had been struck in reading the speeches of the Senators who had impugned the opinion in question, by the absence of any allusion to the doctrine on the subject of the true definition of the maritime jurisdiction over bays which had been invariably held by the United States in regard to their own waters, and which was laid down by the highest American authorities,—a doctrine exactly coinciding with that which had always been held by Her Majesty's Government.

The President not seeming to be clearly aware of the existence of any authoritative statement on this subject by an American authority, I read to him, with his permission, a short memorandum, which, with the assistance of an eminent lawyer of this city, I had drawn up for my own use, a copy of which I have the honour to inclose. Mr. Fillmore seemed struck with the justice of the arguments adduced by Chancellor Kent (a very high authority in this country) which he said would certainly be applicable to the case of two nations when their rights had not been modified by treaty,

but he seemed to apprehend that the Treaty of 1783 and the Convention of 1818 "taken together" would qualify the principle laid down by Kent as regarded the present question between Great Britain and the United States. I confess I was at a loss to seize the drift of his argument in this respect, for he did not contest the correctness of my remark that the rights in question, whatever they might be, now rested solely on the Convention of 1818.

With regard to the instructions given to Commodore Perry, alluded to in my despatch No. 107 of the 2nd instant, the President remarked that he had been careful to draw them up in such a manner as to avoid the possibility of any collision between the United States and British naval forces.

It was understood and agreed between Mr. Fillmore and myself that our conversations on the subject of the construction of the Convention of 1818 were to be considered as confidential and unofficial.

I stated on my part, that I had as yet received no further
169 instructions from Her Majesty's Government upon the subject of the fisheries, than to make known to the United States the intention of Her Majesty's Government to take measures to protect the rights secured to British subjects in regard to them by the Convention of 1818, and this I had done by my note of the 5th ultimo. It was true I presumed that the rights so secured were properly defined by the opinion of the Law Officers of the Crown above alluded to, but this opinion had never been brought officially under my cognizance, nor had I been instructed to insist upon it on the present occasion. Her Majesty's Government would therefore stand entirely uncommitted by any remarks of mine on the subject.

The President entirely concurred in the correctness of my remark and observed on his own part that the Government of the United States having hitherto done no more than simply acknowledge the receipt of my communication, was not to be considered as having, as he expressed it, yet "made any point" on the matter which called for explanation on the part of Her Majesty's Government; but he added that it would always give him pleasure to discuss the question with me in all its bearings, extra-officially, with a view to prevent the adoption of any precipitate step on either side which might involve the two Governments in unfriendly or disagreeable official correspondence.

In alluding to the possibility of settling the present question of the fisheries by a negotiation or by legislation embracing the whole subject of reciprocity of trade with the British North American Colonies, Mr. Fillmore seemed to fear that the excitement created in the country and which he was sorry to see was participated in by the Legislature, had exercised a very unfavourable influence upon this mode of settling the question. He hoped however that even were it found impossible to combine the settlement of reciprocity of trade with that of the present difference about the fisheries, means might nevertheless be found of arranging the latter independently; and he mentioned arbitration by a third Power as one of these means in case Great Britain and the United States found a difficulty in agreeing as to the precise signification of the Convention of 1818.

The President having in our conversation alluded to the supposed uninterrupted indulgence which had been for many years practically

accorded to American fishermen in the exercise of the liberty of fishing in British waters, I was enabled to demonstrate to him the incorrectness of this assumption by placing in his hands the paper which I have the honour to inclose, being a printed return of the Court of Vice Admiralty at Halifax which had just been forwarded to me by the Administrator of the Government of Nova Scotia, stating the number of American vessels which had been seized and condemned by the authorities of that colony for violations of the Convention of 1818—from the year 1838 to 1851.

This document clearly shows that however ineffectual may have been the efforts of the authorities of Nova Scotia to preserve the rights of British fishermen from encroachment, their efforts to do so had nevertheless been unremitting, and, at all events, constitute a substantial protest on their part against the violation of those rights however unsuccessful this protest may in the main have proved.

I have the honour to be, with the greatest respect, My Lord,

Your Lordship's most obedient humble servant,

JOHN F CRAMPTON

The Right Honorable, EARL OF MALMESBURY

&c. &c. &c.

No. 101.—1852, August 10: *Letter from the Earl of Malmesbury to Mr. Crampton.*

No. 78

FOREIGN OFFICE, August 10, 1852.

SIR: I have received and laid before the Queen your despatch No. 105 of the 20th ultimo, respecting the official publication, by the Secretary of State of the United States, of certain information relative to the measures adopted by Her Majesty's Government for the protection of British fisheries on the coasts, the mainland, and islands forming part of Her Majesty's North American Possessions.

Her Majesty's Government must necessarily entertain the sincerest regret that such a publication should have been made without what appears to Her Majesty's Government sufficient inquiry into the circumstances of the case; for the terms of friendly alliance which so happily subsist between the two nations would on the one hand not have warranted Her Majesty's Government in adopting any measures which might be held to be offensive to the United States, and, on the other hand, could not have justified the Government of the United States in supposing that any such measures were intended. Her Majesty's Government therefore, while it gives expression to the abovementioned regret, will assume at once that neither Government entertains towards the other any intention of acting discourteously or of provoking collisions or unfriendly feelings between the subjects and citizens of the two countries; and I will now proceed to explain to you how greatly this question of the protection of British fisheries has been misunderstood and misinterpreted in the United States.

170 In the first place it has been assumed by Mr. Webster that "with the recent change of Ministry in England has occurred entire change of policy;" and here I must take occasion to state, that the question of protecting British subjects in the exercise of their

undoubted rights under treaties is one which in this country is not materially affected by changes of Ministry; and the real question therefore is what are those rights, and how they are understood respectively by Great Britain and the United States.

The rights are laid down in the Treaty of 1818, as quoted by Mr. Webster, that is, undoubted and unlimited privileges of fishing in certain places were thereby given by Great Britain to the inhabitants of the United States; and the Government of the United States on their part renounced for ever any liberty, previously enjoyed or claimed by its citizens, to fish within three marine miles of any other of the coasts, bays, creeks, or harbours, of the British dominions.

A point in dispute in regard to this matter subsequently arose as to the interpretation to be given to the term "bay," namely, whether an American vessel could fish within a bay so long as she was beyond three miles from the shore, or whether the words of the Treaty "within three miles of any of the bays" meant within three miles of a line drawn from headland to headland; and in the year 1845 a correspondence ensued between the British and United States' Governments, which led to the dispatch of a letter from Mr. Everett, the United States' Minister in this country, to his Government, dated London April 26th 1845. This letter has been published by Mr. Webster, and is unfortunately calculated to cause an incorrect view to be taken of the subject by the American public; for Mr. Everett therein stated that Lord Aberdeen's note of the 10th of March 1845 *conceded to American fishermen the right* of fishing within the Bay of Fundy, but left doubtful the question of other bays, and that he had accordingly claimed the same *right* as regards other bays; and it is to be inferred from Mr. Everett's expressions that Lord Aberdeen had replied that he would submit that question to the Colonial Office, and that meanwhile the concession was to be limited to the Bay of Fundy.

Now, if Lord Aberdeen's notes to which Mr. Everett alluded had been carefully examined by Mr. Webster, and had also been published, Mr. Webster and the public of the two countries would have seen that, instead of conceding a right, Lord Aberdeen expressly reserved it; but that, in order to prove the friendly feeling of Great Britain towards the United States, Her Majesty's Government, by Lord Aberdeen's note, "*relaxed*," as regards the Bay of Fundy, the right which Her Majesty's Government felt bound to maintain of excluding American fishermen from that bay, and, moreover, it would have appeared that Lord Aberdeen in the letter referred to merely stated that he would submit to the Colonial Office the question relating to the seizure of two particular vessels, the "Washington" and "Argus," and that, as regarded the bays, his words were to be taken as applying to the Bay of Fundy alone.

It appears however, partly by Mr. Webster's communications with you and by terms of his official publications, and partly by the proceedings in the Senate of the United States, that it is supposed in the United States first that Her Majesty's present Government have resolved to overrule the decision of the Government of 1845 and to withdraw the privilege then granted to American fishermen to fish in the Bay of Fundy; and 2ndly that, notwithstanding the express terms of the Treaty, American fishermen are privileged either by usage or right to fish upon any part of the British coast *within* three marine miles of the shore.

Both suppositions are entirely founded in error. Her Majesty's Government, so far from having any intention of now excluding American fishermen from the Bay of Fundy, are prepared to maintain that the relaxation granted in 1845 was reasonable and just and should be adhered to; and, in giving orders to strengthen the naval force employed to maintain the exercise of our rights under the Treaty of 1818, they could not contemplate that the Government of the United States would assume that a relaxation formally granted as regards the Bay of Fundy was thereby cancelled without the equally formal notice which Her Majesty's Government would undoubtedly feel themselves bound to have given to an ally of the British Crown, had such an act been intended.

But in regard to the 3 mile distance Her Majesty's Government are not aware that it has at any time been maintained by the Government of the United States that there can be, or that there has ever been supposed to be, the slightest doubt that Her Majesty's Government are not only entitled, but bound, to maintain that distance free from encroachment.

Whatever construction either Government may put upon the term "bay" as used in the Treaty, there can be no possible question as to the 3 mile limit from any British shore; and when therefore Mr. Webster alluded in his official publication to the seizure of the American vessel "Coral" in the Bay of Fundy, near Grand Manan, he must have overlooked the fact that Grand Manan was British territory, and that the "Coral" was taken almost within musket shot of the shore.

It is for the prevention of such infractions of treaty, and not with any view to disturb arrangements made in good faith with the United States' Government, that Her Majesty's Government issued orders to their officers to put a stop to illicit proceedings; proceedings which are not merely contrary to treaty, but which are mixed up with smuggling transactions damaging to British interests.

Little therefore as Her Majesty's Government could have contemplated the impression which this matter appears to have produced in the United States, still less could they have imagined that the orders given by them to Vice Admiral Sir George Seymour to attend personally to this matter should have been construed into an offensive proceeding and one calling for the strictures which, without any defence on the part of the United States' Government, it occasioned in the Senate: for, although it is true that the flag of the Commander in chief is hoisted on board a ship of the line, and that in the execution of his instructions Her Majesty's ship "Cumberland" was ordered, with other vessels, to the fishery station, this measure was not

171 adopted with a view to show an imposing force, but in order that Her Majesty's Government might have the advantage, in a matter requiring judgment and discretion, of the presence of an officer so highly distinguished for both qualities, and whose recent judicious conduct in an affair at Grey Town called forth the praise of the officers and of the Government of the United States.

As I propose that this despatch shall merely explain away certain points which have clearly been misunderstood, I shall abstain, for the present, from entering into a discussion upon the interpretation to be given to the term "bay;" and upon this part of the subject I will only add that Her Majesty's Government intended to leave the matter precisely where it was left in 1845 by the Governments of Great

Britain and the United States; namely, that the relaxation as to bays applied, as is stated in Lord Aberdeen's note to Mr. Everett of the 21st of April 1845, "to the Bay of Fundy alone," any further discussion of that question being a matter of negotiation between the two Governments.

I cannot however conclude without adverting to the fact that the proceedings of Her Majesty's Government which have called forth so much animadversion on the part of the United States were adopted, not merely with reference to the protection of British fisheries against American encroachments, but also against similar encroachments on the part of French fishermen; and that a considerable proportion of the armed craft employed for protecting the British fisheries in North America were placed there in order to use means equally used by the French Government to protect French rights.

Now with regard to such species of protection the Governments of Great Britain and France have not been in the habit of evincing any national jealousy, or of considering that offence was thereby intended. On the contrary, both Governments have found that the surest mode of preventing misunderstanding was to join in effectually protecting their respective lines of demarcation.

Such protection, or rather guard, is constantly maintained by both Governments in the British channel, where the fishery is regulated by a Convention between Great Britain and France, whereby the lines are clearly laid down, and where, notwithstanding the mutual precaution adopted by the cruisers of both nations, the fishermen of both countries are repeatedly found encroaching. But such encroachments are not countenanced by either Government. The cruisers of each Government are instructed to warn their own countrymen whenever they observe them disposed to cross the line of demarcation; and the fishermen who trespass pay the penalty of their improper proceedings.

In like manner, trespasses have been committed by French and British fishermen respectively on the coast of Newfoundland; and, in order to avoid disputes, the two Governments resolved to endeavour by negotiation to establish rules for the mutual regulation of the fisheries; but, pending the conclusion of such negotiations, Her Majesty's Government and the Government of France have placed a force off the coast of Newfoundland to watch the proceedings respectively of the fishermen of the two countries.

You will read this despatch to Mr. Webster, and, in leaving a copy of it with him, you will not fail to assure him, and to request him to assure the President of the United States, that Her Majesty's Government continue to feel the same anxiety that has long been felt in this country for the maintenance of the best relations between the two Governments: and it will be to them a source of sincere satisfaction if the attention which has thus been drawn to the subject of the fisheries should lead to an adjustment, by amicable negotiations, upon a more satisfactory footing than at present, of the system of commercial intercourse between the United States and Her Majesty's North American Colonial Possessions.

I am with great truth and regard, Sir,
your most obedient humble servant

MALMESBURY

JOHN F. CRAMPTON, Esq.

No. 102.—1852, August 11: *Letter from the Earl of Malmesbury to Mr. Crampton.*

No. 79.

FOREIGN OFFICE, August 11, 1852.

SIR: In your despatch No. 106 you state that the President of the United States had suggested to you and to Mr. Webster the propriety of entering into some temporary arrangement with regard to the Fishery Question now pending, by which the danger of collision between British subjects and American citizens might be averted during the interval of time which must necessarily elapse before a permanent settlement of the points in dispute can be effected.

The arrangement proposed by the President in his conversation with you is stated to be simply as follows; that the British authorities should for the present abstain from seizing American vessels found fishing in disputed waters; but you add that the President in a communication addressed to Mr. Webster had further suggested that, by mutual agreement between the Governments of the United States and of England, the vessels of both countries should forbear to fish in those waters until the respective rights of each could be finally and amicably settled.

It is impossible for Her Majesty's Government not to do justice to the motive by which the President appears to have been actuated in suggesting the above arrangement: and any proposal
172 calculated to give time for the removal of misapprehension and the subsidence of excited feeling on the part of the people of the United States before a permanent settlement of the existent difference is attempted, cannot fail to meet with their warm and cordial concurrence.

But however desirable the object which it is thus sought to attain, Her Majesty's Government cannot but perceive that the proposed arrangement as it affects the rights of British subjects, rests on a basis of such manifest inequality as to render its acceptance by England impossible.

No question has ever been raised, on the part of the United States or of any other Power with regard to the right of British vessels to fish within the limits of the disputed waters, their privilege to do so is undoubted and indubitable, and in waiving this privilege even for a limited period, they would be parting with that which confessedly belongs to them by the express provisions of the Treaty of 1818. The only point concerning which any difference of opinion either does or can exist, is whether the right so enjoyed by British subjects is a right belonging exclusively to them or one which they share equally with the citizens of the United States. Her Majesty's Government cannot consider it as a just or reasonable demand on the part of the Government of the United States that British subjects should be called upon temporarily to abandon at considerable loss to themselves, a privilege their title to which has never been questioned merely on account of the claim which has recently been put forward by the citizens of another State, to exercise a similar privilege, concurrent with, but in no way invalidating that already exercised by Her Majesty's subjects.

Compelled therefore for the reason already stated to reject the proposition abovementioned but earnestly desirous by all means in

their power to avert the chances of collision between American citizens and British subjects, Her Majesty's Government will at once adopt the precaution of repeating the instructions, on which during a long series of years British Admirals commanding on the North American station have invariably acted, and they will further instruct Sir George Seymour to use the utmost forbearance and moderation in dealing with such American vessels as may be found manifestly infringing the terms of the Treaty.

It is almost needless to add that in regard to the Bay of Fundy where a special permission to fish has been granted to American fishermen, their vessels will be in no way interfered with, but it must be understood that the three mile limit from the shore will as before be maintained.

Her Majesty's Government hope that these precautions, in taking which no time will be lost will sufficiently indicate to the President of the United States, the earnest desire which exists on their part to guard against every possibility, not merely of actual collision between the inhabitants of the two countries, but even of a demonstration of hostile or unfriendly feelings during the conduct of the important negotiation on which both Governments are about to enter.

I am with great truth and regard,

Sir, your most obedient humble servant,

MALMESBURY.

JOHN F. CRAMPTON, Esqr.

P. S. You will take an opportunity of speaking to the President on this subject, and you will read this despatch to him.

M.

No. 103.—1852, August 12: *Debate in United States Senate on North American Fisheries. Speech of Mr. Soulé, of Louisiana.*

On the message of the President of the United States transmitting information in regard to the fisheries on the coasts of the British possessions in North America—

* * * * *

MR. SOULÉ: In delivering out my sentiments with reference to the difficulties which have arisen lately between our fishermen and Her Majesty's Colonial subjects of North America, and in passing an opinion on the course which it has pleased Her Majesty's Ministers to pursue in relation to those difficulties, I shall endeavour to express myself with the utmost moderation and reserve.

The subject is one of considerable moment and delicacy; involving interests of vast national importance, which we can neither barter away nor surrender, and raising questions of momentous bearing, but too well calculated to stimulate and augment the excitement and irritation already produced by the high-handed measures which have occasioned this debate; and it is not to be supposed that I be willing to approach the grave questions which it suggests, without keeping in view the high responsibilities under which I speak. No, Sir; I know too well the unhandy materials with which I have to deal, and you need not apprehend that I be, for a moment, unguarded, in the use which I may have to make of them.

We live in strange times, Mr. President, that we have to witness occurrences like those through which a nation, with whom we are at peace, and semingly, at least, on terms of reciprocal kindness and amity, attempts to signify her disregard of the protest which
 173 we have so often and so solemnly entered against her assuming the rights which she claims to exercise, to the exclusion of others, over regions of the sea which are of all nations, and which she can only make hers as long as she is permitted to cover them, unquestioned and unmolested, with her armed steamers, her sloops, and her men-of-war, and to ride triumphantly upon their waters, in the gorgeous display of her supremacy; and like that Van Tromp, of Holland, to whom my honourable friend from Maine so happily alluded the other day, with a broom at the mast-head of her ships, to sweep away from their approaches whomever she finds within sight of the shore under colours not her own.

The first notice we have of these unaccountable proceedings on the part of England, is to be found in the LETTER-PROCLAMATION issued by our Secretary of State, and officially dated, *State Department, Washington, July 5th, 1852.*

Among other things copied in that letter, from a circular communication addressed, on the 1st of May preceding, by Her Majesty's present Colonial Minister to the Governors of the North American Colonies, I note what follows:

Her Majesty's Ministers are desirous of removing all grounds of complaint on the part of the Colonies, in consequence of encroachments of the fishing vessels of the United States *upon waters from which they are excluded by the terms of the Convention of 1818*; and they, therefore, intend to dispatch, as soon as possible, a SMALL naval force of steamers, or other small vessels, to enforce the observance of that Convention.

We find in the same paper that—

in the mean time, and within ten days of its date, an American fishing vessel called the Coral belonging to Machias, in Maine, has been seized in the Bay of Fundy, near the Grand Messan, by the officer commanding Her Majesty's cutter Nettle, already arriving in that bay, for an alleged infraction of the Fishing Convention, and the fishing vessel has been carried to St. John, New Brunswick, where proceedings have been taken in the Admiralty Court with a view to her condemnation and entire forfeiture.

It informs us, also, that the United States having, by the first Article of the Convention of 1818,

"renounced forever any liberty theretofore enjoyed or claimed by their inhabitants, to take, dry, or cure fish within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's Dominions in North America," not included in "that part of the coast of Newfoundland which extends from Cape Ray to the Rameo Islands, on the western and northern coast of the said Newfoundland, from the said Cape Ray, to the Quirpon Islands, on the shores of the Magdalen Islands, and also in the coasts, bays, harbours, and creeks, from Mount Jolly, on the coast of Labrador, to and through the Straits of Belle Isle, and thence, northwardly, along the coast;" and that "being permitted to enter the bays or harbours" first named, only, for the purpose of shelter and of repairing damage therein, and purchasing wood, and obtaining water, it would appear by a strict and rigid construction of the Article, that fishing vessels of the United States are precluded from entering into such bays and harbours of the British Provinces,

for any other purpose.

That the British authorities *insist* that England has a right to draw a line from headland to headland, and to capture all American fishermen who may follow their pursuit inside of said line.

That the opinion delivered by certain officers of the Crown is that, by the terms of the Convention, American citizens were excluded from any right of fishing within three miles from the coast of British America; and that the prescribed distance of three miles is to be measured from the *headlands* or extreme points next to the sea; and that consequently no right exists, on the part of American citizens, to enter the Bay of Nova Scotia, there to take fish, although fishing, *being within the bay, may be at a GREATER DISTANCE THAN THREE MILES, from the shore of the bay.*

Such is the pretension which England sets up, and which she threatens to enforce with the one hundred and fifty guns which she carries boastingly, mounted, loaded, and primed, on board the nineteen vessels now decking the sea at the entrance and in the environs of the Bays of Chaleurs and Fundy; and we are told, Sir, and told by our Secretary of State, in language most solemn and impressive, that our fishermen must look out AND BE UPON THEIR GUARD.

Sir, is England right? Are we wrong in all this? And why is it that from the very outset we look so humble, so dejected, so submissive, so enduring?

It is not denied, is it, that the liberties which England now attempts thus violently to wrest from us have been practised by our fishermen from time immemorial? They were liberties acknowledged in the Treaty of 1783, as preëxisting to it; liberties retained against most insidious and daring pretensions at the Peace of Ghent, where they were not even suffered to be drawn into question; liberties enjoyed before and after the Convention of 1818; liberties *allowed*, though under an ungracious, but unadmitted proffer of favour and grace, in 1845; and yet, all at once, without previous remonstrance, or the least notice, this, our long possession, this, our solemnly-stipulated right, without whose recognition the Peace of 1783 could have never been concluded; which our negotiators protected against the attainment of a query or a doubt in 1814; which our Envoys thought they had enerved and strengthened by the Convention of 1818; which Lord Stanley, through sufferance, at least, consented to let us enjoy after 1845, as we had enjoyed it before, is brutally torn away from us, as an usurpation and encroachment upon waters from which it would seem we are to be excluded; our vessels are captured, condemned, and sold before an explanation is sought and obtained, or asked and refused; and all this in the midst of the most profound peace, and when England is incessantly receiving at the hands of our Government most profuse tokens and manifestations of condescendence, and is allowed, there, to turn to her advantage and profit the good will which a sister Republic bears us, and the influence which

174 that good will enables us to wield over her affairs—as in the case of Nicaragua, a State all American in spirit and feelings. unmercifully spoliated to enrich Costa Rica, but a British province in all her associations and tendencies; and, here, to introduce her bankers in our Treasury, and give them charge of our concerns, and institute them our disbursing agents, as in the case of the two last installments of the indemnity due to Mexico, that British creditors might get a chance of paying themselves of doubtful claims; and political marauders in Mexico be enabled to pounce *in transitu* upon the emaciated treasure, and, with its remnants, to bring about in that doomed country a crisis and a revolution. Sir, I repeat it again, these are strange times indeed!

Is England right? If we trust the Secretary of State, in the view which he takes of her claims, it would seem, as if the terms, the letter of the Treaty, were on her side. This, Mr. Webster most peremptorily admits, while others but debate it upon mere technicalities of language.

Mr. Webster says that

it was undoubtedly *an oversight* in the Convention of 1818 *to make so large a concession to England*, since the United States had usually considered that these vast inlets or recesses of the ocean ought to be open to American fishermen, as free as the sea itself, to within three miles of the shore.

Here the whole is surrendered; there is no escape from the admission. IT WAS AN OVERSIGHT TO MAKE SO LARGE A CONCESSION TO ENGLAND!

The concession was then made, was it not? If so, the dispute is at an end; and yet, even then, it were a hard task to justify the summary process through which England has sought to compel us to compliance with the concession, particularly as she had, to say the least of it, suffered our fishermen to haunt the Bay of Fundy, by express allowance, in 1844, and to make their haunting other bays rightful, by a continuous, open, and public enjoyment of them, ever since the Convention of 1818. But to this I shall presently revert.

"The precise words of the Treaty," says my friend from Maine, in the remarkable speech he delivered the other day, "may, at first view, seem to carry that construction;" but he denies immediately that the construction be correct; and so does the distinguished Senator from Michigan, who has shed so much light on this controversy, and handled with so rare a dexterity all the questions of secondary right arising under the Treaty of 1818.

The honourable Senator from Massachusetts grants, that "by the terms of the Treaty American fishermen are excluded from the coasts, bays, harbours, and creeks," &c. "The British Government," says he, "raise a question of construction, namely, that we cannot fish within three miles of any of these bays; that we are excluded, to a distance of three miles, not only from the coasts, but also from the bays, including in that term the Bay of Fundy and other larger bays." But with that peculiar energy which characterizes his manner of argument, he also denies that such be the term of the exclusion, predicates his own understanding of the Article upon the obvious meaning which its whole context bears, and strenuously contends for the American construction placed upon it.

For my own part, Mr. President, I consider that the terms of the Treaty need, in no wise, be defended upon such collateral issues. Their true import stands on firmer ground than that of philological discrimination or inferential argument. They are most clear and precise, the very terms, the appropriate terms, for expressing that which it was intended they should convey. Had our negotiations spoken of bays and harbours, without specifying what bays and harbours they mean we should remain excluded from, there might be room for doubt and for dispute. But they did not so speak. On the contrary, they distinctly pointed to the specific places of exclusion; *the bays, creeks, and harbours* OF HIS MAJESTY'S DOMINIONS; and the question recurs: Which are the bays over which His Majesty could claim dominion?

This question, though not a novel one, still has its merits and attractions, and may, perchance, be deemed not altogether unworthy of notice. I shall proceed briefly to its consideration.

England has, from time out of mind, attempted to arrogate to herself the supremacy of the ocean. She once ruled it supreme. But the sceptre has fallen from her hands, and the sea has resumed its freedom. It is of all, and belongs to none. Who dares to claim, at this day, to be the owner of it? Who presumes to command to its waves, and to its currents, and to its storms?

"The earth," says the Psalmist, "was given to the children of men; but the sea is of God alone." The sea is, from its very nature, unsusceptible of human ownership. The idea of ownership implies that of exclusive possession; and, of consequence, the right of using the thing owned at will—and not only that, but the right of excluding others from its possession, and the necessity of so excluding them, that the possessor may make his all the advantages it can yield. The sea has none of the characters that could constitute it in ownership of any man or nation. Its immensity, its fluidity, must forever prevent its being subject to possession. It may be turned to profit it is true, but by each and by all of the human species, without its enjoyment by some, impairing or diminishing its enjoyment by others. Its capacity is incommensurable. There is no volume that can exhaust it. Thousands of fleets may be sunk in it to-day, and to-morrow it will again engulf millions of others, without ever being filled or notably compressed. There are no signs, no marks through which to attest its occupancy. Even those frightful, though majestic, leviathans that now plough it over, in all directions, leave not behind them any trace of their passage. The rolling wave paddled back as they move on, wafts away from its surface the last vestiges of their march.

To make a thing yours by possession, you must possess in continuity the same thing. Identity in the thing owned constitutes one of the main elements of possession. A field, a forest, may be upturned, and altered, and transformed; they will still be the same field, the same forest. Not so with the ocean; so unceasingly changing in its form, place and surface; now sinking its upper layers in the uttermost recesses of the deep, and then upheaving others from her lowest bed to the surface, as if to spread them to the light of Heaven in

175 glorious exultancy. Its inexhaustibility renders its exclusive enjoyment not only useless but impossible. You may take from it for years and ages, with thousands and millions of men; you may seize upon its pearls, and its corals, and its salts, and its fishes—you but develop its powers of production and multiply the yieldings of the mine from which you draw. By the decrees of God, the ocean is of all man. Nations may undertake to explain and interpret those decrees; they cannot abrogate them.

Yet, Sir, nations have claimed ownership over it, or such a supremacy as seemed to constitute it in a sort of monarchy. They would have other nations call them the queens of the sea. Yes, Sir; they claimed to appropriate to themselves the sea, and to subject it to their exclusive dominion. The discovery of America, and the vast development of commerce and navigation incident on it, gave zest to, and became a powerful stimulus for such assumptions.

Thus Venice arrogated to herself the Adriatic; Genoa, the Ligurian Sea; the Portuguese and the Spanish, the Sea of the two Indies; and, in the eighteenth century, England claimed to be the mistress and sovereign of *all the seas in communication with those surrounding her coast*, which, of course was no less than to claim sovereignty over all the seas in the world, as they all communicate with each other. But these arrogant assumptions on the part of powerful States, never were assented to by those whom they excluded from the common domain. The history of England furnishes us with a striking example of her own susceptibility, whenever such claims were set up against her. At a time when, though powerful on the ocean, she could not yet pretend to rule her rivals out of it, and when Spain, in the palmiest days of her strength and glory, and aided by the bulls of the Pope, was claiming titles to all the lands and seas of the two Americas, this latter nation sent her Embassadors to the English Court and loudly complained of the devastations which an illustrious navigator, Sir Francis Drake, was committing on her domains. Here is the answer which the supercilious and unbending Elizabeth made to her complaints:

The use of the sea and of the air is common to all. No people nor private person can claim any power over the ocean; for neither its nature nor its public usage will allow its being occupied.

We find, it is true, in all ages, nations who, being more especially addicted to commerce and navigation, obtained, for a time, what the writers on the Law of Nations would call a *prepotency* over the sea; but, even under that prepotency they never pretended to be the sole tenants of it. Tyre, Rhodes, Athens, Lacedæmon, Carthage, and Rome herself never claimed its absolute and exclusive enjoyment, but suffered other nations to enjoy it with them. Though it was said of the Carthaginians that they exercised such a power over the sea as to render its navigation dangerous—*adeo potentes mari, ut omnibus mortalibus navigatio periculosa esset*—yet they but aimed at a nominal supremacy; and therefore it is that, according to Strabo,

they carried their commercial jealousy so far as to interdict the nations who contested with her for that supremacy, from landing upon their coasts, and to sink all vessels with which her own met, directing their course towards Sardinia, or towards what was called afterwards Gibraltar.

I read in a most lucid and interesting treatise on the right of property, by Comte, that the shores of the sea which formed part of the Roman Empire were considered the property of the Roman people; the use of them was held to be common to all mankind for fishing and navigable purposes; and though the authority of the Prætor was necessary to warrant the construction thereon of any buildings, the want of such an authority did not involve the destruction of the works, if not injurious to fishing or navigation, or the cause of damage to others; and the sole object of the authority required, seems to have been to ascertain and establish the sovereignty of the Roman people over coasts which formed part of their territories.

THE SEA AND ITS SHORES ARE AS COMMON AND FREE TO ALL MEN AS THE AIR ITSELF; AND NO PERSON CAN BE PROHIBITED FROM FISHING IN IT. So speaks the Roman Law; and therefore the Emperor Antoninus, to whom remonstrances were made against the inhabitants of the Cyclades who interrupted the navigation of their neighbours,

appropriately answered: "that he was the lord of the land; but that law alone was Sovereign over the sea."

In more modern times, the Dutch gave a remarkable proof of their pertinacity to resist the claims of England over the immediate seas bordering on her coast. It is somewhat curious to see how the records of that struggle speaks of the constancy, valour, and energy with which they asserted their right to haunt every part of the ocean, and to fish within the very waters that washed the proud island. I hold in my hand a short extract from a musty book, exhibiting, in a striking light, the genius and temerity of that once great nation.

I crave the attention of the Senate to its contents. I read from Selden:

On the 6th day of May, 1609, James I, wishing to put an end to the liberties enjoyed by Holland to fish in the British seas, as they were then called, issued a proclamation wherein, among other things, is what follows:

"We have resolved first to give notice to all the world that our express pleasure is, that from the beginning of the month of August next coming, no person of what nation or quality soever, being not our natural-born subject, be permitted to fish upon any of our coasts and seas of Great Britain, Ireland, and the rest of the isles adjacent, *where most usually heretofore any fishing had been*, until they have orderly demanded and obtained licenses from us, or such of our Commissioners as we have authorized in that behalf; which licences our intention is shall be yearly demanded for so many vessels and ships, and the tonnage thereof, as shall intend to fish for that whole year or any part thereof, upon any of our coasts and seas aforesaid, upon pain of such chastisement as shall be fit to be inflicted upon such wilful offenders."

176 Notwithstanding this proclamation, the Netherlanders proceeded still in their way of encroachment upon the British seas and coasts through the whole reign of King James, *and were at length so bold as to contest with him and endeavour to quarrel His Majesty out of his rights*, pretending, because of the long connivance of himself and Queen Elizabeth, that they had a right of their own by immemorial possession: which some Commissioners of theirs who were sent to London had the confidence to plead *in terminis* to the King and his Council. And though the King, *out of his tenderness to them, insisted still upon his own right*, by his Council to those Commissioners, and by his Ambassador to their superiors, yet they made no other use of his indulgence than to tire out his whole reign and abuse his patience by their artificial delays, pretences, shifts, &c. &c.

In a letter of Secretary Naunton's to the British Ambassador, dated Whitehall, December 21st, 1618, M. Naunton says:

"The States' Commissioners and Deputies both having attended His Majesty at New-Market, and there presented their letters of credence, returned to London on Saturday was a sevensnight, and upon Tuesday had audience in the Council Chamber, where, being required to communicate the points of their commission, they delivered their meditated answer at length. The Lords, upon perusal of it, appointed my Lord Bining and me to attend His Majesty for directions, what reply to return to this answer of theirs, which I presented to their Lordships yesterday to this effect: That His Majesty found it strange that they, having been so often required by your Lordship, His Majesty's Ambassador, &c., to send Commissioners fully authorized to treat and conclude not only of all differences grown between the subjects of both States touching the trade to the East Indies, but withal to take order for a more indifferent course of determining other questions growing between our merchants and them about their draperies and the tare, and more especially to determine His Majesty's right for the sole fishing upon all the coasts of his three kingdoms, into which they had of late times encroached further than of right they could; and lastly, for the reglement and reducing of their coin, &c. &c., all which they confessed your Lordship had instanced them for in His Majesty's name; that after all this attent on His Majesty's part, and so long deliberation on theirs, they were come at last with a proposition to speak only to the *two first points*. They would decline all debate of the fisheries on His Majesty's coasts. They profess their loathness to call their right in doubt or question, claiming an immemorial possession, SECONDED BY THE LAW OF NATIONS."

In his answer Lord Ambassador Carlton says:

"I told the Prince of Orange that howsoever His Majesty, both in honour of his Crown and person and interest of his kingdom, neither could or would any longer desist from having his rights acknowledged. * * * especially finding the same openly oppugned both by their statesmen and men-of-war, as the writings of Grotius and the taking of *John Brown* the last year may testify; yet this acknowledgment of right was no exclusion of grace and favour, * * * and that such was His Majesty's well-wishing to this State (the Netherlands) that he presumed of his permission to suffer them to continue their course of fishing, which they might use thereby with more freedom and less apprehension of molestation than before, and likewise spare the cost of some of their *men of war*, which they yearly sent out to maintain that by force which they may have of courtesy.

"The Prince answered that, for himself, at his return from Utrecht, he would do his best endeavour to procure His Britannic Majesty's contentment. * * * And touching their men-of-war, he said they must still be at the same charge with them because of the pirates."

By another letter, of January 21st, 1618, from Secretary Naunton to the Lord Ambassador Carlton, the latter was instructed to desire the States not to suffer and tolerate the growing abuses committed on the coasts and seas of Scotland, and to issue a proclamation inhibiting their subjects from fishing within fourteen miles of His Majesty's coast this year.

Now, what effect the Ambassador's negotiation with the States had, appears by a letter of his from The Hague, of February 6th, 1618, to King James himself, where, among other passages, he has this:

"I find, likewise, in the manner of proceeding, that treating by way of proposition here, nothing can be expected but their wonted dilatory and evasive answers, &c., &c. The way, therefore, (under correction), to effect your Majesty's intent, is to begin with the fishers themselves, by publishing, against the time of their going out, your resolution, at what distance you will permit them to fish, whereby you will force them to have recourse to their Council of Fishery, that Council to the States of Holland, and those of Holland to the States-General, who then, in place of being sought unto, will, for contentment of their subjects, *seek unto your Majesty*."

On the 16th of April, 1635, Secretary John Cook, writing to Sir William Boswell, the King's resident then at The Hague, after remarking that, "Whosoever will encroach upon the King by sea, will do it by land also, when they see their time"—goes on to say: "To such presumption *mare liberum* gave the first warning voice; which must be answered with a defence of *mare clausum*—not so much by discourses as BY THE LOUDER LANGUAGE OF A POWERFUL NAVY, to be better understood."

This was followed by the apperance, on the fishing-ground, of an imposing naval force, and by a new proclamation which was issued on the 10th of May of the next year, 1636.

177 But the Dutch did not desist from their avocation, and stuck to the shore and fished in the British seas, as before.

The Treaty of 1654 is sometimes quoted as containing on the part of Holland a full acknowledgment of England's sovereignty over the sea. How impotent must the teachings of history be that such errors can obtain credit and be received as truths. Holland had sustained a protracted and most disastrous war against England, and from impending exhaustion had agreed to the main condition of a Treaty of Peace as early as 1561. (*Sic.*) The Long Parliament insisted upon an Article being inserted in the Treaty by which England's sovereignty should be recognized and her flag saluted wherever it might appear on the high seas. This Holland bravely and peremptorily refused. The war continued three years longer, and the Treaty could not be signed, until in 1654 the obnoxious clause had been stricken out, and another inserted in its place, granting the salute also, it is true, but as a mere mark of deference and courtesy alone.

Thus, as it seems, the concurrence of mankind repelled all attempts at transforming the ocean into a thing manageable and compressible,

capable of being reduced to possession and therefore susceptible of ownership. I have already said that it defies the mastery of men, and that being of none, it remains of all and is common to all.

The use of the ocean belongs to man and nations in so far only as it is being exercised. It is a right to such alone as exercise it, for the time they exercise it, and within the space over which it is exercised. As soon as it is abstained from, the right ceases—it is at an end—gone. *Cum igitur nil nisi usus maris et littorum occupari possit, facile constat jus hoc utendi tantum dictare quamdiu quis utitur et quatenus utitur.*

The ocean, therefore, is free. Yet will some say: May not its dominion be conferred from one nation to another—by all men to one? It is clear that it cannot. Concede this, and what becomes of its freedom? If its sovereignty can be conferred, it can be conquered; and if so, it becomes at once the property of the first occupant or of the strongest. Force, in the one case, will be as legitimate as injustice in the other. Even its enjoyment could not be of one man and of one nation, without all other nations and men renouncing the rights which Nature has given equally to them all.

But this is no longer insisted upon. It has grown obsolete; it is not as much as thought of, unless, indeed, it be by some incorrigible tyro of the school of Selden, or some fanatic and blind admirer of every dictum that ever fell from the fertile pen of Grotius. The difficulty is not there. But some contend that though the sea—the main, the high sea—be the common thoroughfare of mankind, there are yet parts of it susceptible of and subject to dominion, which, on that account, may rightfully be claimed as the property of the nation having sovereignty over their immediate coasts.

Armed with these principles, and supported by the opinion of her Crown Officers, England presumes to do away with all restrictions injurious to her in the Treaty of 1818, and placing a most untenable construction on the limits which that Treaty assigns to her maritime jurisdiction, claims that those limits are to be measured from headland to headland, thus assuming that under that Treaty our vessels are excluded from the Bay of Chaleur, the Bay of Miramichi, the Bay of Fundy, and the Straits of Northumberland, within which the greatest quantity of the best mackerel are now taken.

The disasters and loss which such a pretension, if strictly enforced, would entail upon a large portion of the inhabitants of New England, can hardly be computed, although some idea may be formed of them from the short memorial that I send to the Secretary's desk to be read. It was addressed to the lamented Member of the other House whose untimely and much-regrettable loss we had lately to deplore, and has found its way to my hands through the kind indulgence of a friend. [The Clerk read the memorial of fishermen, citizens of Massachusetts, stating the damage which they will sustain in consequence of the late measures adopted by the British Cabinet, unless an armed force of the United States is sent to protect them, &c., &c.]

And thus, if I may be allowed to borrow the pithy language of the Boston Journal,

two thousand vessels and thirty thousand men and boys are now exposed to the cannon of a British fleet, and the cruelties and horrors of British prisons for doing just what they have for thirty-four years been accustomed to do without molestation.

But let us see upon what principle this other pretension is founded. Those who sustain it assert that the rights of the territorial Sovereign over the sea extend as far as his power can physically reach; in other words, it is predicated upon a fiction, and because, since the discovery of fire arms, that power can be extended from the coast to a given distance upon the sea, so as to preclude others from approaching it within that distance, the sovereignty reaches thus far. Such is the foundation, and the only foundation, upon which stands that extraordinary right. It is, at best, as you see, but a constructive right; it is nowhere held up as an absolute and original one. Well, be it so. But, then, to what terms will you reduce it? Undoubtedly to these, and none other: that, being founded upon the power of the Sovereign to extend his armed hand beyond the shore, it reaches as far only as that power is felt. The rule of law is, *terræ dominium finitur ubi finitur armorum vis*—the domain of the land ends where the force of arms terminates. And such seems to be the universally-admitted measure of what, in diplomatic parlance, and in the books treating of the Law of Nations, is termed the maritime jurisdiction. And it is reasonable that it be so. After you have laid down the principle that the ocean is free—that it is of nobody, and therefore of everybody—the exception, if exception there is, must be kept within the terms of the fictitious right under which it is claimed—within the point which the more powerful projector can reach from the shore—within cannon's shot, in a word; and that is within *three marine*

178 *miles—eo potestas terræ extenditur quo usque, tormenta exploduntur eatenus quippe cum imperare tum possidere videtur.*

Galiani, Hubner, Kluber, Vattel, Azuni, Grotius, all concur in assigning those limits to the land power over the circumambient sea. They were solemnly sanctioned by the Treaty of 1780, constituting the armed neutrality. They had been previously acknowledged in the marine regulations adopted by Tuscany in 1778, by Venice in 1779, and are found reaffirmed in those published by Russia in 1787, and by Austria in 1803; and, indeed, in every convention which has been signed since the closing of the last century. If such be the rule of right and the measure of the supremacy to which a nation may pretend over a littoral sea, we have a meaning for the words used in the Convention of 1818; we know what constitutes a bay or a gulf of His MAJESTY'S DOMINION, or a pent up sea, the true and only *mare clausum*. Such bay, says an eminent writer, must communicate with the ocean only by a strait so narrow that it must be reputed as being a part of the maritime domain of the State to which the coast belongs; so that you cannot enter it without going through the territorial sea of that State; which means twice the distance of a gun-shot, or six miles. It is required besides that *all* the coasts bordering on such bay be subject to the State claiming such strait. The two conditions must unite to give to any part of the ocean the character of an internal sea, or a *mare clausum*.

Our Envoys then committed no oversight, and made no such concession in the Treaty of 1818, as is admitted by Mr. Webster. How that eminent statesman could so far have misjudged the sagacity, tact, and subtleness of mind of such men as Messrs. Rush and Gallatin, and of the wisdom and forecast of that far-reaching, astute, alert, and discriminating diplomatist, John Q. Adams, as to suppose that they had all overlooked the untoward remissness of language sup-

posed to exist in it, and surrendered everything, when they thought that, without endangering any substantial interest, they had secured so much that was valuable and good, I am at loss to conceive. A more matured appreciation of that instrument will reclaim, I have no doubt, Mr. Webster from his error, and redeem our Envoys and their illustrious compeer from the foul stain which for a time seemed to darken their diplomatic escutcheon.

The Convention of 1818, therefore, excludes us from no part of the littoral seas washing Her Majesty's Dominions, without three marine miles of the coast of such littoral seas, be they bays, gulfs, or other inlets, unless the coast bordering the same be all under her sovereignty, and unless the strait formed by the headlands at their entrance exceeds six miles in length. The question is here entirely solved and put at rest. It only remains to be ascertained how distant be the headlands at the entrance of the Bays of Fundy, of Chaleurs, and elsewhere. Are they more widely apart than six miles? Then the bays are as open and free as the main ocean itself. Are they within the line of the six miles? Then they are private bays, bays shut up from the commerce of the rest of mankind, at the will of the riparious Sovereign, provided he be the Lord of the whole coast surrounding them, and not otherwise. Now, we know that is not the case with the bays just named. Both have an entrance too wide to be claimed as private seas; and independent of this, the Bay of Fundy is bounded in part by the State of Maine, a circumstance which alone would preclude all pretensions on the part of England to make it hers. I am done with this part of my subject.

The next question which naturally calls my attention is, What can have been the object of the British Government in arraying within sight of the fishing grounds the imposing armaments whose appearance has created such alarm among our fishermen, and so much sharpened the susceptibilities of this whole nation? We have no reliable data on which to base even an approximation. Many are the surmisers and many the surmises. Some suppose that the object was to stir up and stimulate the languid energies of our diplomacy in reference to certain *negotiations about to be reopened with the United States of America, for the settlement of the principles on which the commerce of the British North American Colony is hereafter to be carried on.* I use the language of Sir John Pakington and of the Vice Admiral commanding the forces now plying within the waters of Newfoundland and Nova Scotia, as quoted by Mr. Webster himself;—others consider the movement as having originated in the arrogant and inconsiderate policy of Her Majesty's Ministers, and in their desire to manifest, through some bold and striking exhibition of zeal and earnestness, their anxiety to pay a long-arreared debt to the undeviating toryism of the Colonies by a tender of every protection it may be in the power of the Imperial Government to afford;—others again have thought that those demonstrations were made with a view to strike terror in the minds of the colonists, supposed to be disaffected on account of their failing to obtain the privilege they had asked to build a railroad from Halifax to Quebec;—and there are those, lastly, who cannot be persuaded that the whole is not a deeply-laid game to try us in a diplomatic conflict, and ascertain how far we may feel inclined to surrender this main dependence of our naval strength and important element of our national wealth.

There is that, with nations whose fortune it is to have thrived and prospered under the assumption and exercise of rights which were not theirs, that they grow infatuated with their too easily-earned successes, and become rash, and daring, and reckless, ever ready to jump over abysses of difficulty in pursuit of a cherished object, and in the extravagant conceit that whatever they wish to attain, it is in their power to grasp, and whatever they grasp is legitimately theirs. Such is England. She knows where lies the secret and the great fountain of your power. She loathes to see those naval nurseries of yours almost stuck to her shore, those hives of whizzing seamen pitched upon the waters of what she would have you call *her seas*, and *her gulfs*, and *her bays*, as so many advanced posts watching over the deep, that none may dare to claim its mastery and hold it in thralldom. She cannot but look with extreme jealousy and concern on the growing prosperity of this country. She may think that it were well for her if she could bar its progress while it has not yet reached its acme. Who can say, that in some of those wild dreams that come, at times, over the mind and darken the intellect of nations, she has not conceived that by timely interposition she might, perchance, slacken our march, arrest the tide of our fortune, and assign limits to our greatness? I will not say that she has. Still, 179 how are we to conciliate her well-known sagacity with the intention attributed to her of coercing us into a Treaty by so insulting a premonition of her purposes and designs? Depend upon it, Mr. President, she has been emboldened by *her late triumphs* in the Nicaragua and Mexican questions; and she may expect to deter us from holding on to our rights in the fisheries, as we were deterred, it is said, by omenous warnings, from entertaining the proffer lately made to persons in high places, of isles impatient to throw themselves in our lap.

Sir, what does England mean? What is she after? But, hush! She is negotiating. So says her Admiral; so says Sir John Pakington. She is negotiating? No! she has negotiated, if we are to believe the semi-official announcement made in a Whig paper of this city, under the caption of ADJUSTMENT OF THE FISHERIES DIFFICULTIES. Here it is:

We are enabled to announce upon what we regard as entirely satisfactory authority, that the subject of the recent excitement in regard to the New England fisheries, has been arranged between Mr. Webster and Mr. Crampton in a manner that will prove wholly satisfactory to the American people.

Mr. SEWARD. Will the honourable Senator allow me to ask him, from what paper he reads?

Mr. SOULÉ. The Daily Telegraph. The honourable Senator understands, I imagine, that, when speaking of a semi-official announcement, I meant not to impart a character to the paper, but to the announcement alone. The peculiar language in which the intelligence which it imparts is couched, fully justifies the denomination under which I have presented it to the Senate. The honourable Senator, besides, is presumed not to be unfriendly to the paper; and, in all probability, knows more of its whereabouts than I do.

I was going to remark, when I was interrupted, that the announcement which I have just now read had scarcely gone out from the press, than the magnetic wires were transmitting to us another an-

nouncement, which I have also here. I read from the Union of the 7th instant:

THE FISHERIES DIFFICULTY.—BOSTON, August 6.—Information has been received in this city that a remonstrance to the British Government against the Americans fishing within three miles of the coast, even if reciprocity be granted, is circulating in Halifax, and has received a great number of prominent signatures. The Halifax Acadian and Recorder considers the question fraught with much danger, and that war between the two nations is not improbable.

And thus, Sir, we may, for aught we know, have negotiated away by Treaty a branch of our revenue, with the hope that we would silence the roaring lion; but the lion still roars, it seems, and will roar until he frightens us out of those haunts the participation in which we acquired by original occupation, if not otherwise; which we retained as a constitutive element of our separate existence as a nation; which war itself could not wrest from us; which we hold under no grace or favour of any one but under the sufferance of God alone, and under the highest sanctions of the Laws of Nations; for, in the language of the now redeemed negotiators who signed the Convention of 1818, *ours is a right, which cannot exclusively belong to, or be granted by any nation.* Sir, I ask it of you, would that be an attitude becoming this great country? But I believe not in these rumours; it cannot have escaped that wise and clear-sighted person, who now holds the seals of the State, and whose great mind and exalted patriotism are equal to any emergencies, that to negotiate under such circumstances, and sign a treaty, whatever its merits in other respects be, were to sink in the dust what of pride, what of dignity, what of honour, we have grown to in the rapid race which we had been running since we became a nation.

But, it may be asked, what would you have this Government to do? Sir, as I cannot suppose that this debate is an idle and unmeaning ceremony; as I know too much of the distinguished Senator who so creditably occupies the chair in the Committee on Foreign Relations to indulge the least thought that he could have moved in so grave a matter with no view to some practical end, to the attainment of some object of public interest, I will take it for granted that his aim was to provoke an expression through which the sense of this Senate, and, as far as this Senate may be a proper organ of the nation, the sense of our people might become manifest, and be attended to where otherwise it might have been overlooked and unheeded.

Mr. SEWARD. Will the honourable Senator allow me to ask him whether we are to understand him as supposing that it was the intention of the honourable Chairman of the Committee on Foreign Relations that the sense of the Senate should be taken before any negotiations were entered into, or before any treaty was made?

Mr. SOULE. There are two attributes of this body under which we act in two different capacities. The one connects us with the Executive, and creates duties which we perform in executive session. The other constitutes us a component part of the Legislative power of the country, and enables us to address ourselves without any reserve but that which a proper regard for the interests of the nation may impose, to all questions of public policy, whether internal or external, and to which it may be our wish to call the attention of the country.

Under such promptings, I cannot hesitate to give my humble judgment, which is, that our Cabinet should follow to the letter the course which the great Chatham, on a memorable occasion, recommended to Ministers ready to surrender, in a disgraceful negotiation, what he considered to be the honour of the British Crown.

It was on the occasion of the forcible taking by Spain of the Falkland Islands from the possession of a British garrison. He pointed solemnly to the conduct of Lord Grenville in a like emergency:

"The French," said he, "had taken a little island from us called Turk's Island. The Minister then at the head of the Treasury took the business upon himself; but he did not negotiate. He sent for the

French Ambassador, and made a peremptory demand. A
180 courier was dispatched to Paris, and returned in a few days with orders for instant restitution, not only of the island, but of everything that the English subjects had lost."

Such is the spirited conduct he advised the Ministers to pursue, deeply impressed with the conviction, that while a prompt and warm resentment would infallibly secure peace, tameness and silence would as inevitably lead to a rupture.

Sir, there is a world of storms in the questions which the present difficulty must soon bring to a definite issue. I am fully aware of the great stake which not only this country but the whole world has in their speedy and amicable adjustment. Yet we should insist upon having the last word of them. This is no time for a patched-up accommodation. We owe to ourselves—we owe to all mankind—not to leave undispeled the cloud hanging over our security and peace. We would seek in vain to avoid the contest. If it has to be met at all, let it be met now, and be met fairly, in all its bearings and intricacies. England has forced it upon us; she must expect that we will face its dangers like men.

Sir, these neighbours of ours constitute no longer a mere colonial dependency. They have grown to be a nation—a nation of hardy, industrious, aspiring men, who will have their place, and claim rank, before long, among the independent States of this continent. Whatever be their present views of the relation which it may suit them to form with us hereafter, their interest is too closely linked with ours to be dealt with slightly. While I would wish to see our rights in the fisheries established on a firm and permanent basis, giving security and quiet to our fishermen, I am also for indulging the Colonists in what reasonable concessions they may expect at our hands. I desire to see them contented, and would heartily aid in hastening the conclusion of any arrangement that might be satisfactory to them. But until England has withdrawn her squadron, and given satisfaction for what wrongs she may have perpetrated on us, let no negotiation be entertained; and if, contrary to my expectation, any was being entertained, let it be dropped at once and abandoned. I shall vote for the reference of the papers on the table, in the hope that they will be returned to us with a resolution expressive of such sentiments as behooves this Senate and this great country to speak forth in such an emergency.

No. 104.—1852, August 13: *Letter from Mr. Lawrence (United States Minister at London) to Mr. Webster (United States Secretary of State).*

[No. 200.]

LEGATION OF THE UNITED STATES,
London, August 13, 1852.

SIR: On the 11th instant I again had an interview with Lord Malmesbury, at his request, at the Foreign Office, at which Sir John Packington was present. The conversation was substantially a repetition of what had taken place previously between Lord Malmesbury and myself. Nothing new was said to alter the views I have already expressed to you.

Mr. Crampton will receive by this mail instructions, which he will doubtless read to you. They will contain, I think, the same sentiments expressed to me by Lord Malmesbury. Copies also, of the instructions sent to the colonial governors and to Admiral Seymour will probably accompany the instructions.

Lord Malmesbury will probably propose to leave that part of the treaty about which we disagree, for the present, just where it has been, and will direct the British authorities to confine their exertions to within three marine miles of the shore, to exercise their power with great leniency, and not to make captures except under flagrant circumstances. He wishes to place the question in position to be adjusted, if possible, when the present excitement has passed away. Whatever may be the views of the colonists, the government here has every desire to settle the whole matter. They have committed an error which I think they wish to repair as soon as possible.

The fishing cannot be abandoned at this time of the year without great loss and suffering. It has occurred to me that if, on investigation, it turns out that our fishermen have been in the habit of "finishing their fares" in waters clearly within three miles of the shores, perhaps Mr. Crampton would consent, if his instructions permit him, to advise the authorities not to make captures this year. I still think this question can be now finally and satisfactorily settled.

I have the honor to be, sir, very respectfully, [respectfully]

Your obedient servant,

ABBOTT LAWRENCE.

181 No. 105.—1852, August 14: *Debate in United States Senate on North American Fisheries. Speech of Mr. Seward, of New York.*

The Message of the President of the United States transmitting information in regard to the fisheries on the coasts of the British possessions in North America being under consideration.

Mr. SEWARD said:

Mr. President: when this debate was suspended on Thursday last, a question had just arisen whether the Executive Administration had been censured here for its conduct in regard to the subject.

The honourable Senator from Virginia. [Mr. MASON], Chairman of the Committee on Foreign Relations, when addressing the Senate, remarked that if the President had done his duty, the whole naval

force of the country had been already sent into the northeastern seas to protect the rights of American fishermen against British cannon. The honourable Senator from Maine, [Mr. HAMLIN], the honourable and distinguished Senator from Michigan, [Mr. CASS], and the honourable Senator from Arkansas, [Mr. BORLAND], declared that they fully concurred in all that had been said by the honourable Senator from Virginia.

Now, it is quite certain that the whole naval force of the country has not even yet been sent into those seas, and I suppose it equally certain that at that time none had been sent there.

The honourable Senator from Arkansas [Mr. BORLAND] expressed astonishment and regret that the President had not, without a call, sent here all the information which he possessed. He complained that the Secretary of State had "treated the subject wrongly in what has been called his 'proclamation;'" that it "cast doubts on the right of the fishermen." Alluding to rumoured negotiation at Mr. Webster's country residence, he declared his opinion that the place was ill-chosen, and indeed that negotiation there, or even here, under the circumstances, ought to be reprobated altogether. The honourable Senator from Connecticut [Mr. TOUCER] asked what was the meaning of the notice published by the Secretary of State—was it designed to induce our fishermen to retire from their pursuits; to invite us to surrender the rights secured to us by the Convention of 1818? The honourable Senator was pleased to express his sorrow that he could not have confidence in the Administration, and also an opinion that it needed to be prompted. The honourable and esteemed Senator from Louisiana [Mr. SOULE] was more cautious, but even he complained that some of our rights in the fisheries had "brutally been torn away" "in the midst of the most profound peace," and "when England was incessantly receiving most profuse tokens and manifestations of condescension, and was allowed to turn to her own advantage and profit the good will indulged towards us by Nicaragua, and had been allowed to introduce her bankers into our Treasury as agents in the payment of our debt to Mexico. These," said the Senator, "I repeat it again, are strange times indeed." Again, that Senator argued, that Mr. Webster had erred when he said in the notice published by him—that it was "an oversight in the American Government to have made so large a concession to Great Britain in the Convention of 1818." Further, the honourable Senator said:

We may, for aught we know, have negotiated away by Treaty a branch of our revenue, with the hope that we would silence the roaring lion; but the lion still roars, it seems, and will roar until he frightens us out of those bounds the participation in which we acquired by original occupation, if not otherwise; which we retained as a constitutive element of our separate existence as a nation; which war itself could not wrest from us; which we hold under no grace or favour from any one, but under the sufferance of God alone, and under the highest sanctions of the Laws of Nations; for, in the language of the now redeemed negotiators, who signed the Convention of 1818, ours is a right which cannot exclusively belong to or be granted by any nation. Sir, I ask it of you, would that be an attitude becoming this great country? But I believe not in these rumours; it cannot have escaped that wise and clear-sighted person who now holds the seals of the State, and whose great mind and exalted patriotism are equal to any emergencies, that to negotiate under such circumstances, and sign a Treaty, whatever its merits in other respects be, were to sink in the dust what of pride, what of dignity, what of honour, we have grown to in the rapid race which we had been running since we became a nation.

I disclaim the idea, that these restrictions impute want of patriotism or of fidelity to the Administration; but, when taken together with the facts which they assume, they seem to me to import a censure of this effect and extent, viz.: that Her Britannic Majesty's Government has recently set up a new construction of the Convention of 1818, by which it proposes now to draw lines from chief headland to chief headland, and thus to exclude American fishermen from the Bays of Fundy, Chaleurs, and Miramichi, and also from the Straits of Northumberland, and the Gut of Canso, all of which have hitherto been enjoyed by our fishermen; and that Her Britannic Majesty's Government has sent a large naval force into those waters to enforce that new construction, and has so attempted to bring us to negotiate for maintaining national rights at the cannon's mouth: that the Executive has not acted with sufficient promptness and decision, has not properly resented an insult and an indignity received, and 182 has already negotiated, or may be negotiating or about to negotiate, in the presence of that naval force, in derogation the interests or dignity or honour of the United States, and that Great Britain has been emboldened and rendered thus insolent by previous diplomatic triumphs over the present Administration.

Sir, I take leave to say that there is a presumption, a violent presumption, against the soundness and the justness of all such censures. There is no want of firmness or of boldness in asserting American rights here, or in the House of Representatives. Experience has shown that the Executive Department has generally been quite as firm and as bold as Congress. Sir, the fisheries are a commercial interest. By peculiar fidelity in guarding such interests, this Administration has deservedly gained the confidence of the commercial classes, the conservative classes of the country. The fisheries are practically and peculiarly a Northern interest. In the geographical balance, they were once weighed against the free navigation of the Mississippi. The President of the United States and the Secretary of State are Northern men. Each began, and, and when he shall have closed his public career, each will rest in the associations of the North.

More than this; the fisheries are an interest of the States of Massachusetts and Maine, which practically are undivided and inseparable in commercial fortunes. The Secretary of State, in whose department this subject properly belongs, is a man of Massachusetts—it is too much to say *the* MAN OF MASSACHUSETTS? The ocean, with its fisheries, washes the shore of the farm on which he dwells. Nay, Sir, he is an angler himself, I am told, and of course he is a good one, for he is not half and half in anything. He tills the sea, and I fear his principal harvests are gathered upon it; are gathered with the line, and not with the sickle. There is a strong presumption that the Secretary will be faithful to an interest so near to himself, and the constituency to whom he chiefly owes the long public life which he has enjoyed. A distinguished artist of our country has enriched our academies with a national painting. It represents the Secretary of State in debate defending the honour and fame of Massachusetts against the assault of an eminent orator of South Carolina, Mr. HAYNE. That is a heroic piece; let honourable Senators here take care that they do not provoke the artist to produce a comic counterpart, in which the Senators from Arkansas and Louisiana [Mr. BORLAND and Mr. SOULE] may be presented in the act of rescuing Massa-

chusetts from desolation, brought on through the timidity of her own, her chosen and honoured statesman. Such a picture might enter into a new and interesting series of political illustrations, to be entitled "The Vagaries of a Presidential Election."

Mr. President, the statesman thus impeached for want of boldness and firmness in defending his country's maritime rights, is he who replied to Great Britain, when claiming for the last time the right to "search" American vessels, "The ocean is the sphere of the Law of Nations; every vessel on the seas, is, by that law, under the protection of the laws of her own nation." "The practice of impressing seamen from American vessels cannot hereafter be allowed to take place." "In every regularly-documented American merchant vessel, the crew who navigate it will find their protection in the flag which is over them."

Sir, the statesman thus impeached for being unreliable in defending the interests of Massachusetts is he who, in the memorable debate to which I have referred, achieved his triumph with the words:

I shall enter on no encomium upon Massachusetts. She needs none. There she is. Behold her, and judge for yourselves. There is her history; the world knows it by heart. The past is at least secure. There is Boston, and Concord, and Lexington, and Bunker Hill—and there they will remain forever.

I shall enter into no encomium on the Secretary of State—he needs none. I should be incompetent to grasp so great a theme, if it were needed. The Secretary of State! There he is. Behold him and judge for yourselves. There is his history; there are his ideas—his thoughts spread over every page of your annals for near half a century. There are his ideas, his thoughts, impressed upon and inseparable from the mind of his country and the spirit of the age. The world knows them all by heart. They are there, and there they will be forever. The past is at least secure. The past is enough, of itself, to guaranty a future of fame unapproachable and inextinguishable.

Mr. President, a simple narrative shall now accomplish the two purposes for which I address the Senate. It shall show that the censures of honourable Senators are erroneous, and it will lead us to an exact knowledge of the issue involved in the question which occupies the Senate.

I pass by the Treaty of 1783. All the world knows that, in common with the people of England, we were subjects of the King of Great Britain, and that in the war which terminated that connexion, we secured not only independence, but also an equal right, in common with those, who remained subjects, in the fisheries, which had before been enjoyed in common. I pass by the Treaty of 1815. It was a Treaty concluded at the end of our second war with Great Britain. In that Treaty no allusion whatever was made to the subject; and so Great Britain contended that our rights to the fisheries were gone with the war because they had not been reëstablished by the Treaty of Peace. We maintained, on the contrary, that we retained *all* those rights, because they had not been surrendered in the Treaty of Peace. The Convention of 1818 was a Convention made for the purpose of settling this great dispute, and did settle it in this way. The United States took, under it, the equal right to fish in common with His Britannic Majesty's subjects, in the waters that wash the southern coast of Newfoundland, from Cape Ray to the Rameau

Islands; on the northern and western coasts of Newfoundland, from Cape Ray to the Quirpon Islands; and also the right of fishing along the Magadalone Islands; and from Mount Jolly, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwards indefinitely. Here on this map you see these common fishing [fishing] grounds. By that Convention the United States renounced all right to fish anywhere within the distance of three miles of the shore, within any other of the coasts, bays, creeks, or harbours of His Majesty's Dominions in North America, or to enter them for any cause but distress and want of food and water. The fisheries to which this provision was applicable were, on the excepted coasts of Nova Scotia, New Brunswick, Cape Breton, Prince Edward's Island, and a portion of Canada, called Gaspe. You see them all here on the chart.

Will the Senate please to notice that the principal fisheries in the waters to which these limitations apply, are the mackerel and the herring fisheries, and that these are what are called "shoal fisheries;" that is to say, the best fishing for mackerel and herrings is within three miles of the shore. Therefore, by that renunciation, the United States renounced the best mackerel and herring fisheries. Senators please to notice, also, that the privilege of resort to the shore constantly, to cure and dry fish, is very important. Fish can be cured sooner; and the sooner cured the better they are, and the better is the market price. This circumstance has given to the Colonies a great advantage over us in this trade. It has stimulated their desire to abridge the American fishery as much as possible; and indeed they seek naturally enough to procure our exclusion altogether from the fishing grounds. Such was the Convention of 1818, and its effects.

On the 14th of June, 1819, the British Parliament passed an Act for the purpose of carrying the provisions of this Convention into effect, by which they authorized the King to issue Orders in Council. By Orders in Council the Government of Great Britain provided for the seizure of persons trespassing within the forbidden fishing grounds, or abusing the conceded privileges.

The Provincial Government of Nova Scotia, in 1836, passed a very stringent law for the purpose, or under the pretext, of preventing encroachments by American fishermen; and simultaneously with this Act, they set up the claim to exclude the American fishermen from entering the great Bays of Fundy and Chaleurs, and all other great bays; and also to shut up the Gut of Canso, to prevent American fishermen from using that very necessary channel to reach the Straits of Northumberland and the Gulf of St. Lawrence. That province asserted, at the same time, that by the true and just construction of the Convention of 1818, we were excluded from the British harbours and waters, except in cases of actual distress; and authorized the police to assume to judge absolutely what were cases of distress, and when the plea was at end; and declared it a cause of forfeiture, also, when a fisherman should come in for wood or water, without showing that he had been well supplied when he left home. The province also declared it an abuse and ground of forfeiture, when our fishermen baited fish within three miles from the shore, for the purpose of tempting them out into the deep sea; and also when they prepared, within three miles of the shore, to fish outside those limits.

Moreover, the Nova Scotia statute rendered it almost impossible for a fisherman to defend a just cause, because it allowed only a month in which to prepare his defence, and cast the *onus probandi* on the party libeled. Mr. Stevenson, and after him Mr. Everett, remonstrated with the Imperial Government against this atrocious Act, and insisted on the same construction of the Act we now demand. The Imperial Government indulged a desire to accommodate, and submitted such a proposition to the Colonial authorities of Nova Scotia. That colony resisted, as I think did all the others; and Nova Scotia requested the opinion of the Law Officers of the Crown on the construction of the Treaty in regard to all the points to which I have thus adverted. Those Law Officers confirmed all the pretensions of the Nova Scotians. Under these circumstances the British Government, declaring their adherence to the construction given by the Law Officers, yielded to the appeal of the United States so far as to grant, as a concession, that the Bay of Fundy should be open to the American fishermen, subject to the limitation of not going within three miles of the shore, and *they declined to concede more*. The American Minister, Mr. Everett, received this not as a concession, but as a right. The British Minister insisted that it should be regarded not as a right, but as a concession.

Mr. Everett wrote on the 25th of March, 1845, thus:

I received, a few days since, and herewith transmit, a note from Lord Aberdeen, containing the satisfactory intelligence, that after a reconsideration of the subject, *although the Queen's Government adhere to the construction of the Convention which they have always maintained, they have still come to the determination of relaxing from it, so far as to allow American fishermen to pursue their avocations in the BAY OF FUNDY.*

So, the one party calling it a "concession," and the other defining it as a "right,"—the privilege of fishing, or the right to fish within the Bay of Fundy, except within three miles of the shore, was admitted, and so has constituted a departure, in one instance and on one point, from the rigorous construction otherwise pertinaciously adhered to by the Government of Great Britain.

What the British Government had thus conceded as a relaxation, the Canadian authorities still declared was unwise; and, although this concession had been made, yet all that time, as well as ever since, the Provincial authorities have insisted upon the technical and rigorous construction of the Treaty, and the United States upon the more liberal and just one. The Imperial Government, although it adopted and has adhered to the Provincial construction, has, nevertheless, always declined to maintain it practically by force. Such have been the attitudes of the three parties heretofore. Such are their attitudes now.

Now, Sir, during all this time—I do not know how long before—the Imperial Government has kept some naval force in those seas, for the purpose of preventing encroachments and abuses by American and French fishermen; and the Colonies have, at all times, I believe, made some show of naval force for that purpose, or on that pretext.

184 In the last year a new Administration with the Earl of Derby at its head obtained the control of the Imperial Government. That Administration was understood to favour the principle of *protection*. The United States pay considerable bounty to

their fishermen—bounties amounting to about \$300,000 a year—and they impose a duty of twenty per cent. on foreign fish. The Colonial fishermen claimed of the new Ministry, as they had been in the habit of claiming of the old Ministry, the assent of the Royal Government to the granting of bounties; and they complained to the new Ministry, as they had been in the habit of complaining to the old one, of the encroachments of the American fishermen. The Colonial authorities last year, by reports and resolutions threatened retaliation against the United States in some form, if these claims and complaints should be disregarded.

Under these circumstances, the Imperial Government, in 1851, proposed to the President of the United States to negotiate concerning the questions raised by the British Colonies, and submitted, through Sir Henry Bulwer, a schedule of the terms or principles upon which that Government would negotiate, for the purpose of settling what they were pleased to call the commercial intercourse between the Provinces and the United States. The President of the United States altogether declined to negotiate; and he referred the subject to the Congress of the United States in his annual message of December last, in these words:

Your attention is again invited to the question of reciprocal trade between the United States and Canada and other British Possessions near our frontier. Overtures for a Convention upon this subject have been received from Her Britannic Majesty's Minister Plenipotentiary, but it seems to be in many respects preferable that the matter should be regulated by *reciprocal legislation*. Documents are laid before you, showing the terms which the British Government is willing to offer, and *the measures which it may adopt, if some arrangement upon this subject shall not be made.*

Thus, in December last, was Congress invited by the President to consider the subject out of which all the present difficulties have arisen; and we then had this notice from the British Ministry, viz:

Her Majesty's Government are prepared, on certain conditions and with certain reservations, to make the concession to which so much importance seems to have been attached by Mr. Clayton, namely—to throw open to the fishermen of the United States the fisheries in the waters of the British North American Colonies, with permission to those fishermen to land on the coasts of those colonies, for the purpose of drying their nets and curing their fish: provided that, in so doing, they do not interfere with the owners of private property, or with the operations of British fishermen.

Congress did nothing, said nothing, thought nothing on the subject. The Colonies, in the mean time, continued to complain of encroachments, and continued to demand the consent of the Imperial Government to the granting of bounties. The Imperial Government answered that to remove the complaints of the Colonies, they would not object to measures being taken by the Colonies themselves for the granting of bounties, and they would send an additional force to protect them against encroachments. Such a force was sent, and, simultaneously with sending it, the British Minister here, on the 5th of July last, informed the President of its coming, and its object, in the following communication:

I have been directed by Her Majesty's Government to bring to the knowledge of the Government of the United States a measure which has been adopted by Her Majesty's Government to prevent a repetition of the complaints which have so frequently been made of the encroachments of vessels belonging to citizens of the United States and of France upon the fishing grounds reserved to Great Britain by the Convention of 1818.

Urgent representations having been addressed to Her Majesty's Government by the Governors of the British North American Provinces, in regard to these encroachments, whereby the Colonial fisheries are most seriously prejudiced, directions have been given by the Lords of Her Majesty's Admiralty, for stationing off New Brunswick, Nova Scotia, Prince Edward's Island, and in the Gulf of St. Lawrence, such a force of small sailing vessels and steamers as shall be deemed sufficient to prevent the infraction of the Treaty. It is the command of the Queen that the officers employed upon this service should be especially enjoined to avoid all interference with the vessels of friendly Powers, *except where they are in the act of violating the Treaty*, and on all occasions to avoid giving ground of complaint by the adoption of harsh or unnecessary proceedings when circumstances compel their arrest or seizure.

Let us now see what force it is that has been sent into the field of the dispute. There is the Buzzard, a steamer of six guns, the Sappho, a sloop of twelve guns, and the Bermuda, a schooner of three guns, sent to the Straits of Belle Isle, and on the coast of Newfoundland, where we have an unquestioned right of fishing, and where there is no controversy. Then there is the Devastation, a steamer of six guns, the Arrow and the Telegraph, of one gun each, and the Nettley, of two guns, in the Gulf of St. Lawrence; making, in the whole, seven vessels, with a total of thirty-one guns, sent by the Imperial Government into these waters. If you add to this force the flagship of Vice-Admiral Seymour, the Cumberland, with seventy guns, there are, altogether one hundred and one guns. This is the naval force which has been sent into the northeastern seas.

Now, I desire the Senate to take notice what force was there *before* this great naval force was sent. Last year there was the flag-
 185 ship, the Cumberland, commanded by the same Sir Charles Seymour, with seventy guns, a frigate of twenty-six guns, two sloops of sixteen guns, and one steamer of six guns, making, in the whole, sixty-four guns, without the Cumberland, and, including the Cumberland, one hundred and thirty-four guns.

Then this mighty naval demonstration, which has so excited the Senate, and roused its indignation, and brought down its censures upon the Administration, consists in a reduction of the naval force which Great Britain had in those waters a year ago from one hundred and thirty-four to one hundred and one guns. What the British Government has done has been to withdraw some large steamers, because they were not so useful in accomplishing the objects designed, or because they would be more useful elsewhere, and to substitute in their place a large number of inferior vessels, either more efficient there, or less useful elsewhere.

The Senate will understand me. I do not say this is the whole force which is in those waters. There is an increase, I think, on the whole, which is furnished by small vessels of the different provinces; Canada having sent one; New Foundland one; Nova Scotia four. But the question I am upon, and the real question now is, what the Imperial Government has done, and so I say the British Government has reduced the number of guns employed.

Now, when this force was approaching, a letter from Sir John Pakington, bearing somewhat the tone of a proclamation, appeared, and at the moment was magnified and applauded by the Colonial newspapers in a most bellicose manner, and before the letter of the British Minister could have been read or received by the President of the United States, an alarm went abroad throughout the fisheries and along the northeastern coasts. It was exactly at the season when

the fishermen were going to the ocean fields to gather their autumnal harvests. The President, it seems, took pains to obtain information informally, and he caused it to be published, in a notice issued by the Secretary of State, and dated at the Department of State, July 6, 1852, and which has been called here the "Proclamation" of the Secretary. The Senate will see that the Secretary of State set forth such unofficial information as had been obtained, and all the information was unofficial, and stated the popular inference then prevalent, saying that the Imperial Government "appeared" now to be willing to adopt the construction of the Convention insisted on by the Colonies. Inferring from circumstances, the hazards and dangers which in that case would arise, he set forth the case precisely as it seemed to stand. He adverted to the question understood as likely to be put in issue, and admitting that technically the Convention of 1818 would bear the rigorous construction insisted on by the Colonies, he declared the *dissent* of the Government of the United States from it; and then communicated the case to the persons engaged in this hard and hazardous trade, that they might be "on their guard."

I am surprised that any doubts should be raised as to the proclamation being the act of the Government. I do not understand how a Senator or a citizen can officially know that the Secretary of State is at Marshfield, or elsewhere, when the seal and date of the Department affirm that he is at the capital. I would like to know where or when this Government or this Administration has disavowed this proclamation?

In issuing this notice, the Secretary of State did just what the Secretary of State had been in the habit of doing in such cases from the foundation of the Government, viz: he issued it to put citizens on their guard in a case of apparent danger resulting from threatened embarrassment of our relations with a foreign [foreign] Power. The first notice of the kind which I have found in history, is a notice issued by Thomas Jefferson, Secretary of State under George Washington, to the merchants of the United States, informing them of the British Orders in Council, and of the decrees of the French Directory, and of the apprehended seizure and confiscation of American vessels under them; and assuring the American merchants that, for whatever they might unlawfully lose the Government of the United States would take care that they should be indemnified. I brought that to the notice of the Senate heretofore; and upon that ground, among others, they have twice sanctioned a bill providing for the payment of losses by French spoliations. The notice published by Mr. Webster was of the same character and effect. Since that time, the Mississippi, a steam war-frigate of the United States, has been ordered to those waters, to cruize there for the protection of American fishermen in the enjoyment of their *just* rights. Thus ends the whole story of these transactions about the fisheries. The difficulties on the fishing grounds have "this extent, no more"—they are the wonder of a day, and no longer.

No negotiation has been had between the President of the United States and the English Government. No negotiation is now in progress between the two Governments. No negotiation has been instituted between the two Governments, for any purpose whatever. No overture of negotiation has been made by the British Government since the last year, and no overture has been made by the

American to the British Government. So, then, it appears that nothing has been negotiated away at the cannon's mouth, because there has been no negotiation at all, either at the cannon's mouth or elsewhere. There has been no negotiation under duress, because there has been no pretence of a design by the Imperial Government to enforce its rigorous construction of the Convention of 1818, or to depart from the position of neutrality, if I may so call it, always heretofore maintained. All the change is, that, in August, 1851, the British Government had one hundred and thirty-four guns on that station; and now, in August, 1852, it has one hundred and one guns; and this famous Sir Charles Seymour, who sweeps away, not only fishermen's smacks, but also the icebergs coming down from Hudson's Bay and off the coast of Labrador, with his "broom," is the Admiral of the whole station of British North America—a field of duty which reaches from Central America to the North Pole. He has two headquarters: one at Bermuda, in the winter; and the other at Halifax, in the summer. This same Admiral Seymour was in the same seas with his broom last year, just as he is this year, and yet he excited no alarm then. He has four trusts to execute for his Government with the small force at his command, of which his flag-ship constitutes the largest portion. The first of these is to protect

186 British rights in the vicinity of Cuba, just as the United States last year sent a vessel to maintain their rights and perform their duties there. His next duty is to secure British rights at Greytown, just exactly as the United States ought to have had a vessel there to secure their rights. The third duty is to watch Souloouque, the Emperor of Hayti, to prevent him from subjugating the Dominican colony, which the British Government is bound to do by an arrangement existing between the United States, Great Britain, and France; and the fourth duty is to protect British rights in these fisheries against encroachments and abuses by whomsoever may come along. The season of fishing is in the summer; and, therefore, the Admiral arrives at Halifax with his broom during that season, and perhaps, also, he comes north, because the weather is more pleasant.

There have been since that time, some seizures, four or five, I believe; but, in this there has been nothing new. I have before me a list of seizures of American vessels for the violation of the provisions of the Convention of 1818, from the year 1839 to the year 1851. They amount in the whole to twenty-eight vessels, and it is insisted by the Imperial Government that they were all made on the grounds of violation and abuses of the Convention of 1818, as constructed by ourselves. There may have been mistakes, and probably, instances of oppression, but the British Government is understood to have disclaimed any such. More or less of these seizures have been brought to the notice of the Government of the United States from 1839 to this time. Yet there has been no war—no declaration of war, but, on the contrary, there has been the most pacific spirit on both sides which could be imagined. In 1836, Mr. Forsyth, the then Secretary of State, was so pacific and friendly, that he informed Mr. Bankhead, *by direction of the President*, that masters, owners, and others, engaged in the fisheries, were to be informed by the collectors "that complaints had been made, and that they were enjoined" to the strict limits assigned for taking fish under the

Convention of 1818. So in that year the Secretary of the Treasury addressed a circular letter to the collectors of customs, directing them to inform the American fishermen not to encroach "upon the fishing grounds secured exclusively to British fishermen by the Convention of 1818." So in 1839, Mr. Vail, Acting Secretary of State, in an official communication, said:

Under the supposition that many of the seizures had been made upon insufficient grounds, and in order, if possible, to preclude for the future the recurrence of such proceedings, the Acting Secretary of State, in a note dated the 10th of July, called the attention of the British Minister to the cases of seizure which had come to the knowledge of the Department, and requested him to direct the attention of the provincial authorities to the ruinous consequences of the seizures to the owners of the vessels, whatever might be the issue of the legal proceedings instituted against them, and to *exhort* them to exercise great caution and forbearance in future, in order that American citizens, *not manifestly* encroaching upon British rights, should not be subject to interruption in the pursuit of their lawful vocations.

Sir, I think you now see that this present Administration has roared, in tones of defiance of Great Britain, at least as loud as these utterances of the Administrations of Mr. Van Buren and of General Jackson. It has been a ground of censure, and a cause of excitement here, that no notice was given by the British Government to the United States that they had changed their construction of the Treaty. That is all right. It is a good ground of complaint, provided the condition holds. If they had changed the construction of the Treaty, they ought to have given us notice; but if they had not changed, then the complaint of want of notice must fail.

It has been complained here that the President withheld information. It is enough to know that he had nothing official worth communicating; and that when requested he furnished all that he had.

If I have been successful, I have shown the Senate that there is not, in the present difficulties about the fisheries, any ground of alarm—precisely for the reason that nothing new has occurred. That circumstances remain just exactly as they were; that there is no ground to apprehend a war, because the dispositions of the British Government remain just as pacific as they were before; and the dispositions of the Colonies to retaliate were well known before; and that if there were reasons for censure in any quarter, it must fall elsewhere, and not on the Administration. The President transferred the subject to Congress last December. The Senate implies that this was right, because it rejects the idea of negotiation. Who, then, has a right to complain? Is it Congress, that the Executive has not acted?—or is it the Administration, that Congress has been silent?

I shall be told, indeed, that the notice of the British Minister was ambiguous. But it was no more ambiguous than the well-understood reserve practised by that Government for a dozen and more years past.

The Executive is not to be censured for not having resisted the British force, for there has been none there in hostility to resist. It has not resented indignity, because there has been no indignity offered. That is so, unless the Government of the United States shall claim a right to prescribe to the Government of Great Britain what portion of her naval force, and of what kind, she shall maintain on this station, and what on that. I should like to see how the Senate of the United States would regard a notice from the British

Government that we must send not more than one, or two, or five, or ten war steamers, or ships-of-the-line, off the coast of Nicaragua, or into the Mediterranean. The Executive has acted with all sufficient promptness, and, when it seemed necessary, the Mississippi was sent into those waters. From accounts received, it appears that Commodore Perry found the British authorities adhering practically to our own construction of the Convention of 1818. What is the Mississippi to do? She must not protect fishermen who, according to our own construction, are encroaching, and those who are not seem to need no protection.

187 Sir, it has been complained by the honourable Senator from Louisiana [Mr. SOULE], that Mr. Webster conceded too much in his official notice of July 6, 1851. Now, here is Mr. Webster's language. After quoting the Treaty, he says:

It would appear that, by a *strict and rigid construction of this Article*, fishing vessels of the United States are precluded from entering into the bays, &c.

And, in the same connexion, he adds:

It was undoubtedly an *oversight in the Convention of 1818 to make so large a concession to England*.

That is to say, it was an oversight to use language in that Convention which, by a strict and rigid construction, might be made to yield the freedom of the great bays.

It is then a question of mere verbal criticism. The Secretary does not admit that the rigorous construction is the just and true one. An so he does not admit that there *is* any "concession" in the sense of the term which the honourable Senator adopts. Now, other honourable Senators, if I recollect aright—and particularly that very accurate and exceedingly strong-minded Senator, the gentleman from Massachusetts [Mr. DAVIS]—conceded that the Treaty *would bear* this rigorous construction, insisting, nevertheless, just as the Secretary of State did, that it was a forced and unjust one. The Senator from Louisiana dissents from him and other Senators, and maintains that it will not bear that construction at all; because he says that the other portions of the Convention show that the "bays" described must be bays within the British dominions. He adds that, in order to bring a bay within the dominion of any Power, it must be such that its passage to the sea shall not exceed six miles in width, and that the shores on both sides belong to the Power claiming dominion over the water. I cannot assent to the force of this argument of the honourable Senator from Louisiana. I am the more inclined to go against it, because I believe it is pretty late in the day to find the Secretary of State wrong in the technical and legal construction of an instrument. Let us test the argument. The honourable Senator says that where the Government occupies both sides of the coast, and where the strait through which the waters of the bay flow into the ocean is not more than six miles wide, then there is dominion over it.

Now, then, the Gut of Canso is a most indispensable communication for our fishermen from the Atlantic Ocean to the Northumberland Straits and to the Gulf of St. Lawrence, for a reason which any one will very readily see by referring to the map; yet the Gut of Canso is only three quarters of a mile wide. I should be sorry to adopt an argument which Great Britain might turn against us, to exclude us from that important passage.

Again, I recall the honourable Senator's argument, viz :

Two things unite to give a country dominion over an inland sea. The first is, that the land on both sides must be within the dominion of the Government claiming jurisdiction, and then that the strait is not more than six miles wide; but that if the strait is more than six miles wide, no such jurisdiction can be claimed.

Now, Sir, this argument seems to me to prove too much. I think it would divest the United States of the harbour of Boston, all the land around which belongs to Massachusetts or the United States, while the mouth of the bay is six miles wide. It would surrender our dominion over Long Island Sound—a dominion which I think the State of New York and the United States would not willingly give up. It would surrender Delaware Bay; it would surrender, I think, Albemarle Sound, and the Chesapeake Bay; and I believe it would surrender the Bay of Monterey, and perhaps the Bay of San Francisco, on the Pacific Coast.

Sir, it seems to me that we have been labouring for the last fortnight under a strange misapprehension: that we have been arguing here the freedom of the seas—of open and broad seas—the freedom of great bays, which freedom is not now practically denied, or newly brought in question. It is true that the British Government deny our right to enter the great bays, but it is equally true that they have done so for thirty years; and it is equally true, moreover, that, for thirty years we have practically exercised the right, and that we are exercising it now just as we have done throughout all that period.

Now, how has all this confusion come into the Senate, and how is it that we are alarming, perplexing, and bewildering the country in so idle and cruel a manner? What ground has there been for assuming that the British Government had determined to revise the Convention of 1818, and to enforce its construction by arms? On what did Senators base their apprehensions and build this excitement? The honourable Senator from Michigan [Mr. Cass] quoted from three newspapers, but neither of them was an organ of the Imperial Government, nor even a *British* newspaper. He quoted from merely provincial journals; and I believe that two of the three journals were anti-Ministerial papers. Moreover, such as they were, they did not assume to speak by authority, but only on report, and by way of conjecture. Perhaps with those journals "the wish was father to the thought;" and they thought that their brethren "down South" would soon take a new lesson from the presence of an assumed extraordinary force in the fisheries. My honourable friend from Louisiana based his censure on the Administration for possibly negotiating away valuable national rights on what he called a "semi-official announcement" of the fact in the "*Telegraph*," a small newspaper of this city, which is not, as I understand, an organ of this Administration, but can pretend to no more than a desire, perhaps, if it should survive, as I fear it may not, to become the organ of a future one. The honorable Senator, however, most candidly confessed, when called upon to name the paper, that he called

188 the announcement "semi-official," not from any official character that the paper bore, but from the authoritative manner which it assumed. A case may be easily made out against the Administration, if you will quote from the papers, friendly or otherwise, which make up their articles from telegraphic reports. Now,

if provincial newspapers are authority on one side of a case, I am sure that they are equally so on the other. I am very happy to produce such, for the purpose of restoring the equanimity of the Senate. I read from the New Brunswicker, a provincial paper of the date of August 3, 1852:

Nearly all the American papers we have seen labor under the erroneous impression that the Imperial Government is about to enforce the *legal* construction given to the Convention of 1818 by the Crown Officers of England, and prevent Americans from fishing, except at the distance of three marine miles outside of lines drawn from headland to headland. We have good authority for asserting that such is not the case. It is quite true that since the opinion of the Attorney General and Advocate General of England was given upon the case submitted by the Legislature of Nova Scotia, the Government of that colony, upon the urgent request of the fishermen, has evinced a desire to carry out the extreme *legal* view of that Convention; but the Imperial Government has steadily refused to take that view of the case, conceiving that American fishermen might properly claim to fish anywhere outside of three miles of any part of the coasts of British North America, even within bays more than six miles wide.

Acting under this impression, the Imperial Government has for some years sent a few sloops of war, or other smaller armed vessels, to cruize during the fishing season along the shores of the Colonies, to prevent foreign vessels from fishing within three miles of the land. But these vessels had each such a large extent of coast to watch over, that the duty of keeping foreign fishermen three miles from the land was indifferently performed; and the trespasses and encroachments have consequently increased every year, until they could be borne no longer. The Colonies found they must take the affair into their own hands, or else abandon their shore fisheries to the people of the United States, who, by the Convention of 1818, "renounced *for-ever* any liberty theretofore enjoyed or claimed to take, dry, or cure fish in or within three marine miles of any of the coasts, bays, creeks, or harbours of Her Majesty's Dominions in America."

It was owing to these determined movements on the part of the Colonies that the Imperial Government resolved upon giving efficient assistance to protect the North American fisheries; and this assistance was offered, as our neighbours will soon learn, not with the view of enforcing the rigid legal construction given to the Convention, but absolutely to prevent the Colonial cruizers from carrying out that very construction, thereby incurring the risk of unpleasant collisions with the vessels of a foreign but friendly Power. It was to insure the continuance of peace, and prevent the possibility of hostile encounters, that the Imperial Government has dispatched its vessels to the shores of North America.

Sir, there was a presumption, which, it seems to me, we ought to have admitted, that would have prevailed against the sounding forth of these idle alarms. For one, I want no evidence that England desires, and is determined, to maintain her power wherever she can, and to fortify and extend it over the world wherever she may, consistently with the rights of other nations, and, perhaps, without a very careful regard, in all instances, to those rights. But, on the other hand, I want no evidence to satisfy me that England desires peace with the United States.

The vast commerce of the world is practically divided between these two capital maritime Powers, and is as yet largely in the hands of England. The British Nation is a mercantile one. We also are a mercantile people with whom England deals largely, and we are agents in carrying on a large portion of the commerce of England with other countries. The trade between the two countries employs ten thousand American vessels, and nine thousand British vessels, with an aggregate tonnage of three million tons. The comfort and welfare and happiness of the British Nation depend, as do our own

largely, on the preservation of that commerce. War between the two nations would sweep it from the ocean. The Ministry that should involve that nation in war with the United States, would be driven from power by public indignation, arising out of universal calamity and distress.

England is a manufacturer. Her imports in all her domains are valued by hundreds of millions annually, and her exports are equivalent. She needs raw materials—cotton and wool and other articles, and breadstuffs and provisions. And to get these, while extending the markets for her manufacturers, she bends all the policy of her commercial and fiscal systems. We furnish those indispensable supplies lavishly, and we consume her fabrics of iron, cotton, flax, wool, silver, gold, everything in preference to manufacturing for ourselves. A war with the United States would close these relations at once, and the artisans and labourers of England would be involved in calamities such as they have never yet known.

England is a creditor nation. We are debtors to her. Heaven knows how much capital is not accumulated in England. It is a capital that has been gathered through a thousand years, by a nation of wonderful and world-searching sagacity, industry, and enterprise. We employ of that capital all that we can obtain, for we have need of it all to bring at once into sudden development and perfection vast and perpetually-extending regions, which, for near 6,000 years were by civilized man untrodden and unknown. A large portion of our public debt is owned in England. Large masses of our State debts are owned there. In addition to that, our merchants are indebted to England I know not how much; but I have known the time when the whole public and private debt of the United States was not less than \$250,000,000. The interest on this debt constitutes the support of a considerable portion of the British community.

England, then, cannot wisely desire nor safely dare a war with the United States. She knows all this, and more; that war with the United States about these fisheries, would find the United States able to surround the British Colonies. She would find that the dream of conquest of those colonies, which broke upon us even in the dawn of the revolution, when we tendered them an invitation to join their fortunes with ours, and followed it with the sword; that dream which returned again in 1812, when we attempted to subjugate them by force, would come over us again, and that now, when we have matured the strength to take them, we should find the Provinces willingly consenting to captivity. A war about these fisheries, would be a war which would result either in the independence of the British Provinces, or in their annexation to the United States. I devoutly pray God that that consummation may come—the sooner the better; but I do not desire it at the cost of war, or of injustice. I am content to wait for the ripened fruit, which must fall. I know the wisdom of England too well to believe that she would hazard shaking that fruit into our hands, for all that she could hope to gain by insisting on or enforcing with armed power the rigorous construction of the Convention concerning the Colonial fisheries.

Sir, what is the condition of England for a war with the United States at this moment? Her power has been extended over the East, and she employs nearly all her armies in India and in Africa, to maintain herself against the natives of the one continent and the savages

of the other. At this very moment, those who understand her condition best, say that her home defences are inadequate to protect her against an invasion by France. Wise and able statesmen now representing the ruling and prevailing interest of the country, demand of the Parliament to add to their defences, by extending and reorganizing the militia; and it is a great party question in that kingdom whether the safety of England shall be secured by such an increase, or whether it shall be left exposed to an invader.

What is the condition of English power in Canada, and in the British Provinces? They have never, since the war of 1812, had so small a military force in those provinces as now. The Imperial Government has maintained heretofore some show of naval defence upon our lakes. But within the last six months it has broken up the whole naval force there, and now none whatever exists. While thus showing the supposed motives to peace on the part of Great Britain, I confess that peace is no less the interest and the instinct of our own country. The United States *might* aggrandize themselves by war, but they are *sure* to be aggrandized by peace. I thank God that the peace of the world is largely subject to the control of these two great Powers; and that, while they have common dispositions towards harmony, neither has need of war to establish its character for firmness or for courage. Each has had enough of

"The camp, the host, the fight, the conqueror's career."

Some honourable Senators have averred that they could not trust this Administration, because of its antecedents; that Britain was induced to assume a bold tone on this question, by triumphs which she had obtained in negotiations with this Administration. One general remark meets all these objections; and that is, that they are extraneous issues, each one sufficient for a discussion in itself. Any Senator who thinks the interests of the country have been sacrificed, can bring it before the Senate and the country, and present it distinctly for examination.

But, Sir, what are these charges in regard to Cuba? Why, as I understand, that this Administration interposed to prevent an expedition which it was alleged was fitted out in this country for that island, in violation of our neutrality laws. Was this all? If it was, let Senators dissatisfied repeal the neutrality laws if they can, and not censure the President for executing them. What complaint is made in regard to Mexico? Why, that the Secretary of State employed a British banker, as an agent, to pay the instalments on the debt of this Government, payable in the city of Mexico. I see nothing wrong in that. An agent was necessary, and a foreign one. I believe the money was honestly paid to Mexico, and that she was satisfied. But it is said that British creditors got a portion of the money. I know not what obligations we were under to take measures to defeat British creditors, or any others, or the British Government, from obtaining satisfaction of any of their creditors [*Sic.*]. Indeed, in some of the States, there is a system of remedies founded on the principle that the creditor has a right to attach money belonging to his debtor *in transitu*.

What has the Administration done, or neglected to do, in regard to the Sandwich Islands? It is understood that this imagined shortcoming of the Administration consists in the President's not having

entertained, as is supposed, a proposition from the Government of the Sandwich Islands to put themselves under the protection, or subject themselves to the jurisdiction of the United States. I submit to honourable Senators, that they begin at the wrong end. It was settled by the last precedent, that the function of *annexing* belonged, not to the President, but to Congress. Congress have power "to admit new States." Let Senators who desire annexation introduce the Bill. I am ready to entertain the question for examination, and to act as prudence, wisdom, and the great interests of the country shall be found to require. But I cannot prejudge a question so great, so momentous.

These alleged and mistaken triumphs of England, then, form no cumulative evidence to support the censures bestowed upon the Administration in regard to the transaction in question.

And, now, what is the real question before Congress in regard to these fisheries? That question is simply this: The British Colonies insist upon the rigorous construction of the Convention of 1818, so as to exclude us from entering the large British bays, and distract and annoy our fishermen; and the people of the United States resist that construction, and they never will yield it. The British Government approve in words, and yet, so far as their acts are concerned, refuse to support it. The controversy is thirty years old, and seems an endless one. While that question is kept up, the American
190 fisheries, which were once in a most prosperous condition, are comparatively stationary or declining, although supported by large bounties. At the same time the Provincial fisheries are gaining in the quantity of fish exported to this country, and largely gaining in their exportations abroad. In 1844, those Colonies sent us products of the fishery valued at \$264,000; in 1851 the value of their fish which we received, was \$781,000. In 1844, they exported through our ports to other countries, fish valued at \$3,000; in 1851 their exported products were valued at \$173,000!

Our fishermen want all that our own construction of the Convention gives them, and want and must have *more*—they want and must have the privileges of fishing within the three inhibited miles, and of curing fish on the shore.

Consider for a moment the magnitude of the interest of the fisheries—that it employs a fleet of twelve hundred sail, managed by twelve thousand men, and a capital of \$4,000,000; and that, together with the whale fishery, it constitutes the basis of our naval power.

Shall we not try to quiet and end this long and injurious dispute, and to procure for the fishermen not only peace and security, but also an extension of the fishing ground and its privileges? That is the question; and I am for it.

Sir, there ought to be a decision on this matter some time or other. At all events, delay is injurious and dangerous. We think the right is with us, and so I am sure it is. But nevertheless it is a question. The British Government are our equals, and they hold it an open question. They quote American authorities, especially that of Chancellor Kent, against us. This shows us that they are as confident in maintaining their position, as we are in maintaining ours. We can dictate no terms to Great Britain. We will not allow her to dictate terms to us.

Now, Sir, can we, in any event, yield our right to navigate the Gut of Canso, and with it the fisheries of the Straits of Northumberland? No! Can we enjoy our fisheries as we ought while these disputes exist? No! Are we to leave them open and if so, shall our fisheries be carried on hereafter under the surveillance of an armed British squadron, and the guardianship of a naval fleet of our own?

The indications are abundant that it is the wish of the Senate that the Executive should not treat upon this subject, and I think wisely. I agree on that point with my honourable and distinguished friend from Massachusetts, [Mr. DAVIS]. What the Colonies require is some modification of commercial regulations which may affect the revenue. That is a subject proper to be acted upon by Congress, not by the President, if it is to be acted upon at all. It must not be done by treaty. We seem to have courted the responsibility, and it rests upon us. Let us no longer excite ourselves and agitate the country with unavailing debates; but let us address ourselves to the relief of the fishermen, and to the improvement of our commerce.

Now, Sir, there is only one way that Congress can act, and that is by reciprocal legislation with the British Parliament or the British Colonies of some sort. I commit myself to no particular scheme or project of reciprocal legislation, and certainly to none injurious to any agricultural or manufacturing interest. I, for one, will give my poor opinion upon the subject, and it is this: That so long hereafter as any British force shall be maintained in those northeastern waters, an equal naval force must be maintained there by ourselves. When Great Britain shall diminish or withdraw her armed force, we ought to diminish or withdraw our own; and that in the meantime, a commission ought to be raised, or that some appropriate Committee of this body—the Committee on Foreign Relations, the Committee on Finance, or the Committee on Commerce—should be charged to ascertain whether there cannot be some measure adopted by reciprocal legislation to adjust these difficulties and enlarge the rights of our fishermen, consistently with all the existing interests of the United States.

No. 106.—1852, August 15; *Letter from Commander Campbell to Vice-Admiral Seymour.*

H.M.SS. DEVASTATION *Pictou 15 Aug 1852.*

SIR: I beg to inform you that in consequence of the extraordinary determination evinced by the American fishermen to encroach upon the shores of the Bay of Chaleur I left the pinnacle of this sloop at Port Daniell, under Lieutenant Newport, from 3rd. to 13 inst., to keep them in check. Altho' the Americans have never (on being warned out of that bay by me) asserted their right to be there—I fear an idea has arisen among them that such is the case, & I have deemed it my duty, in consequence, clearly to point out that the Treaty of 1818, excludes them from all bays on this part of the coast, except for the purposes thereon specified—

The doubt has arisen from the fact of the fishing having been carried on by those people, in defiance, of the Treaty, in former years, in consequence of the vessel of war having so much ground to go over

as to render one or two short visits to each port all she could accomplish.

I hear from the people of the country that for years after the Treaty of 1818, was ratified, the Americans never did attempt to fish in any part of Chaleur Bay, and that they have only done so within the last 12 or 15 years—or since the mackerel fishery has been followed by them with so much advantage—The obvious inference then is that it was not till long after the Treaty of 1818 was concluded, that the fishing in the Bay of Chaleur was valued by them, consequently no exception, as regards the word “bays,” seems to have been thought of, & none would ever have been thought of had not the lucrative mackerel fishing become known—

Surely then since they are excluded by the Treaty from fishing &c. “within 3 miles of any coasts, bays, creeks, or harbours—whatever” they can have no right to fish in any part of Chaleur Bay.

A contrary interpretation to this would be fatal to the interests of a vast number of H M subjects on both sides of the bay, on the waters of which they meet each other while fishing, a proof that there is no room for foreign fishermen &, therefore, that the reservation of the exclusive right to them was a just and necessary one.

The mischief done to the fisheries by the Americans is not perceived at once in all its bearings. They with characteristic energy pursue the mackerel to the spawning grounds. & such is their power of attracting the fish, that they leave few along the shores, & will certainly soon, if allowed, exterminate them.

On the cod fishing the effect of their depredations is not to be calculated. for not content with catching the mackerel close to the shore, they clean them there also, often in the very harbours, the consequence is that the cod fish become gorged & will not take bait, so that not only do our own fishermen lose the mackerel as bait, but the fish are prevented by feeding from taking the small quantity they can procure.—As a proof of this I found that no sooner had the cutter of this sloop been stationed at Point Peter than (from the Americans being effectually kept off) the cod fishing improved vastly; indeed I am assured on all hands that the fishery is better than it has been for a great many years, & the people are surprised at discovering how much harm the Americans have done them in former years. It is the poorer fishermen who suffer most from the want of bait while the Americans infest the coast for they cannot compete in capturing the mackerel with the American vessels which are fitted out at a great expense, & have the means of attracting all the fish—leaving none for those who cannot afford to pursue them on the same system—

If the Bay of Chaleur is to be open to the Americans, all the evils I have mentioned with many others must remain and increase for it is in vain to attempt to keep them 3 miles from the shore the fish being all close to the land for the purpose of spawning and they will follow them to the very beach the instant a ship of war is out of sight.

I trust you will pardon my dwelling at such length on this subject, but its extreme importance is my excuse having witnessed the very prejudicial effects of the depredations of the Americans, as well as having heard the well grounded complaints of the people, at the

Americans fishing in a bay from which they believe them to be excluded by Treaty

I have, &c

(Signed)

COLIN G. CAMPBELL
Commander

No. 107.—1852, August 17: Vice-Admiral Seymour's Memorandum of conversation with Commodore Perry.

Confidential

Memorandum from recollection on some points which became the subject of conversation between Commodore Perry of the U.S. Navy and Vice Adml. Sir G. F. Seymour—on the 17 August 1852.

1 The Commodore showed a map of the Gulf of St Lawrence (a copy of which is herewith inclosed) purporting to be drawn up by Mr. Perley, H.M's Emigration Agent at St. Johns N.B. for a report about to be made by Mr. Andrews, who is employed by the U.S. Govt—on the subject of the fisheries in which certain lines are drawn as fishing boundaries demanded by the British Colonial authorities—

2 I acquainted the Commodore that I had not previously known these lines to have been proposed nor had I reason to suppose Mr. Perley was authorized in having described them as claimed by the Colonial authorities.

3 (I have since shown the chart to the Lieut Govr: of Nova Scotia, & Mr. Attorney Genl Uniacke who are of the same opinion & do not know Mr. Perley's authority Mr. Uniacke is particularly conversant with the claims & fishery interests of Nova Scotia)

4 (This chart may probably on its publication in the United States create an erroneous impression of the claims of the British Govt—)

In my opinion the terms of the Convention would not admit of the space between the east point & north cape of Prince Edwards Island being considered a bay from which foreigners may be excluded & I collected from the Commodore that as the space it includes is where the American fishermen fish, with most advantage the U.S. Govt would most strenuously resist the definition of the term bay being applied to the space between the two headlands before named, beyond the distance of three miles from the actual shores to exclusion from which last they can make no valid objection, even on their own reading of the Convention:

192 6. The Commodore was disposed to admit that the proper limits of the Bay of Chaleur were Miscon and Cape Despair & that the U.S. vessels should keep 3 miles beyond a line drawn between those points but as I observe Capt. Bayfield states the northern boundary is generally considered Point Macquereau it is probable the Americans may claim it as the northern limits of the bay.

7 I observed that the same principle which he was disposed to apply to the Bay of Chaleur should attach as against fishing purposes to Georges Bay, at the western end of the Gut of Canso. The Commodore did not dissent nor did he agree further to this observation than in allowing the immediate headlands of bays to form their proper boundaries.

8 Commodore Perry also treated as one of the points which required to be settled [to be settled] regarding the Convention whether

a vessel which had been discovered infringing within 3 marine miles of the British shore, was liable to seizure subsequently, when out of that limit (I consider it manifestly just that the vessel contravening the Treaty should be liable to seizure altho' she might have succeeded in getting beyond that limit & the want of such power would enable those who had transgressed the limits to escape in 9 cases out of 10 with impunity)

9 The 2nd clause of the Act 59 Geo: 3. cap 38, authorize the seizure of vessels which shall be found fishing or to have been fishing, or preparing to fish, but I am of opinion that no action in its exercise, under the language of the Convention of 1818, however necessary will be more liable to opposition from the United States, than a seizure beyond the British waters, and that the principle which I brought under their Lordships observation in my letter No 101, of the 8th July, postscript of legal questions, should be established—I think future difficulties more likely on this subject than any other;—

10—In reference to the United States desire to enjoy to [the] privilege to fish upon our coasts, I took occasion to inquire whether it was not illegal for a native of any other State than Massachusetts to fish on its shores which, Commodore Perry admitted

11 I have since examined the Statute cap: 85 of the laws of that State which enacts that “no person living without the State shall “take any lobsters, tantog, bass, blue fish, or scappang, within the “harbours, streams or waters, of any town on the sea coast, under a “penalty not exceeding: 20 dollars,” which shows that the rights of fishery, even on their own shores, are restricted to the immediate inhabitants

(Signed) G. SEYMOUR V: *Admiral*

No. 108.—1852, August 19: *Letter from Sir J. S. Pakington (British Colonial Secretary) to the Lords Commissioners of the Admiralty.*

The Lords Commissioners of the Admiralty.

DOWNING STREET, 19. August 1852.

My LORDS: In my letter of the 2d. June last, I conveyed to you Her Majesty's commands for stationing off the coasts of the British Possessions in North America a sufficient force of small vessels to protect the fisheries and prevent infractions of the Convention of 1818 with the United States, desiring at the same time that the officers employed on this service should be enjoined to avoid all unnecessary interference with the vessels of friendly Powers and all harshness in the performance of their duty.

Since the time when these instructions were issued, apprehensions have been expressed in the United States that it was intended by them to withdraw the concession made by Her Majesty's Government in 1845, of liberty to the fishermen of the United States to pursue their avocation within the waters of the Bay of Fundy, provided that they should not approach within 3 miles of the inlets and coasts of the British Provinces situated within that bay.

And Admiral Sir George Seymour has referred to the instructions given to successive Naval Commanders in chief that although no right on the part of the United States fishermen to fish from the shores of the Magdalen Islands, or to dry and cure their fish there, could be acknowledged, yet they should not be practically interfered with at those islands.

Sir G Seymour has also stated that the fishing vessels of the United States resort in large numbers to the various harbours in Cape Breton, Prince Edward Island, and New Brunswick, where they pass the Sundays without entering those harbours from stress of weather, or to repair damages or for obtaining wood and purchasing water, as provided for in the Convention, and he has inquired what course should be taken as to these vessels.

With reference to these several subjects, I have it in command to instruct your Lordships to inform the Admiral Commanding in chief on the North American station, that Her Majesty's Government in ordering that the British fisheries should be protected, are not making new claims against the United States, nor altering, or reversing any standing orders to Her Majesty's Governors and public functionaries, nor revoking any such concession as that which was granted in 1845 as regards the Bay of Fundy, or that which has long been practically made in the Magdalen Islands, it being clearly understood that no right of American citizens to land their crews upon those islands is acknowledged by this permission and sufferance on the part of the British authorities.

193 I have further to apprise your Lordships that unwilling to withdraw any accommodation which fishermen of the United States now find in British harbours, although such accommodation may go beyond the terms of the Treaty, Her Majesty's Government do not for the present desire any interference with the resort which it appears that they have formed the habit of making to various ports in the British provinces at times when they are not engaged in fishing, so long as they may conduct themselves in an orderly and peaceable manner

What course may be taken hereafter on these several concessions it is unnecessary now to determine. The various questions at issue between the Governments of this country and the United States will be the subject of future discussion between them; but in the meantime Her Majesty's Government have no wish to withdraw the foregoing privileges from the fishermen of the United States in any manner which could be considered abrupt.

I have therefore to request that your Lordships will desire the Admiral to execute the instructions which you before conveyed to him with due regard to the above concessions and with as much moderation and forbearance as may be consistent with the firm maintenance of those rights on the part of the British North American Provinces, the encroachments upon which have been the subject of their recent and repeated complaints.

I have &c

(Signed)

J S PAKINGTON.

No. 109.—1852, August 20: Letter from Commodore Perry to Vice-Admiral Seymour.

U. S. STEAM FRIGATE MISSISSIPPI AT SEA
OFF THE COAST OF NOVA SCOTIA,
Aug. 20th. 1852.

SIR: Your communication of yesterday, the receipt of which I now have the honour to acknowledge, did not reach me until the moment of the sailing of the *Mississippi* from Halifax.

It is true that I informed you, that I had come into these seas, to warn the American fishermen not to encroach upon the limits prescribed by the Convention of 1818 between Great Britain and the United States, as recognized by general interpretation and usage for the last 34 years, but I also informed you that I should deem it my duty to protect from visitation or interference all vessels of the United States, that might be found in those waters, the jurisdiction of which under the Convention was left in any doubt, and for reason as I intimated to you, that according to the representations made to me, there were enough actually trespassing upon the acknowledged jurisdiction of Great Britain, whose seizure would answer all the purpose of salutary admonition and example without the unnecessary resort to doubtful authority of capture, and I urged the policy of abstaining from such captures, upon the ground of a probable mutual disposition of the two Govts to come to some more definite understanding upon the points at issue.

Up to this time I have heard of no unnecessary exercise of rigour or harshness by the officers under your command, on the contrary I have every reason to believe, that they have in the execution of your instructions exhibited a degree of forbearance as honourable to themselves as to the enlightened views entertained by yourself upon the question, which has recently produced so much discussion.

It is not for me to reply to the second paragraph of your letter, in which you declare against any interference on the part of the naval force of the United States whilst the two countries are at peace, in preventing any vessels charged with infraction of the Convention of 1818 being detained for adjudication before the civil courts which by the received practice of nations, forms the proper tribunal, by which the facts can be ascertained, and in the first resort judgment pronounced. My instructions certainly do not authorize any improper interference with the admitted right of seizure and adjudication by Her Majesty's authorities, of American vessels, detected in a positive violation of the Convention—but such as these instructions are, my duty is, to obey them—Yet I am free to repeat in this formal manner the assurances made to you personally, that whilst they enjoin the most careful watchfulness over the just rights and interests of the American fishermen, they hold forth the strongest solicitude of the President to adhere most faithfully to all the stipulations of the Treaty.

In conclusion permit me thank you, for the courteous manner in which you have met my personal communications, and to assure you that I duly appreciate and cordially reciprocate those motives which should prompt us both, so to administer the duties respectfully [respectively] entrusted to our direction, as to calm rather than provoke,

the excited feelings which seem to have grown out of this vexed question of the fisheries, and which I trust, may soon be amicably disposed of, and in a way alike honourable to the two nations.

I have &c.

(Signed)

M. C. PERRY.

Vice Adml. Sir GEORGE SEYMOUR

Commander in Chief.

194 No. 110.—1852, August 23: Letter from Mr. Crampton to the Earl of Malmesbury.

No. 134.

WASHINGTON. 23rd. August. 1852.

MY LORD: The official communication in regard to the measures taken for the protection of the British fisheries which Mr. Webster informed me he was about to make to this Legation, has not yet been addressed to me.

The subject nevertheless continues to occupy much of the attention of Congress and of the public.

This hesitation on Mr. Webster's part is no doubt to be attributed to the embarrassing position in which the United States Government now finds itself placed in respect to this question. The excitement in regard to it is still very great. Mr. Webster would no doubt be very willing to arrange the matter by a negotiation with Her Majesty's Government embracing the whole subject of reciprocity of trade with the North American Colonies, but a strong objection is felt to this mode of arrangement in many quarters, and a strong feeling seems to prevail against it in Congress,—which, on the other hand, being about to separate, is not prepared to take any legislative measures for a settlement of the question.

Under these circumstances some other means of putting the matter upon a footing satisfactory to the American interests engaged in it were looked for;—but the more correct information which has lately been obtained in regard to the real facts of the case and their bearing on those interests, has added very much to the embarrassment already felt in regard to an independent solution of the difficulty.

The position which I have reason to think was intended to be taken by the United States Government in their proposed communication to me was

1st. to contest the correctness of the British construction of the Convention of 1818 as regards the definition of bays, and to insist on the justice of an extension of the relaxation of that construction which was conceded by Her Majesty's Government in 1845 as it regarded the Bay of Fundy, to the Gulf of St. Lawrence.

2ndly. to endeavour to obtain for American fishing vessels the right of passing through the Gut of Canso, as necessary to a free access to that gulf;—and

3rdly. to urge as a motive for these concessions, the disposition of Congress to impose a prohibitive duty, in case of refusal, on British caught fish, on importation into the United States.

These intended demands and the accompanying threat were based upon the two following assumptions:

1st. That the close fishing within three miles of the shore of the Gulf of St. Lawrence and the privilege of landing and curing fish

thereupon, was not what the American fishermen required. It was stated that they were in the habit of taking their fish in the great bays at a greater distance than three miles from shore,—of pickling it on board their vessels and carrying it home to the American market. It was thought therefore that it would be sufficient to procure for the American fishermen the liberty of entering those bays to fish.

2ndly. It was supposed that the only or at least the principal market for British caught fish was the United States, where it is consumed in considerable quantity, though subject to a duty of 20 per cent ad valorem, and that consequently an intimation that a prohibitive duty might be imposed upon it would compel Her Majesty's Government to accede to the terms proposed.

Both these assumptions however turn out, upon more accurate investigation, to be entirely unfounded in fact.

The close fishing or the power of following the fish within a mile or half a mile of the coast is absolutely essential to the successful prosecution of the mackerel fishery which is now the chief and most lucrative branch of the trade, and were American fishermen to be *effectually* excluded from this, they would be obliged to abandon the pursuit altogether. No interpretation therefore of the Convention of 1818 which could by possibility be contended for, or the extension of the privilege accorded in regard to the Bay of Fundy to the other British waters, would be of the least service to the American fishing interest,—and of this the United States Government is now, I believe, perfectly aware.

As regards the market to which British caught fish is brought, they now find that they have equally been in error. The United States is by no means the exclusive or most important market for the commodity:—by far the greatest consumption of it takes place at Messina, Naples, in Portugal, in Brazil, and the Spanish and British West India Islands. The demand for mackerel, on the other hand, in the United States has very much increased, and the fisheries in which it is taken in American waters are very inadequate to its supply; were American fishermen therefore prevented from taking it in British waters, the consumer in the United States would either be deprived of the article altogether, or obliged to pay a very heavy duty on British caught fish.

These considerations have rendered the United States Government more than ever anxious to arrange this matter in the only
195 way in which it can be arranged satisfactorily to the American interests concerned in it,—that is to say, by negotiation upon the basis which has been proposed by Her Majesty's Government; and I understand that strong efforts will be made in the course of the present week to procure the passage of a resolution by Congress which will empower the President to arrange the matter in this mode.

I have the honour to be with the greatest respect, my Lord,

You Lordship's most obedient humble servant,

JOHN F. CRAMPTON.

The Right Honourable, EARL OF MALMESBURY.

&c. &c. &c.

No. 111.—1852, August 26: Extract from Report Commander Campbell, of the "*Devastation*," to Vice-Admiral Seymour, dated off Prince Edward Island on the 26th, August, 1852.

* * * * *

Had made Prince Edwards Island 14 miles to the westward of this point, while standing along shore observed 18 sail of American fishing vessels within about two miles of the land, hove to and apparently fishing. While nearing them observed the American Commodore coming along shore in the opposite direction.

The distance which the steamers were from each other was very short at this time, as the weather was thick and when this sloop was within hail of the "*Mississippi*," the intruders or those of them which had not stood off were in-shore of both vessels, at this time the distance of the "*Devastation*" from the shore was about $2\frac{1}{2}$ miles.

Commodore Perry in alluding to the fisheries told me, that he was fully aware that the United States fishermen frequently violated the "Treaty, and pointed out what he considered the limits in nearly the same words, as he used while speaking to you in my presence on board the "*Cumberland*," I did not enter upon the subject with him more than I could help, but on his asking me, what I considered the sea boundary of the Bay of Chaleur, I told him that I thought from Miscon Point, to Point Macqueron, but that I was merely giving my private opinion.

The Commodore then told me that all the fishermen he had seen complained more of the exclusion from Chaleur Bay, than any other part of the Gulf, but that he told them distinctly they could not fish in that bay without clearly violating the Treaty and that they must take the consequences if they attempted it. He then informed me that the "*Telegraph*" had detained another vessel called the "*Golden Rule*" but that it was "*quite right*" and that he had been told by the other American fishermen that that vessel was taken fishing within the 3 miles. The only other remark he made on this head was, that he had been informed that the "*Telegraph*" was disguised at the time of this capture.

When this conversation was over, I called the Commodores attention to the position of the fishing vessels immediately inside of his ship, and observed that he himself must see the open violation of the Treaty.

I then remarked that my present duty always a delicate one, became doubly so while in company with him, but that I felt it incumbent on me to request him to have the terms of the Treaty enforced, by at least obliging the intruding vessels immediately to stand off the land with a warning not to return to their present positions. He immediately ordered the boat to be manned and sent for the officer in my presence, desiring them to visit each vessel and warn her to stand out, and to say that she was violating the Treaty by being so close. I then said that after such orders from him I should not interfere, with any vessel while he was in sight.

On returning to the "*Devastation*" I had the satisfaction to see that every vessel made sail and stood off after being boarded, and none remained within 3 miles.

The Commodore remarked that he was going to New York immediately and from thence personally on to Washington, and was

prepared to inform the Govt that the United States fishermen had no just ground of complaint and that considerable forbearance had been shown them.

I neglected to mention that the Commodore remarked, that the Treaty excluded his country men from fishing in the bay, of which Cape St George and Port Hood are the headlands, but that he is at the same time clearly of opinion that the Treaty by no means provides against their navigating the Gut of Canso.

* * * * *

196 No. 112.—1852, August 31: *Letter from Vice-Admiral Seymour to the Secretary of the Admiralty.*

[Commander in Chiefs visit to Prince Edwards Island. Fisheries in the Gulf of St. Lawrence.]

No. 137 CUMBERLAND AT HALIFAX. 31st August. 1852.

SIR: I beg to acquaint you that deeming it advisable to communicate personally with the Lt Govr of Prince Edward Island I proceeded to Charlotte Town, by way of Pictou, on the 23d instant from whence I visited the north part of the island and reembarked in H.M's S. sloop "*Basilisk*" off Richmond Bay on the 26th as I was desirous of observing the effect of the Mississippi's visit to the fishing grounds I did not meet that ship, but Commander Campbell of the "*Devastation*" had fallen in with her on the preceding day, when Commodore Perry had found several United States vessels fishing within 3 miles of the coast and had warned them that they were liable to seizure.

2 I inclose a copy of Comr Campbells report of the circumstances and have approved of his conduct.

3 I received when in the Gulf a reply to the declaration. I had delivered to Commodore Perry, on his quitting Halifax against the interference of the United States vessels of war with vessels detained for adjudication before a court of Vice Admiralty for contravention of the Convention of 1818, a copy of which is also inclosed

4 Their Lordships will observe that although the Commodores letter contains every assurance of his disposition to unite with me to calm rather than to increase the angry feelings, which have arisen on the fisheries, (and with which his conduct, so far as has come within my knowledge has been in unison) still the reference to his instructions shows that they would authorize the Commanders of United States' vessels to exercise a judgment as to the detention of the vessels which would cause a collision if persevered in

5 It appears from the admission made by Commodore Perry—as to his own opinion regarding the headlands, which from [form] the Bay of Chaleur, and George's Bay at the western end of the Gut of Canso that if he represents the views of his Govt there is not the wide difference of interpretation respecting the extent of the bays, from which United States fishermen are excluded, which has existed in the extreme views entertained on either side. of which I furnished their Lordships with an instance in the chart which I inclosed by the last packet, in which the headlands of different islands, were supposed to mark the British claims for bays.

6 It is, however evident that the establishment of well understood limits, becomes of consequence to our peaceable relations with the United States.

7 The north side of Prince Edward Island swarms with fine schooners under the United States flag, though I saw none fishing within 3 miles.

8 I visited Port Hood, in Cape Breton and communicated there with the "*Bermuda*," schooner and two Provincial cruisers, and returned to Halifax by Pictou on the 28th leaving the "*Devastation*" and "*Basilisk*" in the Gulf with 2 tenders.

I have etc etc etc

(Signed)

G. F. SEYMOUR

Vice Admiral and Commander in Chief.

The SECRETARY OF THE ADMIRALTY

P.S. I should acquaint you, that the master of the United States schooner. "*Golden Rule*," which had been detained for infraction of the Convention by the "*Telegraph*" schooner, supplicated his release from me on my arrival at Charlotte Town and I did not consider a 3d example essential for the present and on consideration of the master having been put to great expense in the repairs of his vessel, last year in the island and of his engagement not to repeat the offence, which he acknowledged, I desired Lieutt. Chetwynd not to institute legal proceedings and to release her.

I inclose the masters petition, with Lieutt Chetwynds account of her detention.

G. F. S.

No. 113.—1852, September 16: Letter from the Earl of Malmesbury to Mr. Crampton.

No. 87.

FOREIGN OFFICE, September 16th, 1852.

SIR, I have received and laid before the Queen your despatch No. 134 of the 23rd ultimo, in which you report the state of the Fisheries' Question, as it stood at that date, and the embarrassment felt by the United States Government as to the mode in which that question should be further dealt with by them.

In the present position of that question I have little to add to the instructions which I have already addressed to you respecting it. I have, however, specially to instruct you not to hold out in any shape to the United States Government the slightest hope that by any act of indulgence analogous to the relaxation granted by Lord Aberdeen in respect to the Bay of Fundy Her Majesty's Government will be disposed to admit United States' fishermen to fish within three miles of any part of the coasts of the British Colonies in North America which is not already opened to them by treaty.

With respect to the question of the assumed right of American fishermen to fish, under the provisions, or rather in spite of the provisions, of the Fisheries Convention in 1818, on all the coasts of the British North American Provinces, provided they do not approach within three miles of the land, Her Majesty's Government are glad to learn by your despatch that the views of the American Government appear to have undergone some change on that point, if not with

regard to the assumed right itself, at least with regard to the utility which may result to American fishermen from the assertion of that right.

Her Majesty's Government continue to maintain that under the provisions of the Convention of 1818 the United States Government clearly and distinctly renounced all right on the part of their countrymen to fish within three miles, not only of the coasts of the British Provinces, saving those specially excepted by treaty, but also of the bays, creeks, and harbours of those provinces, and from that view Her Majesty's Government cannot, under any circumstances, depart.

You will not fail to remind the Government of the United States that all civilized nations in both hemispheres recognize as an undisputed point of international law, the jurisdiction, founded on territorial possession, of every nation over the waters in the immediate vicinity of its own coasts; and that in this respect the rights of Great Britain in no way depend upon, although they are expressly recognized and confirmed by the Treaty of 1818. And with reference to the practical adoption of this principle, I have to desire that you will at an early moment, inform me to what extent the United States Government assert, at this moment, an exclusive right and power over the large bays of the United States, such as Cape Cod Bay, the Sound, (Long Island), Delaware Bay, the Chesapeake Bay, and others of the same description.

If however, as I have already intimated, the United States Government should be disposed to enter into a general negotiation for the adjustment of questions, commercial and other, which yet remain to be arranged between the two countries, and if as an element of adjustment the United States Government were to propose the concession of rights undoubtedly belonging to them against an equal concession of rights, undoubtedly belonging to Great Britain, Her Majesty's Government would in that case be quite willing to meet them in a liberal and conciliatory spirit on a wide field of negotiation.

I am with great truth & regard, Sir,

Your most obedient humble servant,

JOHN F. CRAMPTON Esqre

MALMESBURY.

No. 114.—1852, September 24: Letter from the Earl of Malmesbury to Mr. Crampton.

No. 90.

FOREIGN OFFICE September 24. 1852.

SIR, In your despatch No. 140 you state that Mr. Webster had allowed you to peruse the reports made to the United States Government by Mr. Abbott Lawrence of a conversation which he had held with me and Sir John Pakington upon the Fishery Question.

It appears therefrom that Mr. Lawrence was under the impression that I had informed him that no seizures would be made of American vessels trespassing on British fisheries beyond three miles from the shore, and that he had reason to hope that you would be instructed to advise the Colonial authorities, and the Commanders of Her Majesty's ships not to make any seizures whatever during the present fishing season in order that American fishermen might "make up their fares" by fishing close in shore during the two ensuing months.

As Mr. Lawrence appears to have totally misunderstood the tenor of my observations, it is necessary that I should inform you that I did not say that seizures would not be made beyond the three mile distance of the shore within bays, but I said that the President of the United States had proposed to you that Her Majesty's ships should abstain from making such seizures. Moreover no mention was made either by Mr. Lawrence Sir John Pakington, or myself, of permission to American fishermen to "make up their fares" by fishing close in shore for two months.

On the contrary I repeatedly remarked that the intimation given by Her Majesty's Government to the United States left everything as to rights and instructions to Commanders in statu quo; that Her Majesty's Government claimed no new right, and laid down no new principle, nor did they abrogate any previous relaxation; that 198 the British proceeding was in fact one merely of police; but that we had specially enjoined upon Her Majesty's Officers forbearance and judgment in the execution of their instructions.

You will take an opportunity of pointing out to Mr. Webster the misconceptions into which Mr. Lawrence has fallen with regard to the tenor and intent of my observations on the occasion in question.

I am with great truth and regard Sir,

Your most obedient humble servant,

MALMESBURY.

JOHN F. CRAMPTON Esqr

No. 115.—1852, October 28: Letter from Mr. B. N. Norton, United States Consul for Pictou Dependency, to Sir A. Bannerman.

CONSULATE OF THE UNITED STATES,
Province of Nova Scotia, Pictou, October 28, 1852.

SIR: Since my return from Charlotte Town, where I had the honour of an interview with your Excellency, my time has been so constantly employed in the discharge of official duties connected with the results of the late disastrous gale, so severely felt on the north side of Prince Edward Island, that I have not found time to make my acknowledgments to your Excellency for the kind and courteous reception extended to me at the Government-House, nor to furnish you with my views relative to some improvements which might be made by your Excellency's Government, thereby preventing a similar catastrophe to the one which has so lately befallen many of my countrymen; and at the same time on behalf of the Government of the United States, which I have the honour to represent, to thank you most feelingly for the promptness and energy displayed by your Excellency in issuing Proclamations, whereby the property of the poor shipwrecked mariner should be protected from pillage.

These various duties devolving on me, I now have the pleasure of discharging, but only in a brief and hurried manner.

The effect of the recent visitation of Providence, although most disastrous in its consequences, will yet result in much good.

In the first place, it has afforded the means of knowing the extent and value of fisheries on your coast, the number of vessels and men

employed and the immense benefit which would result to the people within your jurisdiction, as well as those of the United States, if the fishermen were allowed unrestrained liberty to fish in any portion of your waters, and permitted to land for the purpose of curing and packing.

From remarks made by your Excellency, I am satisfied it is a subject which has secured your most matured reflection and consideration, and that it would be a source of pride and pleasure to your Excellency to carry into successful operation a measure fraught with so much interest to both countries.

2d. It has been satisfactorily proved, by the testimony of many of those who escaped from a watery grave in the late gales, that had there been beacon lights upon the two extreme points of the coast, extending a distance of 150 miles, scarcely any lives would have been lost, and but a small amount of property been sacrificed. And I am satisfied, from the opinion expressed by your Excellency, that the attention of your Government will be early called to the subject, and that but a brief period will elapse before the blessing of the hardy fishermen of New England, and your own industrious sons, will be gratefully returned for this most philanthropic effort to preserve life and property, and for which benefit every vessel should contribute its share of light-duty.

3rd. It has been the means of developing the capacity of many of your harbours, and exposing the dangers attending their entrance and the necessity of immediate steps being taken to place buoys in such prominent positions that the mariner would in perfect safety flee to them in case of necessity, with a knowledge that these guides would enable him to be sure of shelter and protection.

From the desire manifested by your Excellency previous to my leaving Charlotte Town that I would freely express my views relative to the recent most melancholy disaster, and make such suggestions as might in my opinion have a tendency to prevent similar results, there is no occasion for my offering an apology for addressing you at this time.

I have, &c.

B. N. NORTON,

United States Consul for Pictou Dependency.

His Excellency Sir A. BANNERMAN, &c. &c.

199 No. 116.—1852, December 6: *Extracts from Report of Mr. Lorenzo Sabine on the principal fisheries of the American seas. Transmitted to the United States Secretary of the Treasury.*

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FISHERIES OF LABRADOR.

The coast of Labrador was partially explored by Jacques Cartier in 1534. He was beset with ice, and encountered many difficulties. Little was known of the country for a long period after the voyage of the French navigator. It has been said, however, that our cod-fishery was extensive in this region, not only previous to the Revolution, but in the early part of the last century. The statement I

consider entirely erroneous. As I have examined the scattered and fragmentary accounts of Labrador, there is no proof whatever that its fishing grounds were occupied by our countrymen until after we became an independent people.

In 1761 Sir Francis Bernard, who was then Governor of Massachusetts, wrote a brief "Account of the coast of Labrador," which—found among some of his papers—is preserved in the Collections of the Massachusetts Historical Society. After some general remarks upon the country, and the ignorance that existed relative to the natives, he proceeds to say that, "What follows shall be a plain narration of facts, as I received them from several persons who have been on the Esquimaux coast, with now and then a digression, which I hope may be pertinent." These persons appear to have been Captain Henry Atkins, of Boston, who made a voyage to Davis's Straits in the ship *Whale* in 1729, and who visited the coast a second time in 1758, and a captain Prebble, who was sent by Atkins in 1753. The baronet describes the course of affairs between Atkins and the Indians in 1729, and adds that he "is the more particular in this account from the captain's own mouth, as he thinks it plainly indicates that the natives on this coast and islands had never any trade or commerce with any civilized people from Europe or America; of course not with the French from Canada, or the Hudson's Bay factories." This is conclusive, especially if it be remembered that the object of Sir Francis was to collect information "for the advantage of future navigators." His memory was remarkable, and he himself said that he could repeat the whole of Shakespeare. Of course, this paper embraced everything that had been communicated to him.

As late as 1761, then, it is not probable that fishermen of *any* flag had visited the waters of Labrador. An account of the origin of our own fishery there will be found in the proper place.

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THE UNITED STATES.

[From the declaration of Independence to the year 1852.]

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Whoever examines the records of Congress will find that between February and August, 1779, the various questions connected with the fisheries were matters of the most earnest and continued debates, and of the most anxious solicitude. During the discussions upon a proposition to open a negotiation for peace, Mr. Gerry introduced the following resolutions. First: "That it is essential to the welfare of these United States that the inhabitants thereof, at the expiration of the war, should continue to enjoy the free and undisturbed exercise of their common right to fish on the Banks of Newfoundland, and the other fishing banks and seas of North America, preserving inviolate the treaties between France and the said States." Second: "That an explanatory article be prepared and sent to our minister plenipotentiary at the court of Versailles to be by him presented to his Most Christian Majesty, whereby the said common right to the fisheries shall be more explicitly guaranteed to the inhabitants of these States than it already is by the treaties aforesaid."

Third: "That in the treaty of peace with Great Britain, a stipulation be made on their part not to disturb the inhabitants of these States in the free exercise of their common right to the fisheries aforesaid, and that a reciprocal engagement be made on the part of the United States." Fourth: "That the faith of Congress be pledged to the several States, that, without their unanimous consent, no treaty of commerce shall be formed with Great Britain previous to such stipulation." Fifth: "That if the explanatory article should not be ratified by his Most Christian Majesty, nor the stipulation aforesaid be adopted by Great Britain, the minister conducting the business shall give notice thereof to Congress, and not sign any treaty of peace until their pleasure be known."

The opposition to these resolutions was determined and violent in the extreme. Those who enlisted against them insisted that it was unreasonable and absurd to ask or expect that a war commenced for freedom, should be continued for the humble privilege of catching fish. Mr. Gerry, who had grown up among the fishermen of Massachusetts, replied: "It is not so much fishing," said he, "as enterprise, industry, employment. It is not fish merely which gentlemen sneer at; it is gold, the produce of that avocation. It is the employment of those who would otherwise be idle, the food of those
200 who would otherwise be hungry, the wealth of those who would otherwise be poor, that depend on your putting these resolutions into the instructions of your Minister."

The majority of Congress sustained Mr. Gerry's propositions, in fifteen divisions on calls of the ayes and noes, and rejected numerous amendments offered to modify them; but consented, finally, to the adoption of the single declaration, that "although it is of the utmost importance to the peace and commerce of the United States that Canada and Nova Scotia should be ceded, and more particularly that their equal common right to the fisheries should be guaranteed to them, yet, a desire of terminating the war has induced us not to make the acquisition of these objects an ultimatum on the present occasion."

This declaration appears to have been the result of concession and compromise; since Mr. Adams was instructed, in September, 1779, first, "that the common right of fishing should in no case be given up;" second, "that it is essential to the welfare of all these United States that the inhabitants thereof, at the expiration of the war, should continue to enjoy the free and undisturbed exercise of their common right to fish on the banks of Newfoundland, and all the other fishing-banks and seas of North America, preserving inviolate the treaties between France and the said States;" third, "that our faith be pledged to the several States that without their unanimous consent no treaty of commerce shall be entered into, nor any trade or commerce whatever carried on with Great Britain, without the explicit stipulation hereinafter mentioned. You are, therefore, not to consent to any treaty of commerce with Great Britain without an explicit stipulation, on her part, not to molest or disturb the inhabitants of the United States of America in taking fish on the banks of Newfoundland, and other fisheries in the American seas, anywhere, except within the distance of three leagues of the shores of the territories remaining to Great Britain at the close of the war, if a nearer distance cannot be obtained by negotiation. And in the negotiation you are to exert your most strenuous endeavours to obtain

a nearer distance in the Gulf of St. Lawrence, and particularly along the shores of Nova Scotia; as to which latter, we are desirous that even the shores may be occasionally used for the purpose of carrying on the fisheries by the inhabitants of these States."

These instructions—tediously minute and encumbered with repetitions—embody, as will be seen, the substance of Mr. Gerry's resolutions, with this essential difference—that the right to visit and freely use the fishing grounds was to be made an ultimatum to a treaty of commerce instead of a treaty of peace. Strangely enough, these instructions were revoked by Congress in July, 1781, though adopted after mature deliberation and in the spirit of concession. Whatever the motive of Congress, it was not communicated to Mr. Adams by that body, or by the Committee on Foreign Affairs, or by any individual member. Of this he complains with some asperity. In a letter to Robert R. Livingston he states the fact just mentioned, and remarks, that whether the act of neglect "was intended as a punishment to me, or with a charitable design not to lead me into temptation; whether it was intended as a punishment to the English for their insolence and barbarity; whether it was intended to prevent or remove suspicions of allies, or *the envy and green jealousy of co-patriots*, I know not." That, then, we finally secured the rights in question, was owing to the zeal of Mr. Adams and his associate commissioners, and not to the firmness or good faith of Congress.

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The first American vessel which was fitted for the Labrador fishery sailed from Newburyport towards the close of the last century.

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THE MACKEREL FISHERY.

[From the settlement of New England to the year 1852.]

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* * * The mackerel fishery at Cape Cod was held by the government of the colony of Plymouth as public property, and its profits were appropriated to public uses. The records show that it was rented, from time to time, to individuals, who paid stipulated sums, and that *a part of the fund to support the first free-school established by our Pilgrim fathers was derived from it.*

The proposition to found and endow a school of this description seems to have been made in 1663, but not to have been adopted until seven years later, when the general court, "upon due and serious consideration, did freely give and grant all such profits as might or should annually accrue to the colony," from this and the bass and herring fisheries, at the same place. In 1689, the "rent of the Cape fishery was added to the appropriation for magistrates' salary for that year."

* * * * *

The modes of catching the mackerel have varied with time, and the real or supposed changes in the habits of the fish. The original method was probably in seines, and in the night. John Prince and Nathaniel Bosworth petitioned the general court of the colony of Plymouth, in 1671, in behalf of themselves and their fellow-townsmen

of the "little and small place of Hull," within the jurisdiction of Massachusetts, to be allowed to continue to fish for mackerel at Cape Cod; and stated, among other reasons, that they and others of Hull were some of the first who went there; and that by "beating about by evening," and "travelling on the shores at all times and seasons," they had "*discovered the way to take them in light as well as in dark nights.*" This shows the practice of the early settlers. The court of Plymouth, however, in 1684, prohibited "the taking mackerel ashore with seines or nets," and ordered the forfeiture of these implements, and the vessels and boats, of persons who violated the decree.

* * * * *

THE HERRING FISHERY.

[From its commencement to the year 1852.]

We hear of this fishery among the Pilgrims. In 1641 they rented the herring *weir* at Plymouth for three years to three men, "who were to deliver the shares of fish, and receive one and sixpence per thousand for their trouble." * * *

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EXAMINATION OF THE BRITISH PRETENSIONS, AND OF THE DOCUMENTS WHICH SUPPORT THEM.

* * * * *

* * * As regards the *shore* fishery, for kinds usually dried, that in the region of Barrington is of itself a mine of wealth. Colonial fishermen, here and elsewhere along the coast, may be at home after every day's toil, and look out upon their American competitors in the offing, rejoicing in advantages of pursuing their avocation in open boats, and the consequent advantages of social life, and of fishing and of attending to their little farms between "slacks of the tide," in "blowzy weather," and when the fish "strike off."

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No. 117.—1853, *July 9: Circular addressed to the United States Directors of Ports.*

(Private and Confidential.)

DEPARTMENT OF STATE,
Washington, July 9, 1853.

SIR, The President has learned with much surprise the excitement which exists among our fellow citizens who are interested in the fisheries of British North America, and that they are apprehensive of molestation during the approaching fishing season. It is also stated in the public prints, that some of the American fishing vessels have already sailed, or are about to do so, armed and prepared to sustain their real or supposed rights by the employment of actual force. The President feels a deep interest in this important branch of national industry, and he is now anxiously engaged in negotiations respecting the conflicting interests of Great Britain and the

United States, which may be seriously impeded, as well as greatly complicated, by any actual collision between the subjects of Great Britain and the citizens of this country. The President, relying confidently on your intelligence and activity, is persuaded that you will use all the means in your power to diffuse a good understanding amongst those engaged in the fishery interest. You will warn them of the consequences of committing any unfriendly act during the progress of the pending negotiations, as any such act may postpone indefinitely the settlement of this vexatious question; and the result would be likely, in any event, to prove hazardous to themselves. Any armed resistance on the part of the fishing vessels, either singly or combined, would be an act of private hostility which can never receive any countenance from this Government.

You will omit nothing that your knowledge of the circumstances may suggest, and which our good faith towards a Power with which we are, and desire to remain, at peace demands, to prevent any rash or illegal movements intended or calculated to violate our obligations towards a friendly foreign Power, and our colonial neighbours.

I have been directed by the President to invite your prompt and personal attention to this matter, and to assure you that he places entire confidence in your active and judicious exertions to soothe the present irritation of popular feeling, excited in some instances, it is said, by unfounded reports of alleged violation of our national rights. Every good citizen should be solicitous to prevent any occurrence which may further excite that feeling. No violation of the colonial local law should be attempted, and their civil authorities and other officers should have due respect paid to them within their jurisdiction.

In case of insult to the American flag or of injury to our fishermen, you will request them to transmit the particulars, properly substantiated, to the Department of State instead of attempting to settle the difficulties themselves.

A naval force under the command of Commodore W. B. Shubrick, has been ordered to the fishing grounds to protect the American fishermen in their just rights.

Our hardy and useful seamen may rest assured while engaged in their lawful avocations all over the world, that no outrage or indignity which they may suffer will be permitted to go unnoticed, but that they will be protected to the utmost of its power by the Government of their country.

I am, &c.

W. L. MARCY.

No. 118.—1853, July 21: *Letter from Vice-Admiral Seymour to the Secretary to the Admiralty.*

"Cumberland," Halifax.

SIR, I have to acquaint you, for the information of the Lords Commissioners of the Admiralty, that Mr. Crampton, Her Majesty's Minister to the United States, arrived at Halifax on the night of the 7th instant, for the purpose of conferring with me on a notice he had received on the 2nd from Mr. Marcy, the Secretary of State at Washington, of the intention of the United States Government to send a force to the fisheries, and their desire that the possibility of any col-

lision in the present season should be avoided, by his receiving an assurance that no American vessel would be actually seized for fishing in the open bays; with regard to which the American Government placed a different construction on the terms of the Convention from that adopted by Great Britain. Mr. Crampton felt unable to give this assurance, but deemed it advisable at once to communicate with me on the subject.

2. The vessels employed under my orders in the Gulf have already instructions to exercise the utmost moderation: to prefer warning to seizure; and are told, as last year, to drive away, not to actually seize, beyond three miles from the shore, except in the last resort, in case of determined and contumacious encroachment in what are clearly bays of our provinces.

3. The American Government does not conceal that it has been induced to send a force to the British waters, by the clamour in the Eastern States. The measure has been preceded by an avowal on the part of many of the United States fishermen, that they are armed, and will defend themselves by force against our smaller cruizers; while no concession appears to have been contemplated on the part of the United States Government in exchange for that they profess to deem reasonable on ours, beyond expressing a disposition to avoid dwelling on disputed points in the orders they intended to give their commanders.

4. It is to be observed that the United States Government has deemed force necessary to protect their rights, when no complaint of the mode in which the Convention was enforced last year has, to my knowledge, been made, and no seizure or circumstance had taken place during the present season which justified the probability of a collision, except one may be brought on by their own people, or in consequence of an endeavour to resume the fisheries in the Bay of Chaleur, from which they were excluded last year; and the resumption would tend to the great disadvantage of the British fisheries around that bay.

5. Commodore Perry, in 1852, although not officially authorized to establish what were fishing-grounds open to his countrymen, did not attempt to urge that Chaleur was of that description, and did not himself enter the bay.

6. I am not authorized by my instructions to pursue a different course from that of last year; and I consider the moment when the United States are sending a force beyond any that can be necessary for their proposed object, ill-suited for concessions. Mr. Crampton did not dissent from this view of Mr. Marcy's proposal; and a message was therefore sent by electric telegraph on the 9th to his Secretary of Legation at Washington, that "I could not give the assurance requested; that a single United States ship of war on our own coasts could ascertain facts; and that more would be menace, and likely to produce mischief."

7. Messages by telegraph are necessarily short, and do not admit of much explanation; and I understand this message has given dissatisfaction at Washington. Mr. Crampton, on his return to the United States, for which he left Halifax in the "Medea" on the 14th, will be able to enter into such explanations as may satisfy the United States Government that I retain the same readiness to prevent collisions between the countries as I have always evinced, and to again

repeat that the orders under which Her Majesty's ships act are of the most moderate character: and Mr. Crampton has my permission to describe them more particularly, if he finds it desirable to do so.

8. At the same time there can be no doubt that the circumstances are of a grave nature, and that the presence of a foreign squadron to protect fishing-vessels, among which a disposition to offer forcible resistance to our small cruizers exists, involves contingencies which demand the earliest attention of Her Majesty's Government.

9. The "Princeton," "Fulton," and "Rescue," steamers, under the orders of Commodore Shubrick, were some days since on the point of leaving Portsmouth, in New Hampshire, for the fishing-grounds, and the "Decatur" corvette left Boston for the same destination on the 15th instant.

10. I have therefore deemed it necessary to make an addition to the vessels in the Gulf of St. Lawrence, which only consisted, at the time the American Government ordered this demonstration of force, of the "Basilisk" steam-sloop and two tenders; and as the "Leander" was at Quebec during Lord Ellesmere's absence at New York, I ordered Captain King down the river to Chaleur by electric telegraph on the 14th instant, and the "Devastation" will sail from Pictou [Pictou] to join Captain King on the 23rd.

11. I am very desirous to withdraw the "Leander" from this service, to replace her at Lord Ellesmere's disposal. I have not
203 hitherto deemed it expedient to move the "Cumberland," as the measure would indicate my thinking force indispensable; and
160 men are absent in tenders.

12. In considering the reply I should address to Mr. Marcy's proposal, I have had the advantage of unreserved communications with Mr. Crampton, who in no degree differed from the view I entertained, that any agreement to it required the concurrence of Her Majesty's Government; and as Mr. Crampton communicated his conversation with Mr. Marcy of the 2nd instant, to Her Majesty's Secretary of State for Foreign Affairs, by the mail which left Halifax on the 9th instant, I am in hopes that I may receive, early in August, any directions for my conduct which Her Majesty's Government may deem necessary; and in the interim I shall continue to use my best endeavours to prevent the affairs assuming additional difficulty.

I have, &c.

(Signed) G. F. SEYMOUR.

P. S. 9 A. M.—Since writing the above, I have received a telegraphic despatch from Mr. Crampton at Washington, to the effect that both the President and Mr. Marcy disclaim all idea of menace, and that Commodore Shubrick is especially enjoined to come to see me before going to the fishing-ground, which I hope may lessen the difficulties I anticipated from United States ships of war proceeding to the Gulf of St. Lawrence. The message is dated this day.

G. F. S.

No. 119.—1854, February 6: Letter from Mr. Crampton to the Earl of Clarendon (British Foreign Secretary).

(No. 29.)

WASHINGTON, February 6, 1854.

MY LORD, I have the honour to enclose the copy of a message from the President to the House of Representatives of the United States,

transmitting, in answer to a resolution of the House, a letter from the Secretary of the Navy, accompanied by copies of "the correspondence with, and various orders which have been issued during the past year to, the officers of the United States Navy commanding vessels on the coast of British North America, for the purpose of protecting the rights of fishing and navigation secured to citizens of the United States under Treaties with Great Britain."

Among these papers I would particularly call your Lordship's attention to the letter from Mr. Secretary Dobbin to Commodore Shubrick, dated the 14th of July last, because it professes to put Commodore Shubrick in possession of the past history of the controversies and Treaties between the United States and Great Britain in regard to the Fishery questions, as well as the views entertained by the present Administration of the United States.

I have already had occasion to remark upon the unsoundness of the arguments by which it has been attempted to invalidate the construction of the Convention of 1818, held by Her Majesty's Government in regard to the meaning of the word "bays" in the first Article; and from the confidence with which the American doctrine on this subject has been re-asserted, more especially in the President's message on the opening of the present Congress in December last, I had expected that some additional, if not more plausible, argument in its support would have been adduced.

Your Lordship will, however, perceive from a perusal of Mr. Dobbin's letter that nothing of the sort has been attempted.

Mr. Dobbin contents himself with stating that the American Government contend that American fishermen have a right to enter and fish in any of the bays, which indent the shores in question, "provided they never approach for the purpose of taking fish, within three marine miles of the coasts by which such bays are encompassed," without alleging any reason for so manifest a departure from the obvious meaning of the words of the Convention, or seeming to perceive that the adoption of his construction would render the insertion in the Convention, after the word "coasts," of the words "bays, creeks, and harbours," inexplicable, or leave them without any meaning whatever, a position inadmissible according to the invariably received canons of legal construction.

Appearing, however, to feel that so manifest a departure from the grammatical sense of the words of the provision in question requires some support, he endeavours to obtain it from a reference to the succeeding provision of the Convention, the true tenor of which it is evident he does not understand. This provision authorizes American fishermen "to enter such bays, creeks, and harbours," that is, those described in the preceding clause, "for the purpose of shelter, and repairing damages therein, of purchasing wood and obtaining water, and for no other purpose whatever;" and Mr. Dobbin states that the President is further of opinion that this clause precludes the idea that the Convention alludes to large open bays, because these would afford little better shelter than the open sea."

It is difficult to conceive under what impression the President can suppose that the word "bays" must therefore be restricted to narrow small bays and harbours. For it is clear that the permission contained in the proviso applies, for the purposes therein enumerated,

to all bays, creeks, or harbours whatever named in the Treaty, without any restriction as to distance from the shore; and consequently can have no reference whatever to their dimensions, or in any way modify the sense of the words of the preceding clause of this Article.

204 I have much satisfaction in calling your Lordship's attention to the letter from Mr. Louis A. Kimberley of the United States Navy, to Captain Whittle, dated August 30, 1853 (page 26), being one of the papers accompanying Mr. Dobbin's report, which contains an account of the humane and gallant exertions of that officer and his boat's crew, in saving the officers and crew of the British vessel "Cleopatra," under circumstances of great danger and difficulty. I have, &c.

(Signed)

JOHN F. CRAMPTON.

No. 120.—1855, May 5: *Letter from Lieutenant-Governor of New Brunswick to Lord John Russell (British Colonial Secretary).*

No. 38 GOVERNMENT HOUSE, FREDERICTON NEW BRUNSWICK,
May 5th, 1855.

MY LORD: Although the Treaty recently concluded between Her Majesty and the United States of America has been for some months in full operation, so far as it affects the commercial intercourse between this Province and the United States, yet, as the fishing season of last year was at an end before this Treaty was carried into effect, and the season for the present year has not commenced, that part of the Treaty which relates to the fisheries has hitherto been, and still is practically in abeyance.

The period however is now rapidly approaching, when the fishermen of this Province will recommence operations; and I do not doubt that large numbers of the United States fishermen will hasten to avail themselves of the rights, which they possess under the Treaty to which I have referred.

The readiness with which an Act was passed by the Provincial Legislature to carry this Treaty fully into effect in this Province is of itself a sufficient proof that there is no disposition here to exclude the citizens of the United States from the practical enjoyment of all the rights conferred on them by the Treaty; and I have no ground whatever for believing that the fishermen of the Province are inclined to obstruct the full exercise of these rights, provided that the Laws and Regulations, by which they are themselves bound, are likewise observed by the fishermen from the United States.

But should the United States fishermen from ignorance or from any other cause violate or disregard these Laws and Regulations, a different feeling might probably arise, and there would be reason to apprehend dissatisfaction among the fishermen of this Province, and a renewal of misunderstandings and disputes between Her Majesty's subjects and the citizens of the United States, the prevention of which, as appears from the preamble of the Treaty, was one of the principal objects of that Treaty.

The general statutory regulations respecting the fisheries of New Brunswick are contained in one Act, C. 101. Title. 22. of the Revised

Statutes Vol. I, page 262—Your Lordship will observe that the 6th sectn. of this Act empowers the Governor in Council to make Regulations for the management or protection of the fisheries: this power however has only been exercised in one instance, viz. for the regulation of the fisheries belonging to the County of Northumberland.

But by C. 64. Title 8. of the Revised Statutes Vol. I. page 147, the Justices in Sessions of each county in the Province are invested with the power to make Regulations "for the regulation of the fisheries and of seines, nets and fish weirs within the harbours as well as rivers belonging to their respective counties," and Regulations of this nature have frequently been issued, and are now in existence, and have the force of law.

I am not as yet in a position to furnish your Lordship with the particulars of all these Regulations, but I hope to be able by the next mail to send to your Lordship a complete set of all the Laws, Byelaws and Regulations, respecting the fisheries of this Province.

It is impossible to expect that either the fishermen or even the Government of the United States should be aware of the nature of the local Regulations on this subject, even if they are cognisant of the provisions of Provincial Statutes; and I therefore take the liberty of submitting to your Lordship whether it might not be desirable that I should receive instructions to forward to Her Majesty's Minister at Washington, copies of these Laws and Regulations as well as copies of any other Regulations of a similar character, which may be hereafter issued.

I have the honor to be your Lordship's most obedient humble servant

J. H. T. MANNERS SUTTON

Right Honourable Lord John Russell. M. P. &c &c &c

205 No. 121.—1855, May 25: *Letter from Lord John Russell (British Colonial Secretary) to Lieutenant-Governor of New Brunswick.*

DOWNING STREET, 25th May 1855.

SIR, I beg to acknowledge the receipt of your despatch No. 38 of the 5th. instant and to transmit to you five copies of the Laws and Regulations in force in the British North American Provinces with reference to the Fisheries.

I concur in your opinion that it is very desirable that these Laws should be communicated to Her Majesty's Minister at Washington, in the event of that Officer not being already in possession of them; and it will further be desirable that you should transmit to Mr. Crampton and also to this Department copies of any other Regulations respecting the Fisheries which may have been framed subsequently to those in this collection, or may hereafter be framed.

I have the honor to be Sir,

Your most obedient humble servant,

J. RUSSELL.

Lieut: Governor the Honble. J. H. T. MANNERS SUTTON

&c &c &c

No. 122.—1855, June 16: *Letter from Mr. Manners Sutton (Lieutenant-Governor of New Brunswick) to Mr. Crampton (British Minister at Washington).*

Private

GOVT HOUSE FREDERICTON N. BRUNSWICK

June 16th 1855.

SIR, I have the honor to inform yr. Ex: that I have received instructions from H.M's Govt to transmit to yr Ex, copies of all the laws & regulations, whether statutory or local, which affect the outside fisheries, & the fisheries in the harbors, of this province.

The statutory regulations are contained in one Act: ch: 101—title 22: of the Revised Statutes of New Brunswick.—

The local regulations, are of two different kinds—1stly those, which, under the provisions of the 6th secn of the Act: referred to, have been made by the Governor in Council; & 2ly those which the Justices in Session of the respective counties are empowered, by the Provincial Act—ch: 64 title 8: of the Revised Statutes to make for the govt of fisheries within the rivers & harbors of the several counties.—

The local regulations of the last mentioned description, altho' issued in many counties, & having the force of law, were not included in the collection, published from H.M's Stationery Office in 1853, because, as appears from a despatch from Sir E. Head to the Duke of Newcastle, which is printed in page 37 of that paper,—of which yr Ex no doubt has a copy,—these regulations were at the time considered to be immaterial, inasmuch as they do not affect the outside fisheries.—But yr Ex: will observe that they do, in some instances at least, affect the fisheries in the harbors of this province, which are now thrown open to the fishermen of the U.S. as well as the river fisheries, which are reserved to H.M's subjects.—

Considerable anxiety is felt & expressed here, lest the rules, which have been deemed necessary for the preservation of the fisheries of the province, & by which the fishermen of the province are themselves bound, may be disregarded by those who are now admitted to an equal participation with them in the fisheries;—but yr Ex: may feel assured that there is no disposition, either on the part of the Provincial Authorities or of the fishermen themselves to deprive the citizens of the U.S. of the full benefit of that Article of the Treaty of Reciprocity, by which the U.S. fishermen enjoy in common with H.M's subjects the right of fishing both on the outside fishing grounds & in the harbors of this province.—

I have &c

(Signed)

J. H. T. MANNERS SUTTON

J. F. CRAMPTON ESQRE

&c &c &c

No. 123.—1855, June 27: *Letter from Mr. Crampton to Mr. Manners Sutton (the Lieutenant Governor of New Brunswick).*

WASHINGTON June 27th 1855

SIR, I have to acknowledge the receipt of Your Excellency's despatch of the 16th instant, respecting the laws and regulations which affect the fisheries of the Province of New Brunswick. I have, to-

206 day, communicated with the Secretary of State of the United States upon this subject, and suggested the expediency of adopting some means of making American citizens, concerned in the prosecution of the fisheries, acquainted with these laws and regulations.

Mr. Marcy entirely concurs with me in the opinion that such a measure would be calculated to prevent the occurrence of any misunderstanding on the part of American fishermen, who may now resort to New Brunswick for the purpose of exercising their newly acquired rights under the Treaty of Reciprocity, and proposes that, after the documents—with which Your Excellency is about to furnish me—shall have been examined by him, and shall have been found, as he doubts not will be the case, to contain no provisions inconsistent with the full enjoyment of the American citizens of the rights of fishing secured them by the Treaty, and to direct the “Collectors of the United States’ Customs” to furnish copies of the same to the masters of all the vessels clearing from American ports to the British fisheries.

I will observe that I am not in possession of the collection of documents published from Her Majesty’s Stationery Office in 1853, to which Your Excellency alludes, and that I should consequently feel obliged, should your Excellency be so kind as to furnish me with a copy of the collection.

I have, &c.,

(Signed)

JOHN F. CRAMPTON.

H.E. The Honble J. H. T. MANNERS SUTTON

&c &c &c

No. 124.—1855, June: *Letter from Mr. Crampton to the Earl of Clarendon (British Foreign Secretary).*

No. 129.

WASHINGTON June 1855

MY LORD—I have the honour to enclose the copy of a letter which I have received from the Lieutenant Governor of New Brunswick regarding the laws & local regulations, affecting the fisheries of that Province; & I have also the honour to enclose a copy of my reply to His Excellency’s communication.—

Your Lordship will perceive that it is Mr. Manners’ Sutton’s object, to prevent the occurrence of disputes between provincial & American fishermen; arising out of violations, by the latter, of those laws & local regulations by which the fishermen of New Brunswick are bound.—

I have thought this a subject of sufficient importance to bring it under the attention of the Government of the United States, with a view to the adoption of such measures as may, as much as possible, prevent the occurrence of any misunderstanding on the part of American citizens, who, in the exercise of their newly acquired right under the Reciprocity Treaty, may resort to the fisheries of New Brunswick.—

I found every disposition on Mr. Marcy’s part to concur with the British provincial authorities in the adoption of any measures of precaution by which the chances of collision between the fishermen

of the two countries may be diminished; & with this view it is proposed that the masters of American fishing vessels, clearing for the fisheries of New Brunswick, shall be furnished with printed copies of the laws & regulations in question it being understood that these shall contain nothing inconsistent with the unrestricted exercise, by American citizens of the rights secured to them by the Reciprocity Treaty.—

I have thought it right to bring this matter under the immediate attention of the Governor General of Canada, & the Lieutenant-Governors of Nova Scotia, & Prince Edward Island, with a view to the adoption of a similar arrangement, in regard, to the fisheries of those provinces, to that now proposed, in regard, to the fisheries of New Brunswick;—& I have the honour to enclose herewith the copy of a letter which I have addressed to their Excellencies for that purpose.—

I have the honour to be with the highest respect—My Lord,
Your Lordship's most obedient humble servant

JOHN F CRAMPTON

The Right Honbl. The EARL OF CLARENDON—K.G.

&c &c &c

No. 125.—1855, June 28: *Letter from Mr. Crampton to the Governor-General of Canada.*

WASHINGTON, June 28, 1855.

SIR, With a view to preclude the possibility of misunderstanding on the part of citizens of the United States who may in the exercise of the rights secured to them by the Reciprocity Treaty resort to the fisheries on the coasts of Canada, I have the honour to suggest
207 to your Excellency that I should be furnished with authentic copies of such laws and local regulations as may have been adopted by the Legislature or other competent authority of the Provinces of Canada, for the preservation of the fisheries in harbours for similar purposes, in order that the same may be communicated to the Government of the United States with a view to their being made known by them to American citizens concerned in the fisheries. Copies of the laws and regulations of the Province of New Brunswick relating to the fisheries have already been communicated to me by the Lieutenant-Governor of that province, and I find every disposition on the part of the Government of the United States to co-operate with the British provincial authorities, in such measures as may diminish the chance of disputes arising between the fisheries of the two countries.

With this view it is proposed by the American Secretary of State to instruct United States' Collectors of Customs to furnish printed copies of the laws and regulations in question to the masters of all vessels clearing from American ports to the British fisheries. It is of course understood that these laws and regulations shall contain no provisions at variance with the stipulations of the Reciprocity Treaty by which the right of participating in the British fisheries is secured to American citizens.

I have, &c.,

JOHN F. CRAMPTON.

No. 126.—1855, July 12: *Circular addressed by Mr. Marcy, United States Secretary of State to the Collector of Customs.*

CH. H. PEASLEE Esqre
Collector of the Customs
Boston.

Circular DEPARTMENT OF STATE, Washington, July 12, 1855.

SIR, It is understood that there are certain Acts of the British North American Colonial Legislatures, and also, perhaps, Executive Regulations, intended to prevent the wanton destruction of the fish which frequent the coasts of the Colonies and injuries to the fishing thereon. There is nothing in the Reciprocity Treaty between the United States and Great Britain which stipulates for the observance of these regulations by our fishermen; yet, as it is presumed, they have been framed with a view to prevent injuries to the fisheries, in which our fishermen now have an equal interest with those of Great Britain, it is deemed reasonable and desirable that both should pay a like respect to those regulations, which were designed to preserve and increase the productiveness and prosperity of the fisheries themselves. It is, consequently, earnestly recommended to our citizens to direct their proceedings accordingly. You will make this recommendation known to the masters of such fishing vessels as belong to your port, in such manner as you may deem most advisable.

I am, &c.,

(S) W. L. MARCY.

It is believed that the principal regulations referred to above are the following, from the Revised Statutes of New Brunswick, Vol. I, Title 22, chap. 101:—

7. The Wardens of any county shall, when necessary, mark out and designate in proper positions "gurry grounds" putting up notices thereof, describing their limits and position, in the several school houses and other most public places in the parish where the said gurry grounds are marked out, publishing the like notice in the "Royal Gazette"; and no person after such posting and publication shall cast overboard from any boat or vessel the offal of fish into the waters at or near the said parish at any place except the said gurry grounds.

12. Within the parishes of Grand Manan, West Isles, Campo Bello, Pennfield, and St. George, in the County of Charlotte, no seine or net shall be set across the mouth of any haven, river, creek, or harbour, nor in any place extending more than one-third the distance across the same, or be within 40 fathoms of each other, nor shall they be set within 20 fathoms of the shore at low water mark.

15. No herrings shall be taken between the 15th of July and 15th October in any year, on the spawning ground at the southern head of Grand Manan, to commence at the eastern part of Seal Cove, at a place known as Red Point; thence extending westerly along the coast and around the southern head of Bradford's Cove, about five miles, and extending one mile from the shore; all nets or engines used for catching herring on the said ground within that period shall be seized and forfeited, and every person engaged in using the same shall be guilty of a misdemeanour and punished accordingly

208 No. 127.—1855, August 7: *Letter from Mr. Crampton to the Earl of Clarendon.*

No. 163.

WASHINGTON August 7th 1855.

MY LORD, With reference to my despatch No 129 of the 28th of June last, stating to your Lordship the measures which I had taken for effecting such an arrangement with the Government of the United

States as would tend to prevent the occurrence of disputes between American and British fishermen, in the waters of the North American Colonies, by securing due respect by American fishermen, to such local regulations as had been established by the provincial authorities for the preservation of the fisheries, I have now the honour to inclose the copy of a circular instruction which has been addressed by Mr. Marcy to the Collectors of Customs of the United States with a view to the attainment of this object.—

Your Lordship will observe that Mr. Marcy, while he strongly recommends to American citizens to respect the local regulations in question, as calculated to preserve the fisheries in which they have a joint interest with British subjects—states nevertheless that, “there is nothing in the Reciprocity Treaty between the United States and Great Britain which stipulates for the observance of such regulations by the United States.”—

I cannot but regret that Mr. Marcy has expressed this view of the matter, which I apprehend may give rise to misunderstanding; for it is evident that, were it admitted, that in the exercise of a privilege, to which both have a common right, American citizens are to be merely recommended by their Government to conform to certain regulations, which British subjects are compelled by legal penalties to respect, the latter would have just grounds for dissatisfaction.—Nor can I concur with Mr. Marcy in the principle upon which his view of the subject is based;—for it appears to me that American citizens, while within British jurisdiction would be subject to the penalties attached to the infringement of all legal regulations, local, as well as general, by which British subjects are bound:—and not less to those affecting the fisheries, provided always, that these latter did not trench upon the rights secured by treaty to citizens of the United States.—Did any such law or police regulation exist, or were any such to be enacted, the Government of the United States would no doubt be justified in demanding its abrogation;—but the principle now enounced by Mr. Marcy extends much further, for it goes to exonerate American citizens from the penalties attaching to the violation of all British laws and regulations, however unobjectionable, now affecting, or which may hereafter affect, the British fisheries; and leave their observance to depend solely on the good feeling or good sense of the individuals who may at any time happen to be engaged in those fisheries.—

I have the honour to be with highest respect, My Lord,

Your Lordship's most obedient humble servant

JOHN F CRAMPTON

The Right Honble The EARL OF CLARENDON KG.

No. 128.—1855, October 11: *Letter from the Earl of Clarendon to Mr. Crampton.*

No. 120.

FOREIGN OFFICE October 11, 1855

SIR, Her Majesty's Government have had under their consideration your despatch No. 163, of the 7th of August last, enclosing copy of a Circular addressed by the United States Secretary of State to

the Collector of Customs of the United States respecting the observance by American fishermen of such local regulations as have been established by the Colonial Authorities for the protection of the fisheries, and I have to state to you that Her Majesty's Government entirely concur in the view which you have taken of Mr. Marcy's Circular.

By the Reciprocity Treaty between this country and the United States American citizens are admitted to the benefit of certain fisheries carried on in British waters in common with Her Majesty's subjects. It follows as a necessary consequence that such American citizens are bound to observe the existing laws and regulations established for the conduct of such fisheries by which British subjects are bound.

This is necessarily implied in the very words of the Article of the Treaty, but independently of all agreement, it would follow, on general principles, that American fishermen pursuing their occupation within British territory would be bound to observe the local laws and regulations in like manner as all foreigners are bound to observe the municipal laws of the country in which they are resident.

It is indeed literally true, as Mr. Marcy states, that there is no *express* stipulation in the Reciprocity Treaty which binds American citizens to observe the British Colonial Regulations, but the obligation to do so did *not require a stipulation*; it attaches upon American citizens as soon as they claim the benefit of the Treaty.

Her Majesty's Government are of opinion that the expressions adopted by Mr. Marcy are much to be regretted as they are calculated to mislead and to be a fruitful source of disputes and opposition to British authority, and you will therefore take an early opportunity of urging upon Mr. Marcy the expediency of some explanation being given by the United States, to prevent that misapprehension, to which the language of the Circular is undoubtedly likely to give rise.

I am, with great truth and regard, Sir,
Your most obedient humble servant,

CLARENDON

JOHN F. CRAMPTON Esqr
&c &c &c

No. 129.—1856, March 28: Letter from Mr. Marcy to Mr. Crampton.

Private.

WASHINGTON, March 28. /56

SIR: I enclose a Circular to be issued to our fishermen modified, as I think, so as to conform to your suggestions on that subject. I submit it to you with a request to return it with such remarks thereon as you may see fit to make.

Yours,

W. L. MARCY

JOHN F. CRAMPTON, Esqre.,
&c., &c., &c.

No. 130.—1856, *March 28: Circular, Mr. Marcy to Mr. Peaslee (Collector of Customs at Boston).*

DEPARTMENT OF STATE,
Washington, March 28, 1856.

To CHARLES H. PEASLEE, Esq.,
Collector of the Customs, Boston.

SIR: It is understood that there are certain Acts of the British North American Colonial legislatures, and also, perhaps, Executive Regulations, intended to prevent the wanton destruction of the fish which frequent the coasts of the Colonies, and injuries to the fishing thereon. It is deemed reasonable and desirable that both United States and British fishermen should pay a like respect to such laws and regulations, which are designed to preserve and increase the productiveness of the fisheries on those coasts. Such being the object of these laws and regulations, the observance of them is enjoined upon the citizens of the United States in like manner as they are observed by British subjects. By granting the mutual use of the inshore fisheries neither party has yielded its right to civil jurisdiction over a marine league along its coast. Its laws are as obligatory upon the citizens or subjects of the other as upon its own. The laws of the British Provinces not in conflict with the provisions of the Reciprocity Treaty would be as binding upon citizens of the United States within that jurisdiction as upon British subjects. Should they be so framed or executed as to make any discrimination in favour of the British fisherman, or to impair the rights secured to American fishermen by that Treaty, those injuriously affected by them will appeal to this Government for redress. In presenting complaints of this kind, should there be cause for doing so, they are requested to furnish the Department of State with a copy of the law or regulation which is alleged injuriously to affect their rights or to make an unfair discrimination between the fishermen of the respective countries, or with a statement of any supposed grievance in the execution of such law or regulation, in order that the matter may be arranged by the two Governments. You will make this direction known to the masters of such fishing vessels as belong to your port, in such manner as you may deem most advisable.

I am, Sir, respectfully, Your obedient servant,

W. L. MARCY.

It is believed that the principal regulations referred to above are the following, from the Revised Statutes of New Brunswick, vol. 1, title 22, chapter 101:

7. The wardens of any county shall, when necessary, mark out and designate, in proper positions, "gurry grounds," putting up notices thereof, describing their limits and position, in the several school houses, and other most public places in the parish where the said gurru grounds are marked out, publishing the like notice in the Royal Gazette; and no person, after such posting and publication, shall cast overboard from any boat or vessel the offal of fish into the water at or near the said parish at any place except the said gurru grounds.

12. Within the parishes of Grand Manan, West Isles, Campo Bello, Pennfield, and Saint George, in the county of Charlotte, no seine or net shall be set across the mouth of any haven, river, creek, or harbour, nor in such place extending more than one-third the distance across the same, or be within forty fathoms of each other, nor shall they be set within twenty fathoms of the shore at low-water mark.

15. No herrings shall be taken between the 15th day of July and the 15th of October in any year, on the spawning ground at the head of Grand Manan, to commence at the eastern part of Seal Cove, at a place known as Red Point, thence extending westerly along the coast and around the southern head of Bradford's Cove, about five miles, and extending one mile from the shore; all nets or engines used for catching herring on the said ground within that period shall be seized and forfeited, and every person engaged in using the same shall be guilty of a misdemeanour, and punished accordingly.

No. 131.—1856, April 24: *Letter from Mr. Marcy to Mr. Crampton.*

DEPARTMENT OF STATE,
Washington, 24th April, 1856.

SIR: I have the honour to communicate printed copies of a letter of the 28th ultimo from this Department to the Collector of the Customs at Boston, relative to the observance by the fishermen of the United States of the laws of the British Provinces, enacted for the preservation of the fish on the coasts thereof. Copies of the letter have been sent to the Collectors of the Customs at other principal ports of this country from which vessels may proceed for the purpose of fishing in that quarter, and the Collectors have all been instructed to furnish the master of every such vessel with a copy of the letter.

I avail myself of this occasion, Sir, to offer to you a renewed assurance of my very high consideration.

W. L. MARCY.

JOHN F. CRAMPTON, ESQRE,
&c. &c. &c.

No. 132.—1856, April 25: *Letter from Mr. Crampton to the Earl of Clarendon.*

No. 104

WASHINGTON April 25th 1856

MY LORD: I did not fail, in obedience to the instructions contained in your Lordship's despatch No 220 of the 11th of October last, to take an opportunity of calling Mr. Marcy's attention to an objectionable expression contained in the Circular Letter which had in July last been issued by the Department of State, by which American fishermen who should repair to the British fisheries in North America were recommended to conform themselves to such laws and regulations as have been adopted by the Provincial authorities for the preservation of the fisheries.

The expression is as follows—"There is nothing in the Reciprocity Treaty between the United States and Great Britain which stipulates for the observance of these (the above-named) regulations."

I pointed out to Mr. Marcy the ill-effects which might arise from such a declaration by the Government of the United States. I remarked that it would be inferred that the observance by American fishermen of the laws and regulations in question would be discretionary only, while the observance of the same laws and regulations would be enforced on British fishermen by legal penalties; and I added that the Provincial Magistrates would have no choice but to enforce the existing laws whatever they might be upon all persons without distinctions; And that consequently collision or unpleasant

discussions would be sure to arise, were American fishermen to be left under the impression that they were not, while within British jurisdiction, equally amenable with British subjects to the British laws and regulations affecting the fisheries, as well as in every other respect.

I admitted, I said, that, if any of those laws were framed or executed so as to make an unfair discrimination in favour of British fishermen, or directly or indirectly to deprive American fishermen of the privileges secured to them by the Reciprocity Treaty, this would afford just ground for representation to Her Majesty's Government by the Government of the United States. But I called Mr. Marcy's attention to the danger of allowing to each individual the right to judge for himself whether a regulation was in conformity with the provisions of the Treaty or not, and at once to object to observe it.

Mr. Marcy appeared entirely to concur in this view of the matter, and said that he would cause such an alteration to be made in the wording of the circular instruction to be issued for the approaching fishing season as would obviate the objection which I had put forward.

211 Accordingly a few days after my conversation with Mr. Marcy I received from him the private note, of which I have the honor to enclose a copy containing an amended draft of the instruction also enclosed herewith.

Availing myself of the request contained in Mr. Marcy's note to return it with such remarks as I might think fit, I took the liberty of suggesting the insertion of the passage which I have marked with red ink in the copy, as being necessary to point out more clearly than Mr. Marcy's amended draft appeared to me to have done the liability of American fishermen in British waters to British jurisdiction.

Receiving no rejoinder to my note I lately reminded Mr. Marcy of the matter, when he told me that he had adopted my suggestion, although he had somewhat altered the phraseology of the passage I had proposed to insert, and he added that he would send me copies of the instructions so amended.

These I have received, and have the honor to enclose with a copy of the note from Mr. Marcy which accompanied them—

I have underlined in red ink the passage which Mr. Marcy has substituted for that which I suggested.

Although the instruction is now in general more satisfactory inasmuch as it admits that the laws of each country within its own jurisdiction are as obligatory upon the citizens or subjects of the other as upon its own, Your Lordship will remark that Mr. Marcy has taken the opportunity of introducing a phrase by which the extent of the maritime jurisdiction of each country is defined in conformity with the recently adopted American doctrine that the civil jurisdiction of a country *in no case extends further than* "a marine league along its coast."

I say the recently adopted doctrine, for although it is certain that the American Executive has asserted this doctrine in the discussion which preceded the Reciprocity Treaty with Great Britain, and that they are now maintaining it in a controversy with the Spanish Government respecting the search of the American steamer "El Dorado" by the Spanish frigate "Ferrolana," it is equally certain that this doctrine is at variance with that laid down by eminent American

jurists (see Chancellor Kent's Commentaries page 32, 7th edition and Wheaton's Elements of the Law of Nations chap. 4. § 6.), that it has never directly or indirectly received the countenance of Congress, that its unqualified admission is firmly resisted by the Government of Spain, and that it has not, unless I am mistaken been ever acquiesced in by Her Majesty's Government.

I have the honour to be, with the highest respect, My Lord,

Your Lordship's most obedient humble servant,

JOHN F CRAMPTON

The Right Hon.^{ble} The EARL OF CLARENDON K.G.—

&c &c &c.

[Mr. Marcy's "private note" mentioned in the foregoing letter appears above as No. 129 under date 28th March, 1856.

A copy of the "instruction" with Mr. Crampton's amendment written by him in red ink (shown in the print in italics) is the document next hereinafter printed.

Mr. Marcy's altered instruction appears *ante* under date 28th March, 1856. Where Mr. Crampton speaks of the passage "which Mr. Marcy has substituted for that which I suggested" he refers to the following words which were underlined by him in the copy enclosed to the Earl of Clarendon:—

By granting the mutual use of the inshore fisheries neither party has yielded its right to civil jurisdiction over a marine league along its coast. Its laws are as obligatory upon the citizens or subjects of the other as upon its own. The laws of the British Provinces not in conflict with the provisions of the reciprocity treaty would be as binding upon citizens of the United States within that jurisdiction as upon British subjects.]

[1856, March 28: Circular enclosed in above Letter.]

DEPARTMENT OF STATE,
Washington March 28. 1856

SIR, It is understood that there are certain acts of the British North American Colonial Legislature and also perhaps Executive Regulations intended to prevent the wanton destruction of the fish which frequent the coast of the Colonies and injuries to the fishing thereon.

It is deemed reasonable and desirable that both United States and British fishermen should pay a like respect to such laws and regulations which are designed to preserve and increase the productiveness of the fisheries on those coasts.

Such being the object of these laws and regulations, the observance of them is enjoined upon citizens of the United States in like manner as they are observed by British subjects.

American citizens would indeed, within British jurisdiction, be liable equally with British subjects to the penalties prescribed by law for a wilful infraction of such regulations, but nevertheless should these be so framed or executed as to make any discrimination in favour of the British fishermen or to impair the rights secured to American fishermen by the Reciprocity Treaty, those injuriously affected by them will appeal to this Government for redress; In

prosecuting complaints of this kind, should there be cause for doing so, they are requested to furnish the Department of State with a copy of the law or regulation which is alleged to be injurious to affect their rights, or to make an unfair discrimination between the fishermen of the respective countries or with a statement of any supposed grievance in the execution of law or regulation, in order that the matter may be arranged by the two Governments.

212 You will make this direction know to the masters of such fishing vessels as belong to your port, in such manner as you may deem most advisable.

C. H. PEASLEE Esqr.

Collector of Customs Boston.

No. 133.—1856, August 8: *Extracts from Commissioners' Journal showing Awards under the Convention between Her Britannic Majesty and United States of February 8, 1853.*^a Transmitted to the United States Senate, August 8, 1856.

SCHOONER WASHINGTON.

[Construction to the Treaty of 1818 relative to Fisheries on the Coasts of North America.]

The clause in said treaty in which the United States renounced the liberty "to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of his Britannic Majesty's dominions of North America," held not to include the Bay of Fundy.

The Bay of Fundy is held to be an open arm of the sea, so as not to be subject to the exclusive right of Great Britain as to fisheries.

The schooner Washington, while employed in fishing in the Bay of Fundy, ten miles distant from the shore, was seized by her Britannic Majesty's cruiser, and taken to Yarmouth, in Nova Scotia, and condemned, on the ground of being engaged in fishing in British waters, in violation of the provisions of the treaty relative to the fisheries, entered into between the United States and the British government on October 20, 1818.

Claim of damage was made before the commission, on the ground that the seizure was made in violation of the provisions of that treaty and of the law of nations.

Thomas, Agent and Counsel for the United States.

Hannen, Agent and Counsel for Great Britain.

Upham, United States Commissioner:

In 1843 the fishing schooner Washington was seized by her Britannic Majesty's cruiser when fishing broad, as it is termed, in what is called the Bay of Fundy, ten miles from the shore.

This seizure was justified on two grounds:

1. That the Bay of Fundy was an indentation of the sea, extending up into the land, both shores of which belonged to Great Britain, and that for this reason she had, by virtue of the law of nations, the

^a Under this Convention, Mr. Hornby was appointed by the British Government as its Commissioner and Mr. Upham by the United States, Mr. Joshua Bates was agreed upon as Umpire.

exclusive jurisdiction over this sheet of water, and the sole right of taking fish within it.

2. It was contended that, by a fair construction of the treaty of October 20, 1818, between Great Britain and the United States, the United States had renounced the liberty heretofore enjoyed or claimed, to take fish on certain bays, creeks, or harbours, including, as was contended, the Bay of Fundy and other similar waters within certain limits described by the treaty.

The article containing this renunciation has various other provisions, supposed to throw some light on the clause of renunciation referred to. I therefore quote it entire, which is as follows:

Whereas differences have arisen respecting the liberty claimed by the United States to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of his Britannic Majesty's dominions in America, it is agreed that the inhabitants of the United States shall have, in common with the subjects of his Britannic Majesty, the liberty to take fish on certain portions of the southern, western, and northern coast of Newfoundland, and also on the coasts, bays, harbors, and creeks from Mount Jolly, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of said described coasts, until the same become settled. And the United States renounce the liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbors of his Britannic Majesty's dominions in America not included within the above-mentioned limits: *Provided, however*, that the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purposes whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

The first ground that has been taken in the argument of this case is that, independent of this treaty, Great Britain had the exclusive jurisdiction over the Bay of Fundy, as part of her own dominions, by the law of nations. As this matter, however, is settled by the treaty, the position seems to have no bearing on the case, except as it may tend to show that the United States would be more likely to renounce the right of fishing within limits thus secured to Great Britain by the law of nations, than if she had no such claim to jurisdiction.

But on this point we are wholly at issue. The law of nations does not, as I believe, give exclusive jurisdiction over any such large arms of the ocean.

Rights over the ocean were originally common to all nations, and they can be relinquished only by common consent. For certain purposes of protection and proper supervision and collection of revenue the dominion of the land has been extended over small enclosed arms of the ocean, and portions of the open sea immediately contiguous to the shores. But beyond this, unless it has been expressly relinquished by treaty, or other manifest assent, the original right of nations still exists of free navigation of the *ocean*, and a free right of each nation to avail itself of its common stores of wealth or subsistence—(Grotius, Book 2, chap. 2, sect. 3; Vattel, Book 1, chap. 21, secs. 282 and 283.)

Reference has been made to the Chesapeake and Delaware bays, over which the United States have claimed jurisdiction, as cases militating with this view; but those bays are the natural outlets and enlargement of large rivers, and are shut in by projecting headlands, leaving

the entrance to the bays of such narrow capacity as to admit of their being commanded by forts, and they are wholly different in character from such a mass of the ocean water as the Bay of Fundy.

There is no principle of the law of nations that countenances the exclusive right of any nation in such arms of the sea. Claims, in some instances, have been made of such rights, but they have been seldom enforced or acceded to.

This is well known to be the prevailing doctrine on the subject in America, and it would have been surprising if the United States negotiators had relinquished, voluntarily, the large portions of the ocean now claimed by Great Britain as her exclusive right, under the provisions of this treaty, on the ground that it was sanctioned by the law of nations.

It would be still more surprising if it had been thus relinquished, after its long enjoyment by the inhabitants of America *in common*, from the time of their first settlement down to the revolution, and from that time by the United States and British provinces, from the treaty of 1783 to that of 1818.

I see no argument, in the view which has been suggested, to sustain the right of exclusive jurisdiction claimed by England.

2. I come now to the consideration of the *second* point taken in the argument before us, which is that, by the treaty of 1818, the United States *renounced* the right of taking fish within the limits now in controversy. This depends on the construction to be given to the article of the treaty which I have already cited.

In the construction of a treaty admitting of controversy on account of its supposed ambiguity or uncertainty, there are various aids we may avail ourselves of in determining its interpretation.

"It is an established rule," says Chancellor Kent, "in the exposition of statutes"—and the same rule, I may add, applies to treaties—"that the intention of the lawgiver is to be deduced from a view of the whole and of every part of a statute, taken and compared together, and the real intention, when accurately ascertained, will always prevail over the literal sense of the terms."

He further says:

When the words are not explicit, the intention is to be collected from the occasion and the necessity of the law, from the mischief felt and the remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and discretion—(1 Kent's Com., 462.)

Now there are various circumstances to be considered in connexion with the treaty, that will aid us in coming to a correct conclusion as to its intent and meaning.

These circumstances are the entire history of the fisheries: the views expressed by the negotiators of the treaty of 1818, as to the object to be effected by it; the subsequent practical construction of the treaty for many years; the construction given to a similar article in the treaty of 1783; the evident meaning to be gained from the whole article taken together, and from the term "*coasts*," as used in the treaty of 1818, and other treaties in reference to this subject.

All these combine, as I believe, to sustain the construction of the provisions of the treaty as contended for by the United States.

It will not be contested that the inhabitants of the territory now included within the United States, as a matter of history, have had generally the common and undisturbed right of fishery, as now

claimed by them, from the first settlement of the continent down to the time of the revolution, and that it was subsequently enjoyed in the same manner, in common, by the United States and the British Provinces, from the treaty of 1783 down to the treaty of 1818.

This right was based originally on what Dr. Paley well regards, in his discussion of this subject, "as a general right of mankind;" and the long and undisturbed enjoyment of it furnishes just ground for the belief that the United States negotiators would be slow in relinquishing it.

They certainly would not be likely to relinquish more than was asked for, or what the United States negotiators a few years before contended was held by the same tenure as the national independence of the United States, and by a perpetual right.

In the negotiation of the treaty of peace in 1814, no provision was inserted as to the fisheries. Messrs. Adams and Gallatin notified the British commissioners that "the United States claimed to hold the right of the fisheries by the same tenure as she held her independence; that it was a perpetual right appurtenant to her as a nation, and that no new stipulation was necessary to secure it."

214 The negotiators on the part of the British Government did not answer this declaration, or contest the validity of the ground taken.

Afterwards, in 1815, the consultations had between Lord Bathurst and Mr. Adams, the then Secretary of State, relative to the fisheries, show on what grounds negotiations were proposed, which were perfected by the treaty of 1818; and that the renunciation desired, from the treaty of 1783, consisted of the *shore or boat fisheries*, which are prosecuted within a marine league of the *shore*, and no others.

At the first interview of the commissioners, Lord Bathurst used this distinct and emphatic language:

As, on the one hand, Great Britain cannot permit the vessels of the United States to fish within the creeks and *close upon the shores* of the British territories, so, on the other hand, it is by no means her intention to interrupt them in fishing anywhere in the open sea, or without the territorial jurisdiction, *a marine league from the shore*.

Again, he said on a subsequent occasion:

It is not of fair competition that his Majesty's government has reason to complain, but of the pre-occupation of British *harbors and creeks*.—(Sabine's Report on Fisheries, p. 282.)

It is clear that it was only within these narrow limits the British government designed to restrict the fisheries by the citizens of the United States.

The views of Messrs. Gallatin and Rush, the American negotiators of the treaty of 1818, appear from their communication made to the Secretary of State, Mr. Adams, immediately after the signature of the treaty.

In this communication they say:

The renunciation in the treaty expressly states that it is to extend only to the distance of three miles from the coast; and this point was the more important, as, with the exception of the fisheries *in open boats in certain harbors*, it appeared that the fishing-ground on the *whole coast of Nova Scotia* was more than three miles from the shore.

It thus appears that the negotiators of both governments concurred, at the time of making the treaty, in giving to it the intent and meaning now contended for by the United States.

It further appears that such was the intent and effect of the treaty of 1818, from the fact that the construction practically given to it for more than twenty years, and indeed down to the year 1842, conformed to the views of the negotiators as thus expressed.—(See Sabine's Report, p. 294.)

There are certain circumstances also appearing in the case, which show the evident reluctance of the British government to assert the exclusive pretensions ultimately put forth by them, and that they have been goaded to it, against their better sense, as to the construction of the treaty, by jealousies and laws of the colonists of a very unusual character, and which Great Britain was slow to sanction. And when she ultimately concluded to assert this claim, she tendered with it propositions for new negotiations, by which all matters connected with the colonies should be amicably adjusted.

I shall now consider the construction given to similar words of the treaty of 1783.

It will not be denied that the words used in the treaty of 1783 and the treaty of 1818, where they are identical, and where express reference is made to the provisions of the former treaty, mean the same thing. When the United States are said, in the treaty of 1818, to *renounce the liberty heretofore enjoyed and claimed*, it means the liberty heretofore enjoyed under the treaty of 1783, and the liberty then enjoyed was to take fish "on certain bays and creeks," without any limitations as to distance from them.

Now, what were those *bays and creeks* on which—that is, *along the line of which*—drawn from headland to headland, the citizens of the United States were allowed to take fish under the treaty of 1783? It cannot be pretended that *bays and creeks* there intended were any other than small indentations from the great arms of the sea. They certainly did not include the Bay of Fundy and other large waters; because if fishing was allowed merely *on* that bay, as is now contended—that is, on and along the line of the bay from headland to headland, then all fishing in the Bay of Fundy would be excluded. But it is a well-known fact that the suggestion never was made, or a surmise raised, that the expressions used in the treaty of 1783 permitted the fishermen of the United States to go merely to the line of the Bay of Fundy, and restricted them from fishing within it.

A practice, therefore, for thirty-five years under this treaty of 1783, had determined *what classes of bays and creeks* were meant by the expressions there used.

The treaty of 1818 *renounced the liberty heretofore enjoyed of fishing on these identical bays and creeks*—that is, immediately on the line of them; and also further renounced the liberty of fishing *within a space of three miles of them*. But the *bays and creeks* here referred to were the same as those referred to in the treaty of 1783, and neither of them ever included the Bay of Fundy.

The express connection between these two treaties is apparent from the face of them. Reference is made to the treaty of 1783 in a manner that cannot be mistaken; the subject-matter is the same, and the terms, as to the point in question, identical.

I contend, therefore, that the governments, in adopting the language of the treaty of 1783 in the treaty of 1818, received the words with the construction and application given to them up to that time, and that neither party can now deny such construction and application, but is irrevocably bound by it.

There are other portions of the article in question that aid in giving a construction to the clause under consideration, and that irresistably sustain the view I have adopted.

Thus it is provided, in another portion of the *same article*, in reference to these *same creeks and bays*, that the fishermen of the United States shall be admitted to enter "*such bays*" for the purpose of shelter and to obtain wood and water; thus clearly implying that such bays are small indentations, extending into the land, to which fishing craft would naturally resort for shelter, and to obtain wood and water, and not large, open seas like the Bay of Fundy.

215 There are numerous bays of this character along the coast, within the Bay of Fundy, such as the Bay of Passamaquoddy, Annapolis, St. Mary's, Chignecto, Mines bay, and other well known bays extending up into the land.

There is a further argument to sustain the American construction given to the treaty, derived from the meaning affixed to the term "coasts," as applied by the usage of the country, and which was adopted and embodied in the various treaties between France and England from a very early period, and has been continued down to the present time.

I have not seen this argument adverted to; but it seems to me important, and, indeed, of itself quite conclusive as to the matter in question, and I shall now consider it.

The term "coasts," in all these prior treaties, is applied to all the borders and shores of the eastern waters, not only along the mainland, but in and about the Gulf of St. Lawrence, and around all the larger and smaller islands where fisheries were carried on.

These coasts are thus defined and specified in the treaty of Utrecht between Great Britain and France in 1713, of Paris in 1763, and other treaties to the present time. In the treaty of Utrecht, between France and England, the liberty of taking and drying fish is allowed "on the *coasts* of Newfoundland"; provision is also made as to the fisheries on the *coasts*, in the *mouth*, and in the *Gulf* of St. Lawrence.

Reference is also made to these "*coasts*" in the same manner in the treaty of Paris, which took place after the conquest of Canada. The French are permitted by this treaty to fish in the *Gulf* of St. Lawrence at a given distance from all "*the coasts*" belonging to Great Britain, as well as those "of the continent" as those of the *islands* situated in the Gulf of St. Lawrence. The fishery also "*on the coasts*" of the comparatively small island "of Cape Breton out of said Gulf" is regulated and provided for; and further, it is provided "that the fishery on the *coasts* of Nova Scotia or Acadia, and everywhere else out of the said Gulf, shall remain on the footing of former treaties."

Now I regard it as utterly impossible for any one looking at these treaties, with the map of the islands and waters in the Gulf or Bay of St. Lawrence, and in and around Nova Scotia, referred to in these treaties, to doubt for a moment that the term "coasts" was designed to apply, and did, in terms, apply to the whole contour of the main-

land and the islands referred to, including the entire circuit of *Nova Scotia on the Bay of Fundy*.

These expressions are continued in the same manner in the treaty of 1783. The United States are there allowed to take fish in the Gulf of St. Lawrence, "on the coast of Newfoundland," and also "on the coasts, bays, and creeks of all other of his Britannic Majesty's dominions in America."

Again, in the preamble to the treaty of 1818, which we are now considering, it is said to have been caused by differences as to the liberty claimed to take fish on certain *coasts*, bays, harbors, and creeks of his Britannic Majesty's dominions in America, and by the treaty provision is made as to the fisheries on the *coasts* of Newfoundland, and on "the coasts, bays, harbors, and creeks from Mount Joly, on the southern coast of Labrador, to and through the straits of Belle Isle, and thence northwardly indefinitely along the coast;" and then follows the renunciation of *the right before enjoyed* by the United States "to take, dry, or cure fish on or within three marine miles of any of 'the coasts,' bays, creeks, or harbors of his Majesty's dominions in America."

It seems to me undeniable that the term *coasts* in all these treaties was well defined and known. The outlet of the St. Lawrence is equally well known by the term Bay or Gulf. The shores on that bay or gulf, and on the islands within it, are uniformly spoken of as "coasts"; and the same mode of designating the shores along this entire country is used in all these treaties in reference to the various waters where fisheries were carried on.

"The coasts" named in these treaties were not only the coasts of the Bay or Gulf of St. Lawrence, and of the island of Cape Breton, but extended from the head of the Bay of Fundy along the bay entirely around Nova Scotia to the Gulf or Bay of St. Lawrence.

There never had been any misunderstanding as to the application of this term, or denial of the right to fish on these coasts, as I have named them, under all these treaties down to 1818. The term "coasts," as applied to Nova Scotia during this long period, was as well known and understood as the term "coasts" applied to England or Ireland, and it included the coasts on the Bay of Fundy as fully and certainly as the term coasts of England applies to the coasts of the English Channel. It was a fixed locality, known and established, and the right of taking fish had always been "enjoyed there."

When, therefore, the treaty of 1818 "renounced the liberty, 'heretofore enjoyed,' of taking fish within three marine miles of any of the coasts, bays, creeks, &c., of his Britannic Majesty's dominions," the renunciation was, for this distance from a fixed locality, as fully settled and established as language, accompanied by a long and uninterrupted usage, could make it.

"The coasts" named are those of 1783, and of prior treaties, and the renunciation of three miles was to be reckoned from these coasts. The Bay of Fundy was therefore not excluded from the fishing grounds of the United States. I am not aware of any reply to the points here taken that I think can at all invalidate them.

From the papers filed in the case, it appears that in 1841 the province of Nova Scotia caused a case stated to be drawn up and forwarded to England, with certain questions to be proposed to the law officers of the crown.

One inquiry was, whether the fishermen of the United States have any authority to enter any of *the bays of that province* to take fish. These officers, Messrs. Dodson and Wilde, reply that no right exists to enter the bays of Nova Scotia to take fish, "as they are of opinion the term headland is used in the treaty to express the part of the land excluding the interior of the bays and inlets of the coasts."

216 Now it so happens that no such term is used in the treaty, and their decision based on its falls to the ground.

They were also specifically asked to define what is to be considered a headland. This they did not attempt to do. The headlands of the Bay of Fundy have never been defined or located, and from the contour of the bay no such headlands properly exist.

These officers held that the American fishermen, for the reason named, could not enter the bays and harbors of Nova Scotia. But the Bay of Fundy is not a bay or harbor of the province of Nova Scotia, and was never included in its limits. The Bay of Fundy is bounded on one side by Nova Scotia, and on the other by New Brunswick, and it is not clear that either the question proposed, or the answer given, was designed to include this large arm of the sea.

It is also said that Mr. Webster has conceded the point in issue in a notice given to American fishermen. The claims now asserted were not put forth till many years after the treaty of 1818; and it was not till 1852 the British government gave notice that seizures would be made of fishermen taking fish in violation of the construction of the treaty of 1818, as then claimed by them, when Mr. Webster, to avoid the collisions that might arise, issued a notice setting forth the claims put forth by England.

In one part of his notice he says: "It was an oversight to make so large a concession to England;" but closes by saying: "Not agreeing that the construction put upon the treaty by the English government is conformable to the intentions of the contracting parties, this information is given that those concerned in the fisheries may understand how the concern stands at present, and be upon their guard."

Mr. Webster subsequently denied relinquishing, in any manner, by this notice, the rights of the United States, as claimed under this treaty.

Detached expressions quoted from it, to sustain a different opinion, can hardly be regarded, under such circumstances, as an authority.

I have seen no other argument or suggestions tending, as I think, to sustain the grounds taken by the British government.

On the other hand, I have adverted, briefly, as I proposed, to the history of the fisheries: the views expressed by the negotiators of the treaty of 1818, as to the object to be effected by it; the subsequent practical construction of it for many years; the construction given to a similar article in the treaty of 1783; the evident meaning to be gained from the entire article of the treaty taken together, and from the term "coasts" as used in the treaty of 1818, and other treaties in reference to this subject; and the whole combine, as I believe, to sustain the construction contended for by the United States.

I am therefore of opinion, the owners of the Washington should receive compensation for the unlawful seizure of that vessel by the British government, when fishing more than three miles from the shore or coast of the Bay of Fundy.

Hornby, British Commissioner:^a

An opinion was delivered by Hornby, conflicting with the views and conclusion of the United States Commissioner, and sustaining the position taken by his government, on the ground that Great Britain, by virtue of her ownership of both shores of the Bay of Fundy, had exclusive jurisdiction over the waters of the bay, by virtue of the law of nations, applicable to such sheets of water, and cited various claims that had been put forth to a similar jurisdiction.

He also held that the provision in the treaty by which the United States "renounced the liberty previously enjoyed, to take, dry or cure fish on, or within three marine miles of any of the coasts, bays, creeks or harbors of his Britannic Majesty's dominions in North America," excluded by its terms, and by a just construction of the treaty, fisheries of the United States citizens in the Bay of Fundy.

Bates, Umpire:

The schooner Washington was seized by the revenue schooner Julia, Captain Darby, while fishing in the Bay of Fundy, ten miles from the shore, on the 10th of May, 1843, on the charge of violating the treaty of 1818. She was carried to Yarmouth, Nova Scotia, and there decreed to be forfeited to the crown by the judge of the vice-admiralty court, and, with her stores, ordered to be sold. The owners of the Washington claim for the value of the vessel and appurtenances, outfits and damages, \$2,483, and for eleven years' interest, \$1,638, amounting together to \$4,121. By the recent reciprocity treaty, happily concluded between the United States and Great Britain, there seems no chance for any future disputes in regard to the fisheries. It is to be regretted that, in that treaty, provision was not made for settling a few small claims of no importance in a pecuniary sense, which were then existing; but as they have not been settled, they are now brought before this commission.

The Washington fishing schooner was seized, as before stated, in the Bay of Fundy, ten miles from the shore, off Annapolis, Nova Scotia.

It will be seen by the treaty of 1783 between Great Britain and the United States, that the citizens of the latter, in common with the subjects of the former, enjoyed the right to *take* and *cure* fish on the shores of all parts of her Majesty's dominions in America. used by British fishermen; but not to dry fish on the island of Newfoundland, which latter privilege was confined to the shores of Nova

Scotia, in the following words: "And American fishermen
217 shall have liberty to dry and cure fish on any of the unsettled bays, harbors, and creeks of Nova Scotia; but as soon as said shores shall become settled, it shall not be lawful to dry or cure fish at such settlement, without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground."

The treaty of 1818 contains the following stipulations in relation to the fishery: "Whereas differences have arisen respecting the liberty claimed by the United States to *take*, *dry*, and *cure* fish on certain

^a The opinion of the British commissioner in this, and some other cases, was to have been drawn up at length, and furnished, to be placed on file. It is to be regretted that these opinions have not been received, and that, after this length of time, they probably will not be.

coasts, bays, harbors, and creeks of his Britannic Majesty's dominions in America, it is agreed that the inhabitants of the United States shall have, in common with the subjects of his Britannic Majesty, the right to fish on certain portions of the southern, western, and northern coast of Newfoundland; and, also, on the coasts, bays, harbors, and creeks from Mount Joly, on the southern coast of Labrador, to and through the straits of Belle Isle; and thence northwardly indefinitely along the coast, and that American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of said described coasts, until the same become settled, and the United States renounce the liberty *heretofore enjoyed* or claimed by the inhabitants thereof, to take, dry, or cure fish *on or within three marine miles* of any of the coasts, bays, creeks, or harbors of his Britannic Majesty's dominions in America not included in the above-mentioned limits: Provided, however, that the American fishermen shall be admitted to enter such bays or harbors, for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved for them."

The question turns, so far as relates to the treaty stipulations, on the meaning given to the word "bays," in the treaty of 1783. By that treaty the Americans had no right to dry and cure fish on the shores and *bays* of Newfoundland; but they had that right on the coasts, *bays, harbors, and creeks* of Nova Scotia; and as they must land to cure fish on the shores, bays, and creeks, they were evidently admitted to the shores *of the bays*, &c. By the treaty of 1818 the same right is granted to cure fish on the coasts, bays, &c., of Newfoundland; but the Americans relinquished that right, and *the right to fish within three miles* of the coasts, bays, &c., of Nova Scotia. Taking it for granted that the framers of the treaty intended that the words "bay or bays" should have the same meaning in all cases, and no mention being made of headlands, there appears no doubt that the Washington, in fishing ten miles from the shore, violated no stipulations of the treaty.

It was urged on behalf of the British government, that by coasts, bays, &c., is understood an imaginary line, drawn along the coast from headland to headland, and that the jurisdiction of her Majesty extends three marine miles outside of this line; thus closing all the bays on the coast or shore, and that great body of water called the Bay of Fundy against Americans and others, making the latter a British bay. This doctrine of the headlands is new, and has received a proper limit in the convention between France and Great Britain of 2d of August, 1839, in which "it is agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland."

The Bay of Fundy is from 65 to 75 miles wide, and 130 to 140 miles long; it has several bays on its coast; thus the word bay, as applied to this great body of water, has the same meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume sovereignty. One of the headlands of the Bay of

Fundy is in the United States, and ships bound to Passamaquoddy must sail through a large space of it. The islands of Grand Menan (British) and Little Menan (American) are situated nearly on a line from headland to headland. These islands, as represented in all geographies, are situated in the Atlantic ocean. The conclusion is, therefore, in my mind irresistible, that the Bay of Fundy is not a British bay, nor a bay within the meaning of the word, as used in treaties of 1783 and 1818.

The owners of the Washington, or their legal representatives, are therefore entitled to compensation, and are hereby awarded not the amount of their claim, which is excessive, but the sum of three thousand dollars, due on the 15th of January, 1855.

No. 134.—1858, April 8: *Extract from Awards of Mr. Gray appointed in pursuance of the Treaty of 5 June, 1854.*^a

* * * * *

I come now to the second division, namely:—The Miramichi and Buctouche, being admitted to be rivers, which of the lines pointed out by the Commissioners shall respectively designate the mouths of those rivers?

THE MIRAMICHI.

I, the Undersigned, Arbitrator, or Umpire, under the Reciprocity Treaty, concluded and signed at Washington, on the 5th day of June, 1854, have proceeded to, and examined, the mouth
218 of the Miramichi, in the Province of New Brunswick, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner, and the Commissioner of the United States, as disclosed in Record, No. 2, of their proceedings, declare as follows.

With reference to the Miramichi, it will be seen by Record, No. 2:—"Her Majesty's Commissioner claims, that a line connecting Fox and Portage Islands, (marked in red, plan No. 2, Record Book No. 2), designates the mouth of the Miramichi River. The United States Commissioner claims, that a line from Spit Point to Moody Point, (marked in blue, plan No. 2, Record Book No. 2), designates the mouth of said river."

By the Treaty it is provided, that—"the above mentioned liberty applies solely to the sea fishery; and that the salmon, and shad fisheries, and all fisheries in rivers, and the mouths of rivers, are reserved exclusively," &c., &c.

The preceding portion of Article 1st, gives the right to fish—"on the sea coasts and shores, and in the bays, harbours and creeks."

The inner Bay of the Miramichi, and the Harbour of Buctouche, are, among other grounds, claimed as coming within the definition of "bays and harbours," and it has been urged, that the clause just referred to, is conclusive in favour of that claim, whether such bay or harbour, does, or does not, constitute the mouth of a river.

^a Mr. Perley was the British Commissioner, Mr. Hubbard was the United States Commissioner, and Mr. Gray was the Umpire.

It is, therefore, necessary before deciding which of the lines above designated as the mouth of the Miramichi, is the correct one, to dispose of this preliminary question,—namely:—Does the mouth of a river forfeit its exclusive character, under this Treaty, because it may constitute a bay, or harbour? Is the restriction imposed, limited to particular fish, or locality? The spirit with which this Treaty was made, and the object it has in view, demand for it the most liberal construction; but, consistently with the most liberal construction, there are many wise and judicious reasons why the exception should be made. The joint, or common, fishery in those places where the forbidden fish resort, would be a prolific cause of dispute. The very fact, that after the forbidden fish are named, there should follow the significant expression that *all* fisheries in those places, should be reserved, is conclusive as to the idea, predominant in the minds of the framers of the Treaty. They wanted peace; they would not put the fishermen of the two nations together, on the same ground, where they would have unequal rights. Considerations of a national, administrative, or fiscal character, may have determined them to exclude the entrances of the great thoroughfares into the respective countries, from a common possession. There are large and magnificent bays, and harbours, unconnected with rivers; there are bays, and harbours, dependent upon, and formed by, the mouths of rivers. The terms are not indicative of locality. Bays, and harbours, may be found far up in the interior of a country; in lakes, or in rivers; and on the sea-board. The “mouths of rivers,” are found only in one locality,—namely, in that part of the river by which its waters are discharged into the sea, or ocean; or into a lake, and that part of the river is, by the express language of this Treaty, excluded. Is the use of a term which may be applicable to many places, to supersede that which can only be applied to a particular place, when the latter is pointedly, *eo nominê*, excluded? But why should such a construction be required, when the object of the Treaty can be attained without it? The cause of the difficulty was, not the refusal to permit a common fishery within the mouths of rivers, but within three marine miles of the sea coast. That difficulty is entirely removed, by the liberty to take fish, “on the sea coast and shores, and in the bays, harbours, and creeks, without being restricted to any distance from the shore.”

The position taken by the Commissioner of the United States, is further pressed upon the ground,—“that the terms of a grant are always to be construed most strongly against the granting party.” The application of that principle to the present case is not very perceptible. This is rather the case of two contracting parties exchanging equal advantages; and the contract must be governed by the ordinary rules of interpretation. Vattel says,—“In the interpretation of Treaties, compacts, and promises, we ought not to deviate from the common use of the language, unless we have very strong reasons for it.” And,—“when we evidently see what is the sense that agrees with the intention of the contracting parties, it is not allowable to wrest their words to a contrary meaning.” It is plain, that the framers of this Treaty intended to exclude the “mouths of

* Vattel, book 2, c. 17, sec. 271.

“rivers,” from a common possession. Ought we by construing the terms of the Treaty most strongly against the nation where the river in dispute may happen to be to,—“wrest their words to a contrary meaning?” I think not.

Mr. Andrews, for many years the United States Consul in New Brunswick and in Canada, a gentleman whose great researches and untiring energies were materially instrumental in bringing about this Treaty, and to whom the British Colonies are much indebted for the benefits they are now deriving, and may yet derive, from its adoption, thus speaks of the Miramichi, in his Report to his Government, in 1852:—

The extensive harbour of Miramichi is formed by the estuary of the beautiful river of that name, which is two hundred and twenty miles in length. At its entrance into the Gulf, this river is nine miles in width.

There is a bar at the entrance to the Miramichi, but the river is of such great size, and pours forth such a volume of water, that the bar offers no impediment to navigation, there being sufficient depth of water on it, at all times, for ships of six and seven hundred tons, or even more. The tide flows nearly forty miles up the Miramichi, from the Gulf. The river is navigable for vessels of the largest class full thirty miles of that distance, there being from five to eight fathoms of water in the channel; but schooners, and small craft, can proceed nearly to the head of the tide. Owing to the size and depth of the Miramichi, ships can load along its banks for miles.

219 In Brookes' Gazetteer, an American work of authority, the width of the Potomac, at its entrance into the Chesapeake, is given as seven and a half miles.

In the same work, the mouth of the Amazon, is given at “one hundred and fifty-nine miles broad.”

In Harper's Gazetteer, (edition of 1855), the width of the Severn, at its junction with the British Channel, is given at ten miles across. That of the Humber, at its mouth, at six or seven miles; and that of the Thames, at its junction with the North Sea, at the Nore, between the Isle of Sheppey and Foulness Point, or between Sheerness and Southend, at fifteen miles across. And the St. Lawrence, in two different places, in the same work, is described as entering “the Gulf of St. Lawrence, at Gaspé Point, by a mouth one hundred miles wide.” And also, “that at its mouth, the Gulf from Cape Rosier to Mungan Settlement, in Labrador, is one hundred and five miles in length.”

Thus, width is no objection. The real entrance to the Miramichi is, however, but one and a half miles wide. Captain Bayfield may, apparently, be cited by both Commissioners as authority. He says, pages 30, 31, and 32:—

Miramichi Bay is nearly fourteen miles wide from the sand-bars off Point Blackland to Point Escumenac beacon, and six and a half miles deep, from that line across its mouth, to the main entrance of the Miramichi between Portage and Fox Islands. The bay is formed by a semi-circular range of low, sandy islands, between which there are three small passages, and one main, or ship channel, leading into the inner bay, or estuary, of the Miramichi. The Negowac Gully, between the sand-bar of the same name, and a small one to the south-west, is 280 fathoms wide, and three fathoms deep; but a sandy bar of the usual mutable character, lies off it, nearly a mile to the S.S.E., and had about nine feet over it at low water at the time of our survey. Within the gully, a very narrow channel, only fit for boats, or very small craft, leads westward, up the inner bay. The shoal water extends one and a quarter miles off this gully, but there is excellent warning by the lead here, and everywhere in this bay, as will be seen by the chart. Shoals, nearly dry at low water, extend from the Negowac Gully to Portage Island, a distance of one and a

quarter miles to the south-west. Portage Island is four miles long, in a south-west by south direction; narrow, low, and partially wooded with small spruce trees, and bushes. The ship channel, between this island and Fox Island, is one and a half miles wide.

Fox Island, three and three quarters miles long, in a S.S.E. direction, is narrow and partially wooded; like Portage Island, it is formed of parallel ranges of sand hills, which contain imbedded drift timber, and have evidently been thrown up by the sea, in the course of ages. These islands are merely sand-bars on a large scale, and nowhere rise higher than fifty feet above the sea. They are incapable of agricultural cultivation, but yet they abound in plants, and shrubs, suited to such a locality—and in wild fruits, such as the blueberry, strawberry, and raspberry. Wild fowl of various kinds are also plentiful in their season; and so also are salmon, which are taken in nets and weirs, along the beaches outside the island, as well as in the gullies.

The next, and last, of these islands, is Huckleberry Island, which is nearly one and a half miles long, in a south-east direction. Fox Gulley, between Huckleberry and Fox Islands, is about 150 fathoms wide at high water, and from 2 to 2½ fathoms deep, but there is a bar outside, with 7 feet at low water. Huckleberry Gulley, between the island of the same name and the mainland, is about 200 fathoms wide; but it is not quite so deep as Fox Gallery. They are both only fit for boats, or very small craft; and the channels leading from them to the westward, up a bay of the main within Huckleberry Island, or across to the French River and village, are narrow and intricate, between flats of sand, mud, and eel-grass, and with only water enough for boats. Six and a quarter miles from the Huckleberry Gulley, along the low shore of the mainland, in an E.S.E. ½ E. direction, brings us to the beacon at Point Escuménac, and completes the circuit of the bay.

The Bar of Miramichi commences from the south-east end of Portage Island, and extends across the main entrance, and parallel to Fox Island, nearly six miles in a south-east by south direction. It consists of sand, and has not more than a foot or two of water over it, in some parts, at low spring tides.

He also says pp. 37, and 39:—

The Inner Bay of Miramichi is of great extent, being about thirteen miles long, from its entrance at Fox Island, to Sheldrake Island (where the river may properly be said to commence), and seven or eight miles wide. The depth of water across the bay is sufficient for the largest vessels that can cross the inner bar, being 2½ fathoms at low water, in ordinary spring tides, with muddy bottom.

Sheldrake Island lies off Napan Point, at the distance of rather more than three-quarters of a mile, and bears from Point Cheval, north-west by west one and three quarters of a mile. Shallow water extends far off this island, in every direction, westward to Bartibogue Island, and eastward to Oak Point. It also sweeps round to the south and southeast, so as to leave only a very narrow channel between it, and the shoal, which fills Napan Bay, and trending away to the eastward past Point Cheval, forms the Middle Ground already mentioned. Murdoch Spit, and Murdoch Point, are two sandy points, a third of a mile apart, with a cove between them, and about a mile W.S.W. of Sheldrake Island. The entrance of Miramichi River is three-quarters of a mile wide, between these points and Moody Point, which has a small Indian church upon it, and is the east point of entrance of Bartibogue River, a mile north-west by west half west from Sheldrake Island.

220 But a strong, and I may add, a conclusive point, in showing the passage between Fox and Portage Island, to be the main entrance, or mouth of the Miramichi, is the peculiar action of the tides. It is thus described by Bayfield, p. 35:—

The stream of the tides is not strong in the open bay, outside the bar of Miramichi. The flood draws in towards the entrance as into a funnel, coming both from the north-east and south-east, alongshore from Tabusintac, as well as from Point Escuménac. It sets fairly through the ship channel, at the rate of about 1½ knots, at the Black buoy, increasing to 2, or 2½ knots, in strong spring tides between Portage and Fox Islands, where it is strongest. The principal part of the stream continues to flow westward, in the direction of the buoys of the Horse-shoe, although some part of it flows to the northward, between that shoal and Portage Island.

The effect of this, is thus singularly felt. A boat leaving Neguac to ascend the Miramichi, with the flood tide, is absolutely met by the tide flowing northerly against it, until coming abreast of the Horse-shoe Shoal, or in the line of the main entrance; and a boat at the Horse Shoe Shoal, steering for Neguac, with the ebb-tide making, would have the current against it, though Neguac is on a line, as far sea-ward, as the entrance to the Portage and Fox Islands—thus shewing conclusively, that the main inlet, and outlet, of the tidal waters to and from the mouth, or entrance, of the Miramichi, is between Portage and Fox Islands.

As such Arbitrator or Umpire, I decide, that a line connecting Fox and Portage Islands, (marked in red, plan, No. 2, Record Book, No. 2.) designates the mouth of the Miramichi River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D., 1858.

JOHN HAMILTON GRAY.

No. 135.—1860, November 17: *Award of Commissioners' as to the River Hudson, in the State of New York, United States.*

We, the Undersigned, Commissioners under the Reciprocity Treaty between Great Britain [Britain] and the United States, signed at Washington, on the 5th day of June, A.D., 1854, having examined the River Hudson, in the State of New York, United States, do hereby agree and decide, that the two following described lines, to wit:—The first bearing north, 5° 30' east, (magnetic,) from the northern end of Sandy Hook to the western extremity of Coney Island; the second bearing south, 33° 45' east, (magnetic), drawn from Fort Schuyler, on Throg's Neck, to the point on the opposite shore, as shown on Plan, No. 39, Record Book, No. 2, shall mark respectively the southern and eastern mouths, or outer limits, of said river; and that all the waters within, or to the westward of said lines, shall be reserved and excluded from the common right of fishing therein, under the first and second Articles of the Treaty aforesaid.

Dated at the City of Boston, United States, this 17th day of November, A.D. 1860.

(Signed,
(Signed,)

M. H. PERLEY, *H.M. Commissioner.*
JOHN HUBBARD, *U.S. Commissioner.*

No. 136.—1860, November 19: *Award of Commissioners as to the River St. Lawrence, in the Province of Canada.*

We, the Undersigned, Commissioners under the Reciprocity Treaty between Great Britain and the United States, concluded and signed at Washington, the 5th day of June, A.D., 1854, having examined the river Saint Lawrence, in the Province of Canada, do hereby agree and decide, that a line bearing north, 40° west, (magnetic), connecting Cape Chatte with Point Des Monts, as shown on Plan, No. 40, Record Book, No. 2, shall mark the mouth, or outer limit, of said river; and that all the waters within, or to the westward of said line, shall

be reserved and excluded from the common right of fishing therein, under the first and second Articles of the Treaty aforesaid.

Dated at the city of Boston, United States, this 19th day of November, A.D., 1860.

(Signed,)
(Signed,)

M. H. PERLEY, *H.M. Commissioner.*
JOHN HUBBARD, *U.S. Commissioner.*

221 No. 137.—*1865, January 18: Joint Resolution providing for the Termination of the Reciprocity Treaty of June 5, 1854, between the United States and Great Britain.*

[Public Resolution No. 5.]

Whereas it is provided in the Reciprocity Treaty concluded at Washington, the fifth of June, eighteen hundred and fifty-four, between the United States of the one part, and the United Kingdom of Great Britain and Ireland of the other part, that this Treaty "shall remain in force for ten years from the date at which it may come into operation, and further until the expiration of twelve months after either of the High Contracting Parties shall give notice to the other of its wish to terminate the same;" and whereas it appears, by a Proclamation of the President of the United States bearing date sixteenth March, eighteen hundred and fifty-five, that the Treaty came into operation on that day; and whereas, further, it is no longer for the interests of the United States to continue the same in force: therefore

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that notice be given of the termination of the Reciprocity Treaty, according to the provision therein contained for the termination of the same; and the President of the United States is hereby charged with the communication of such notice to the Government of the United Kingdom of Great Britain and Ireland.

Approved, January 18, 1865.

No. 138.—*1866, April 12: Letter from Mr. Cardwell, Secretary of State for the Colonies, to the Lords of the Admiralty.*

Confidential.

DOWNING STREET, April 12, 1866.

MY LORDS, The determination of the Reciprocity Treaty contracted in 1854 between Great Britain and the United States revives the 1st Article of a Convention of the 20th of October, 1818, with various Imperial and Colonial Acts enumerated in the margin,^a of which the operation had been suspended during the continuance of the Treaty by the Imperial Act 18 & 19 Vict., cap. 3, sec. 1, or otherwise.

^a Imperial, 59 Geo. III, c. 38. Nova Scotian Revised Statutes (3rd Series), c. 94, ss. 1-18. New Brunswick, 16 Vict., c. 69, ss. 1-18. Prince Edward Island, 6 Vict., c. 14, declared to contain the Fishery Regulations by Order in Council of 3rd September, 1844.

The precise provisions of that Article will be seen by reference to the Convention. Its general result is as follows:

1. American fishermen may fish, "in common with the subjects of Her Britannic Majesty," in certain specified parts of Newfoundland and Labrador, and on the shores of the Magdalen Islands, with liberty to dry and cure fish on the shores of certain of the unsettled—or with the consent of the inhabitants of the settled bays, harbours, and creeks of Newfoundland and Labrador.

2. Except within the above limits American fishermen are not to take, dry, or cure fish on or within three miles of the coasts, bays, creeks, and harbours of British North America. But they may enter such bays and harbours for certain specified purposes under such restrictions as may be necessary to prevent abuse by fishing or otherwise.

I. With regard to Newfoundland and Labrador, the Convention does but continue within certain geographical limits, and subject to a qualification in respect to the curing of fish, the privileges which have hitherto been exercised under the Reciprocity Treaty. It does not, therefore, call for much observation. It is only requisite to say that although the privilege of drying and curing fish on the Magdalen Islands is not expressly given to American fishermen, Her Majesty's Government have no desire at present to exclude them from it, nor to impose any narrow construction on the word "unsettled." A bay containing a few isolated houses is not to be considered as "settled" for the purpose of this clause of the Convention.

On the other hand, naval officers should be aware that Americans who exercise their right of fishing in Colonial waters in common with subjects of Her Majesty, are also bound, in common with those subjects, to obey the law of the country, including such Colonial laws as have been passed to ensure the peaceable and profitable enjoyment of the fisheries by all persons entitled thereto.

222 The enforcement of the Colonial laws must be left as far as the exercise of rights on shore is concerned, to the Colonial authorities, by whom Her Majesty's Government desire they shall be enforced with great forbearance especially during the present season. In all cases they must be enforced with much forbearance and consideration, and they must not be enforced at all by Imperial officers if they appear calculated to place the Americans at a disadvantage in comparison with British fishermen in the waters which, by the Treaty of 1818, are opened to vessels of the United States. On the contrary, their unequal operation should, in this case, be reported to their Lordships, a copy of the Report being at the same time sent to the Governor of the Colony.

II. Full explanation is necessary respecting that part of the Convention by which the United States renounce the right of fishing, except within the permitted limits—"on or within three miles of any of the coasts, bays, creeks, or harbours" of British North America, and are forbidden to enter such bays or harbours, except for certain defined purposes.

The Act of Parliament (59 Geo. III, cap. 38), already mentioned, subjects to forfeiture any foreign vessel which is found fishing, or having fished, or preparing to fish, within the prohibited limits, and authorises the enforcement of this forfeiture by the like means and in the same Courts as may be resorted to under any Act of

Parliament in the case of any offence against the laws relating to Customs, or the laws of trade and navigation.

The statutory mode of enforcing the law against Customs' offences committed in the Colonies will be found in the Act 16 and 17 Vict., cap. 107, and particularly in the 2nd, 183rd, 186th, and 223rd clauses. But as it would probably be held under this Act that a vessel could only be seized safely by a naval officer "duly employed for the prevention of smuggling" (section 223), it will be probably more convenient for naval officers to take advantage of the procedure authorised by the 103rd clause of the Merchant Shipping Act, which is a law relating to "trade and navigation."

Under that clause^a (of which a copy is annexed) any commissioned officer on full pay in the military or naval service of Her Majesty may seize any ship subject to forfeiture, and bring her for adjudication before any Court having Admiralty jurisdiction in Her Majesty's dominions.

It will probably be advisable, as a general rule, that officers of the navy should proceed against vessels engaged in unlawful fishing under the Act of George III and the Merchant Shipping Act, which extend to all the closed waters of British North America, and do not require the officer's authority to be fortified by any Colonial commission or appointment. But more extended powers are conferred by the above-mentioned local Acts of Nova Scotia, New Brunswick, and Prince Edward Island, on persons commissioned by the Lieutenant-Governors of these Colonies, and any officer who is permanently charged with the protection of the fisheries in the waters of any of these Colonies may find it useful to obtain such a commission.

It will invest him with a special authority in the waters of the Colony to which it relates, to bring into port any foreign vessel which continues within these waters for twenty-four hours after notice to quit them, and, in case she shall have been engaged in fishing, to prosecute her to condemnation. It will also enable him to prosecute the forfeiture of the vessel, if it shall be found to have prohibited goods on board. But this power it would be undesirable to exercise, as Her Majesty's Government do not at present desire officers of the navy to concern themselves with the prevention of smuggling.

These being the powers legally exercisable by officers of Her Majesty's navy, it follows to consider within what limits and under what conditions they should be exercised.

Her Majesty's Government are clearly of opinion, that by the Convention of 1818, the United States have renounced the right of fishing, not only within three miles of the Colonial shores, but within three miles of a line drawn across the mouth of any British bay or creek. But the question what is a British bay or creek is one which has been the occasion of difficulty in former times.

It is, therefore, at present, the wish of Her Majesty's Government neither to concede, nor, for the present, to enforce any rights in this respect which are in their nature open to any serious question. Even before the conclusion of the Reciprocity Treaty, Her Majesty's Government had consented to forego the exercise of its strict right to

^a 17 & 18 Vict., c. 104, s. 103.

exclude American fishermen from the Bay of Fundy; and they are of opinion that during the present season that right should not be exercised in the body of the Bay of Fundy, and that American fishermen should not be interfered with either by notice or otherwise, unless they are found within three miles of the shore or within three miles of a line drawn across the mouth of a bay or creek which is less than ten geographical miles in width in conformity with the arrangement made with France in 1839.^a American vessels found within these limits should be warned that by engaging or preparing to engage in fishing they will be liable to forfeiture, and should receive the notice to depart which is contemplated by the laws of Nova Scotia, New Brunswick, and Prince Edward Island, if within the waters of one of these colonies under circumstances of suspicion. But they should not be carried into port except after wilful and persevering neglect of the warnings which they may have received; and in case it should become necessary to proceed to forfeiture, cases should, if possible, be selected for that extreme step in which the offence of fishing has been committed within three miles of land.

Her Majesty's Government do not desire that the prohibition to enter British bays should be generally insisted on, except when there is reason to apprehend some substantial invasion of British rights. And in particular, they do not desire American vessels to be prevented from navigating the Gut of Canso (from which Her Majesty's
223 Government are advised they might be lawfully excluded), unless it shall appear that this permission is used to the injury of Colonial fishermen, or for other improper objects.

I have it in command to make this communication to your Lordships as conveying the decision of Her Majesty's Government on the subject.

I have, &c.

(Signed)

EDWARD CARDWELL.

No. 139.—1868, *September 14: Letter from Mr. Campbell to the Canadian Secretary of State.*

OTTAWA, *September 14th, 1868.*

SIR,—I beg to state for the information of the Government, that during the present season, in consequence of the refusal of the American fishermen, passing through the Strait of Canso, to pay the tonnage dues now exacted, the officers of the customs there have prevented such vessels from having their former business transactions [transactions] with the merchants and others in that locality, and from landing, refitting, or obtaining supplies there. The effect of this prohibition is that a very lucrative and extensive trade, long enjoyed by my constituents, has been entirely cut off, and has been transferred to Prince Edward Island, where, although there is said to be in force a similar ordinance to our own in relation to tonnage dues, I have still reason to believe that the violation of such ordinance is a matter or daily recurrence, and that in fact the American fishermen on the coasts and in the ports of Prince Edward Island are permitted as ample privileges as they ever enjoyed during the existence of the Reciprocity Treaty.

^a Hertslet, vol. v, p. 89; Convention of August 2, 1839. Arts. IX and X.

I need not remind [remind] you that the treaty between Great Britain and the United States, in relation to the Fisheries of British North America, is equally operative on the coasts of Prince Edward Island as it is on the coasts of Nova Scotia, under the facts as I assume them to exist. The knowledge of such being the scope of the treaty, on the part of my constituents, largely aggravates the very serious damage to which they have been subjected.

Under these circumstances I deem it my duty very respectfully to solicit the attention of the Government to this important subject, and it will be a matter of great gratification to myself and to those on whose behalf I am interested, to learn at as early a day as may be convenient, that steps have been taken by the Government to ascertain the facts in relation to this matter with a view to some practical and beneficial result.

I have the honour to be, Sir, your obedient servant,

(Signed,) STEWART CAMPBELL, M. P.,
Guysborough, N. S.

HON. H. L. LANGEVIN, C. B.,
Secretary of State, Canada.

No. 140.—1868, September 15: Memorandum of Mr. Campbell, M. P.
for Guysborough, Nova Scotia.

MEMORANDUM.

Mr. Stewart Campbell, after communication this day with the Honourable the Minister of Marine and Fisheries, begs to submit the following remarks in connection with his letter of yesterday's date conceived in general terms, and addressed to the Honourable the Secretary of State.

During the continuance of the Reciprocity Treaty, and even during the season of 1867, a very large and lucrative trade and business, extending a distance of 25 miles interiorly from the Strait of Canso, had existed between the merchants and inhabitants of the County of Guysborough and the American fishermen passing through the Strait. This trade and business consisted in the sale to the Americans of very many thousands of barrels manufactured by the people of that county; in the sale of salt, bait and necessary fishing and other supplies, in the storage of the cargoes and materials of such vessels and in the refitting of the same. This trade and business had rendered the western side of the Strait of Canso (embracing three convenient harbours and forming a portion of the County of Guysborough) the constant resort of American fishing vessels, and a very prosperous and progressive section of the Province.

During the present season, the Department of Customs, through its officers, by a strict construction of the treaty between Great Britain and the United States, have put a stop to all commercial intercourse between the American fishermen and the constituents of Mr. Campbell, in consequence of the refusal by the former to pay the tonnage dues now exacted from them. The effect of this prohibition has been to transfer to Prince Edward Island the whole of the advantageous trade heretofore subsisting and as a natural con-

sequence a very serious depression at this moment exists in that community.

Mr. Campbell has good reason to believe that the American fishing vessels are now admitted to equally ample privileges in Prince Edward Island as they enjoyed previous to the abrogation of the Reciprocity Treaty, he having been credibly informed that during the present season, notwithstanding the fact of there being in the Island a similar regulation in reference to tonnage dues as exists in the Dominion of Canada, the American fishing vessels do not pay such dues, while they are constantly to be found within the prohibited limits of the coasts of that Island, and carrying on commercial intercourse in the ports and harbours thereof in violation of the treaty with Great Britain. The treaty is of course equally operative when licences are not obtained at Prince Edward Island, as it is on the coasts of Nova Scotia, and the constituents of Mr. Campbell, with the knowledge of this fact, feel as they have reason to feel much aggrieved by the destruction of their trade under the peculiar circumstances.

Mr. Campbell regrets to be obliged to say that he anticipates considerable commercial embarrassment in the community whose interests he represents, as the consequence of the diversion of the trade in question.

Mr. Campbell would add, that he has also reason to believe that much of the fish landed by the Americans on Prince Edward Island, is in reality British caught fish, while it is exported thence to the United States as fish caught in American bottoms.

Ottawa, 15th September, 1868.

No. 141.—1868, *September 15: Report of Hon. Peter Mitchell, Canadian Minister of Marine and Fisheries.*

DEPARTMENT OF MARINE AND FISHERIES,
Ottawa, 15th September, 1868.

The Minister of Marine and Fisheries to whom have been referred, for Report to Council, the letters of Stuart Campbell, Esq., M.P., of the County of Guysborough, Nova Scotia, under date 14th and 15th instant, in relation to the exercise of privileges by American fishermen, and the construction to be placed upon the Treaty of 1818, begs to report—

That Mr. Campbell alleges, that under the Reciprocity Treaty, a trade of considerable magnitude grew up in the Province of Nova Scotia, and especially in that part of it bordering upon the Straits of Canso, between the people of that Province and American fishermen frequenting our waters; that a considerable market was afforded for the farmers in the supplying of these fishermen; that the manufacture of barrels had sprung up to a great extent along the Straits, giving employment to great numbers of people, and that a large business was done through the local merchants in supplying the American vessels with salt and other outfits for the prosecution of their business; that business practically continued even since the termination of the treaty until the present year, when, as he alleges, the

American vessels were prevented by the Customs Officers from landing, refitting and storing cargoes and supplies, from purchasing barrels, salt and outfits in the Straits, without first taking out licences, and paying the fee of \$2 per ton, as it was contended that the Treaty of 1818 precluded such privileges, and that the permission to fish or enjoy the privileges not conceded to them by the treaty could only be enjoyed on such licence being obtained. Mr. Campbell alleges that in the neighbouring Colony of Prince Edward Island, a different system prevails, and that though they are equally bound by the treaty referred to, they permit the storing of fish and the landing of bait and supplies, and the purchasing of salt, barrels, and other outfits and materials necessary for the prosecution of the fisheries, whether the masters of these vessels have first taken out a licence or not.

Mr. Campbell further alleges that he believes that American fishermen largely supply themselves in the vicinity of the said Island, and within the prohibited limits, with fish caught in British waters, and catch fish and obtain supplies, and in a large majority of cases have no licences—thus practically evading the terms of the treaty and enjoying all the rights of Her Majesty's subjects.

He further complains that the effects of such a laxity in the enforcement of the treaty rights in Prince Edward Island, while they are stringently enforced in Nova Scotia, has had the effect of drawing off a lucrative trade which had sprung up in the Straits of Canso to the ports of that Island.

The undersigned begs respectfully to submit:—

That the rights which the citizens of the United States are entitled to enjoy in relation to the fisheries on the coast of these Provinces, are those only which are granted them by the Convention of 1818.

That this Convention excludes them from any right of fishing within 3 miles of the coast of British America, and that the prescribed distance is to be measured from the headlands or extreme points of land next the sea or the coast, or the entrance of bays or indents
 225 of the coast, and consequently that no rights exist on their part to enter the bays or ports of Nova Scotia for the purpose of fishing, other than for the purpose of getting wood and water, or for the purpose of shelter and repairing damages therein. (See Sections 2 and 3 of the Imperial Act 59 Geo. 3, Cap. 38) in the latter part of which it is distinctly stated that they shall enter "*for no other purposes whatever.*"

The concluding part of the Fishery Article of the Convention of 1818 reads thus—

Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter, and for repairing damages therein—of purchasing wood and of obtaining water and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking drying or curing fish therein, or in any other manner whatever abusing the privileges hereby preserved to them.

It may be suggested, however, that though precluded from entering for purposes of fishing, that they may be permitted to exercise the right of entering for purposes of trade. Whether such a claim might be fairly maintained were the vessel purely a trading vessel would depend upon the treaties between Great Britain and the United States and the usages of nations in such cases; but I presume

that no such question could arise here—the vessels in question are alleged to be purely fishing vessels—fitted out as such, and calling into the ports referred to for the purposes of supplying themselves with salt, barrels, stores and provisions for the prosecution^a of a fishery business, and for landing and storing their catch from time to time, and alleging that they do not want a licence to fish as they do not intend to fish within the three miles limit, avowing themselves fishermen; but at the same time declaring that they do not contemplate fishing within the limits. This class of vessels, have no right to enter our ports for other purposes than those of *shelter, repairing damages, purchasing wood, and obtaining water.*

Citizens of the United States have no right conceded them by the Treaty of 1818, to navigate or use the passage or Strait of Canso, and the Queen's Advocate General and Her Majesty's Attorney General of England in 1841, gave the following opinion upon this point:—

We are of opinion that independently of treaty, no foreign country has the right to use or navigate the passage of Canso; and attending to the terms of the Convention relating to the rights of fishing to be enjoyed by the American citizen, we are also of opinion that that Convention did not either expressly or by necessary implication concede any such right of using or navigating the passage in question. We are also of opinion that casting bait to lure fish in the track of any American vessel navigating the passage would constitute a fishing within the negative terms of the Convention.

I would also notice that a letter from the Hon. Edward Cardwell, the Secretary of State for the Colonies to the Lords of the Admiralty, under date 12th April, 1866, in relation to this question of the Fisheries, states:—

The determination of the Reciprocity Treaty, concluded in 1854, between Great Britain and the United States, renews the first article of the Convention of the 20th of October, 1818, with various Imperial and Colonial Acts enumerated in the margin, of which the operation had been suspended during the continuance of the treaty by the Imperial Act 18 and 19 Vic. Cap. 3, Sec. 1, or otherwise.

The letter referred to goes on to state, amongst other things, that except within certain limits named, American fishermen are not to take, dry or cure fish on or within three miles of the coasts, bays, creeks and harbours of British North America. But they may enter such bays and harbours *for certain specified purposes*, under such restrictions as may be necessary to prevent abuse by fishing or otherwise; but are forbidden to enter such bays or harbours except for *certain defined purposes*. The letter further states, after referring to Act of Geo. III, and the Merchant Shipping Act, that more extended powers are conferred by the Local Acts of Nova Scotia, New Brunswick and Prince Edward Island on certain officers, sufficient to bring into port any foreign vessel which continues within these waters for twenty-four hours after notice to quit them, and in case she shall have been engaged in fishing to prosecute her to condemnation. It further refers to the wish of Her Majesty's Government, in reference to treatment of American fishermen, in connection with a question of bays and headlands, and that they should not be interfered with, unless found within three miles of the shore; but if found within these limits, should receive the notice to depart, which is contemplated by the laws of Nova Scotia, New Brunswick or Prince

^a *Qy.* prosecution.

Edward Island, if within the waters of one of these Colonies under circumstances of suspicion,—and the letter in concluding states:—

Her Majesty's Government do not desire that the prohibition to enter British Bays should be generally insisted upon, except when there is reason to apprehend some substantial invasion of British rights. And in particular they do not desire American vessels to be prevented from navigating the Gut of Canso, (from which Her Majesty's Government are advised they might be lawfully excluded), unless it shall appear that this permission is used to the injury of Colonial fishermen; or for other improper objects.

The undersigned therefore concludes that as it is only by treaty right that these American fishing vessels have a right to enter Nova Scotia ports, and as that is limited to specific objects, they have no right to exceed them; and the Customs officers were quite within the scope of their jurisdiction in refusing to allow them to enjoy privileges other than those named in the treaty.

226 Next it is submitted that the same duties which it devolved on the Customs Officers of the Dominion applied equally to those of Prince Edward Island, which latter Colony has, like the Colonies of New Brunswick and Nova Scotia, her own laws, similar in their scope and spirit, and giving ample power to enforce compliance with the terms of the Convention of 1818 above referred to. But it is alleged by Mr. Campbell that they are not equally enforced by the Officers of that Government, and while this enures to the benefit of the Island inasmuch as it attracts the trade, a large share of which Nova Scotia formerly enjoyed, it must be most damaging to certain sections of the latter Province, and if permitted to continue, would be manifestly unjust.

Before dealing with the question of remedy for such an anomalous state of things, the undersigned would respectfully recommend that he be instructed to employ Mr. Campbell personally to proceed to Prince Edward Island and Nova Scotia, and ascertain with accuracy the facts in detail, in relation to the American fishing trade with these Colonies, and report fully on all matters connected therewith, with as little delay as possible.

Respectfully submitted.

P. MITCHELL,
Minister of Marine and Fisheries.

No. 142.—1868, November 9: *Report of Hon. Peter Mitchell, Minister of Marine and Fisheries.*

DEPARTMENT OF MARINE AND FISHERIES, (Fisheries Branch,)
Ottawa, 9th November, 1868.

In connection with the unsettled state of the Fishery Question between Great Britain and the United States, the Minister of Marine and Fisheries desires respectfully to draw the attention of the Governor General in Council to certain anomalous features of the present system of granting licences to American fishing vessels.

When it was at first suggested that at least some formal recognition of the just and reasonable claims of the British North American Colonies, to exclusive rights of fishery within the limits described in the Convention of 1818, should be exacted, the Canadian Government perceived that the situation of the inshore fishings around Prince Ed-

ward Island and the exceptional position of that colony as regards the other confederated colonies, must necessarily occasion new difficulties in carrying out the desired policy; and that any system not under uniform control would operate to the relative disadvantage of the other provinces forming the Confederation. This was felt to be the case not merely in a pecuniary but likewise in a political sense. The proposal, however, that interchangeable licences should be issued by the respective Governments was acquiesced in by Canada, as well in deference to the proposed arrangement of a complicated and urgent dispute, as in view of the expressly temporary nature of the system. But this system has now extended over three years, instead of being confined to the current season of 1866, as it was then stipulated should be the limits of its duration. And owing to the practice of mutually recognising licences issued, the chief political burden of such renewed policy, and the whole provincial cost of applying and enforcing the system, have devolved on the united provinces, while a very large share of the licence fees collected has accrued to Prince Edward Island. These results appear in some degree an aggravation of injury borne by the Dominion from the continued admission of foreign fishermen and vessels into Colonial waters on merely nominal terms, whilst the produce of Canadian fisheries still competes in the United States markets on most disadvantageous conditions with fish caught by Americans on the same fishing grounds.

The undersigned having already brought this particular subject under notice, begs reference to the Minute of Council adopted thereon, the 22nd of May last.

Another anomaly arising out of the licensing system has developed itself in the course of the fishing season of 1868, and forms the subject of a report on the 15th of September last, to which the Minister has now the honour to revert.

It is therein stated that a very considerable trade, which formerly existed among the crews of American fishing vessels and the merchants at several of the ports of Nova Scotia, to which they resorted in great numbers has latterly become diverted to Prince Edward Island; and that such diversion occurs through facilities afforded by the Island authorities to United States citizens, to fish and land and trade there without first obtaining fishing licences, such as are required at Nova Scotian ports, in conformity with the laws and the system adopted under the existing Treaty with Great Britain. Although these vessels are prohibited by the Imperial and Provincial Statutes, and by the Convention of 1818, from entering British harbours for any other purposes than shelter, or to repair damages and to purchase wood and water, the masters are there allowed to procure supplies, to store fish, and bait, buy salt, barrels and other materials necessary for fishing operations, without any interference on the part of the Island officials; all of which is in violation of the Customs laws, and at variance with the letter and spirit of the Treaty by which they are equally bound with the officers and inhabitants of the other provinces. In addition to which evasive privileges

227 United States vessels (unlicensed) are also permitted to transfer their cargoes at Prince Edward Island to foreign steamers, and to include quantities of fish captured by and purchased from the Island fishermen,—thus exempting them from duties levied on fish

caught and marketed by the other colonists. The actual gain from this mode of dealing with the crews and owners of United States fishing vessels, and the requisite establishment of business firms and agencies at the Island, together with minor benefits of local trade, doubtless prove more than an equivalent to the aggregate amount of small tonnage fees which might be derived through strict enforcement of the laws and the system in force under the treaty.

The undersigned perceives that were the revenue officers who are stationed at these ports of Nova Scotia, to avail themselves of the auxiliary means afforded by the Customs Acts, to enforce, under pain of direct seizure and confiscation, the acceptance of licences, notwithstanding any professed intention to resort to Prince Edward Island to procure licences—which are not there required of them,—the evil complained of might in a measure be remedied. These officers have (under instructions) refrained from such legitimate action because of an anxious desire to avoid every possible risk of collision, and bearing in mind the particular wish expressed by the Colonial Secretary's Despatch of 12th April, 1866, respecting the free navigation of the Gut of Canso by American vessels.

There can be no doubt that the laxity and connivance [connivance] of the authorities of Prince Edward Island are calculated practically to defeat the Imperial measures devised for the protection of our Fisheries, and they certainly thwart the endeavours of the Canadian Executive to give effect to the very moderate and conciliatory views of Her Majesty's Government. It is, moreover, peculiarly unfortunate that any such grievance as the diversion of an active portion of local trade should at this time be superadded to the feeling of discontent in Nova Scotia, particularly as it seems closely related to the insufficiency of naval assistance referred to in the Minute of Council dated 9th of October last. In the present temper of that province an injury of this kind is naturally ascribed to the policy and action of the Dominion Government, instead of being attributed to the peculiar conduct of Prince Edward Island.

It is quite obvious from recent events, that influential parties in the United States are seeking to take advantage of, as well as to encourage the isolation of that province, and by tempting inducements to the fishing and other interests there designed to react upon the fishing populations of the adjacent provinces, may much embarrass any future disposal of the fishery question.

Under all of these circumstances it seems highly important, that, if the system of licensing American fishing vessels is to be again renewed, the whole administration of it should be placed under control of the Government of Canada. Otherwise it will be absolutely necessary, should the licence system continue, to compel the masters of foreign fishing vessels to provide themselves with licences on entering the Gulf of Canso, or upon touching in their course at any of the ports of Nova Scotia. It is, however, questionable whether such system of licensing, adopted as a temporary expedient on the termination of the Reciprocity Treaty, should be further continued since its past continuance has not led to any desirable results.

The undersigned recommends that advantage be taken of the presence in England of Sir Geo. E. Cartier and the Honourable Mr. Macdougall, C.B., to make this the subject of personal conference with the Secretary of State for the Colonies.

The Minister having prepared and furnished directions to Stewart Campbell, Esq., M.P. of Guysborough, Nova Scotia, in accordance with the Minute of Council dated 18th September last, to ascertain accurately the facts in detail of the American fishing business and trade at the various sea-ports of Prince Edward Island and Nova Scotia, and their relation to the licensing system, that gentleman is still engaged in making such inquiries, and so soon as his report shall be received it may be found necessary again to refer to the subject.

The whole respectfully submitted.

P. MITCHELL,
Minister of Marine and Fisheries.

No. 143.—1869, February 2: Letter from Mr. Campbell, M. P., of Guysborough, Nova Scotia, to Hon. Peter Mitchell, Canadian Minister of Marine and Fisheries.

GUYSBOROUGH, N. S., February, 2nd, 1869.

SIR,—With reference to your communication of the 16th September last, on the subject of the operation of the licence system policy embodied in and intended to be enforced by the provisions of the Act for the regulation of fishing and protection of the fisheries, and the Act respecting fishing by foreign vessels, and also in relation to the fishing trade and business generally, I have the honour to inform you that in accordance with your instructions conveyed to me by that communication, I visited the Island of Prince Edward, and the other localities affected by the subject in the months of October and November last, and I now beg to report the following observations bearing upon the general question. I regret that in doing so, I shall not be able to reply seriatim to the several inquiries propounded
228 by you. The difficulty or rather the impossibility of obtaining in the Island the required information, will I hope be regarded as sufficient apology for such deficiency, and the probably less satisfactory shape which this communication will consequently assume. I trust however that even in its present form, it will not be without some value.

The principal source of inconvenience and grievance on the part of the British traders and subjects generally in the Maritime Provinces, who are connected with the fisheries is to be found in the great change of circumstances brought about by the abrogation of the Reciprocity Treaty. During the existence of that treaty, the entire freedom with which that branch of industry, represented by the fisheries, was pursued on the part of the subjects of the United States of America on the coasts of the British Provinces, naturally brought these foreigners into most intimate business relations with merchants, traders, and others in many localities of the maritime portion of the Dominion, and especially at and in the vicinity of the Strait of Canso. The great body of the large fleet of American fishermen, numbering several hundred vessels, which annually passed through that Strait to the Gulf of the St. Lawrence in the prosecution of the fisheries, and especially the mackerel fishery, was invariably in the habit of procuring much of the requisite supplies for the voyage at the several ports in that Strait. The business thus

created largely benefited not only those directly engaged in commercial pursuits, but was also of immense advantage to other classes of the inhabitants of several of the adjacent counties of Nova Scotia. The constant demand for, and ready disposal at remunerative prices to the American fishing vessels, of a large quantity of farm produce, and other products of industry in the shape of barrels, hoops, lumber, wood, &c, was at once the character and result of the intercourse which subsisted during the existence of the Reciprocity Treaty. The total exemption from duty of all fish exported from the Maritime Provinces to the markets of the United States was also a boon of inestimable value to the very large class of British subjects directly and indirectly connected with our fisheries and its resulting trade. This state of things, which was beneficial also in no small degree to the subjects of the United States, undoubtedly created a condition of general prosperity and contentment among the classes of British subjects referred to, such as had never previously existed.

On the termination of the Reciprocity Treaty in 1866, by the Act of the Government of the United States, both parties, viz.: the subjects of Great Britain and those of the United States were remitted to their respective former status under the terms and provisions of the London Convention of October 20th, 1818, and the several Colonial enactments based on, and in accordance therewith, supplemented by such exceptional rights in favour of foreign fishing vessels as the licence system or policy has created and conferred. To that status I beg now to advert. And first with regard to the rights of American fishermen under the Convention of 1818, although no small amount of official correspondence and even controversy between Great Britain and the United States has taken place on this subject, particularly previous to the Treaty of Washington, 1854, commonly known as the Reciprocity Treaty, the right of American fishermen to participate in the fisheries on the Coasts of British North America are very clearly defined by the latter part of the first Article of the Convention of 1818; "And the United States hereby renounce for ever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's Dominion in America, not included within the above mentioned limits." (The limits here referred to are specified in the same Article, and have no application to the matter in hand) "provided however that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter, and repairing damages therein, of purchasing wood and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or, in any other manner whatever abusing the privileges hereby reserved to them."

Notwithstanding the just and indisputable construction of the terms of this Article by Her Majesty's Government, to the effect that the Government of the United States have thereby renounced the right of fishing not only within three miles of the Colonial shores, but also within three miles of a line drawn across the mouth of any British bay or creek, and although Her Majesty's Government is advised that American vessels engaged in fishing, might be lawfully excluded from navigating the Strait of Canso, yet as I apprehend,

it is not the desire of Her Majesty's Government, or of the Government of this Dominion, to either waive or enforce the more extensive but legal construction of the Article already cited in the foregoing respects, the policy of granting American subjects the liberty to fish within three miles of the Colonial shores, and the conditions upon which such liberty is to be permitted, became, on this branch of the subject, questions of very serious moment, and entitled to very serious and mature consideration. Upon the first of these points, I think I may assume that both the Imperial and Dominion authorities, entertain no other idea than that of insisting, under any circumstances, upon the absolute right to exclude American fishermen from any free participation in the inshore fisheries. Any other policy would, I conceive, under existing circumstances be unjust and suicidal, particularly in view of the impositions of the United States Government upon British caught fish, and would certainly eventuate in general dissatisfaction of the most aggravated kind. I trust therefore that it is unnecessary to dwell upon this point. Upon the second, viz.: The conditions upon which, if permitted, the liberty to fish is to be enjoyed by the subjects of the United States, difference of opinion may no doubt exist, and the character and form of those conditions are of course subject to question. The experience of the past may, in this particular as in others, be a guide for the present. I shall therefore examine the operation of the licence system during the last three years, and present the results. In 1866, the tonnage duty under that system was 50 cents per ton. In 1867 was \$1.00 per 229 ton, and in 1868, \$2.00 per ton. In 1866 about eight hundred vessels were engaged in the fisheries of the Gulf and River St. Lawrence, of which number, 454 took out licences, the aggregate amount of tonnage dues paid by them being \$13,016.85. In Nova Scotia there were 354 licences issued, the collections on which amounted to \$9,368.50. In Prince Edward Island 89 licences were taken out, and dues paid to the amount of \$3,339.35. Only 10 licences were taken out in the late Province of Canada, the payment on which was \$296. But one was issued in New Brunswick, yielding \$13, and none were granted in Newfoundland.

In 1867, in Canada and New Brunswick no licences were issued. In Nova Scotia the whole number issued was 269. The amount received therefor was \$13,929. This amount is proportionably greater in consequence of the double rate or [of] \$1 per ton, as against 50 cts per ton in the previous year. The actual diminution in the number of licences may be regarded as owing in some measure to the practice of giving three warnings to intruders, before enforcing acceptance of licence, or making seizure.

In 1868, 49 American fishermen took out licences in Nova Scotia, the tonnage dues on which at \$2, per ton amounted to \$4,691.50. The diminution in this year of the number of licences accepted, is attributed to the high rate of the tonnage duty. From personal observation and inquiry I am disposed to charge it to another but additional reason, and that is the exemption from all restrictions practically enjoyed by American fishing vessels at the several ports and on the shores of Prince Edward Island. In this connexion I would submit the very strange and startling fact that only five or six licences were issued by the Island authorities in the past year. Free fishing upon grounds within the most liberal interpretation of the

phrase "prohibited limits" was the rule and not the exception. This unquestionably passive toleration on the part of the Island authorities is certainly quite inconsistent with the arrangements entered into with regard to the mutual adoption of the licence system and the exaction of a similar rate of tonnage dues between the Government of the Island, and that of Canada.

On the assumption that the policy of exacting tonnage dues from the American fishermen for the privilege of fishing in British waters, will be continued for the present, the question naturally presents itself, at what amount such exaction should be placed. The statistics of the last three years show a decided diminution in the acceptance of licences by the Americans in proportion to the increase of duty payable thereon; and I am strongly of opinion that henceforth it will be extremely difficult, if not impossible, to induce them to accept licences, unless the dues be placed at the lowest rate yet exacted. I derive this view from personal intercourse with many of the parties concerned; and even in their submission to that rate, I might be disappointed, if the authorities of Prince Edward Island continue practically to encourage the refusal to take licences from the authorities of the Dominion, by permitting on the shores, within the jurisdiction of that Island, the free fishing to which I have already adverted. There is, I am aware, a considerable class of persons, who advocate a continuance of the present high, or even a higher rate of duty as the condition of licence. But it must be borne in mind that in the present state of this question a high rate of duty means efficient protection and its accompanying expense. Without that efficient protection, licences at any rate, exceeding a nominal amount, and I consider 50 cents per ton to be an amount of that character, will not be accepted. And this brings me to the consideration of the nature and character of such protection. I would be the last man to utter a word or write a line that could be construed as a matter of reproach towards the Imperial naval authorities, in respect of their services on this point, but the facts of the case compel me to say that I cannot regard with favour the present system of the protection of the fisheries. The inefficiency of the protection now afforded may be attributed to two causes. In the first place, Her Majesty's ships are sent on this service at too late a period in the fishing season. It is during the months preceding the fall of the year that their presence on the fishing grounds is most required. Later in the season the fish resort to deeper water, and are to be found outside of the prohibited limits. Protection therefore is not then necessary. As an illustration of the habits of the fish, as well as of the necessity of the vessels engaged in the protection of the fisheries being on the ground at an earlier period, I may mention that I was credibly informed, when at Georgetown, Prince Edward Island, by an eye witness of the fact, that in the month of August last an entire fleet of about 100 sail of American fishermen had actually and very successfully fished for several days, without interruption, in the land-wash near Rustico, on the North side of the Island, of course to the great insult and detriment of British subjects residing there. I was also given to understand that Her Majesty's ships *Niger* and *Barracoutta*, detailed as the protective force during the last season, did not reach the shores of Cape Breton and Prince Edward Island until the beginning of the month of October. In the

second place, the vessels ordinarily employed on this service are of considerable size and being steamers, their approach is readily discerned by actual intruders and thus time is afforded for escape. It is a remarkable fact that not a single seizure has been made during the season.

The conclusions suggested by the foregoing state of facts are very intelligible. If the present high or any higher rate of tonnage dues is to be continued, and in view of the hostility which such exactions will undoubtedly induce, the water police to be provided, must be of corresponding power of control, and perfect good faith, material aid and activity on the part of the authorities of Prince Edward Island must be demanded. As I have already intimated, the force now provided seems of a character ill-calculated to answer the purpose for which it is designed. Upon a careful consideration of the subject, and having conferred with many persons whose opinions are entitled to weight, I am led to entertain the opinion that the aid of H. M. ships of the class now in use might to some extent be dispensed with. A single vessel of war discreetly stationed in the vicinity of the principal fishing grounds, say alternately at Port

Hood, Cape Breton, and Georgetown, Prince Edward Island,
230 and perhaps an additional port to the north-ward of the

Island, from the first of July to the tenth of November, would be sufficient, if in connection with her and subject to proper communication with her Commander, four or five fast-sailing schooners of similar size and appearance to the ordinary class of American fishing vessels, with a commissioned officer, and sufficient crew, and duly armed, were appointed to cruise during the above mentioned period within the points embracing the fishery rights of the Dominion. The expense of such a force is easy of ascertainment, and it would no doubt be considerable. This however would be met to some fair extent by the revenue from dues, and possibly by a share of seizures. This suggestion is predicated upon the exaction of what may be termed a high rate of tonnage dues. If on the other hand the nominal rate of 50 cents per ton as hereinbefore stated, and which is more as an explicit acknowledgment of our right than as an equivalent for the privileges conceded, be sanctioned. I feel well assured that although the revenue derived would be of smaller amount, yet the force necessary to ensure its collection might be of a very inferior, and consequently less expensive description, while the national bitterness which this question is daily engendering, would be largely averted.

And here I may offer some observations as to what in my judgment would be the probable effects of dealing with the American fishermen in the more liberal spirit of cheap licences. In a former part of this communication I have referred to the active and advantageous business relations subsisting between them and the merchants, traders, and others, in the Eastern Counties of Nova Scotia, and particularly at the Strait of Canso, during the existence of the Reciprocity Treaty, and pointed out the very prosperous condition of our own people during that period. Much depression has prevailed since its abrogation, caused principally by the exaction of a higher rate of tonnage dues, which has induced the Americans to transfer their former business relations to Prince Edward Island, where the terms of the Convention of 1818 are practically permitted to be unrecognized. The

suggestion I have offered with regard to the imposition of a nominal duty of 50 cents, seems to me if adopted as well calculated to restore to the sections of Nova Scotia referred to, much of their former prosperity and consequent contentment. I firmly believe that licences at that rate will be generally if not universally accepted. The liberty to use our ports as a consequence of such acceptance of licences, will be again embraced. The transfer of their trade to Prince Edward Island will be checked, if not abandoned. The Americans will use the more convenient ports of the Strait of Canso. Their cargoes will be landed and stored there, while if they desire to ship the same to their own home markets, facility to do so by steamers which pass through the Strait of Canso weekly will be at hand. And I feel convinced that a marked improvement in our trade and business generally would be the immediate result.

There is another branch of the general subject on which I take the opportunity to remark, and that is the probability of a large amount of American caught fish being forwarded as British caught fish to ports in the United States by steamboats trading from British ports and particularly from ports in Prince Edward Island. There is an obvious difficulty in obtaining accurate information on this point. The records of the Custom Houses in the United States would be the only means of arriving at just conclusions in the matter. I may however give an extract of a letter received from a merchant of standing, residing at St. John, N. B., which throws some light upon the state of the case. It is dated 4th December, 1868. The writer says, "I fear the Bostonians are doing a large illicit trade in British caught mackerel in Prince Edward Island. There have been large quantities passing through here this season, principally Prince Edward Island brand. I learn that they are forwarded by an American, who is carrying on a shore fishery at the Island in small boats, and in addition, buys all he can get, and is allowed by the authorities at Washington, to enter his fish as American caught, he being an American citizen. The shipments have been from 200 to 300 barrels by each boat semi-weekly since I came here, up to last week, and as I am told, was going on for some time before. I presume they will amount in the aggregate to some 4000 or 5000 barrels for the season by this route. They arrive here by railway from Shediac, and likely the same parties are shipping by the Charlottetown, Halifax and Boston line also. This may lessen your Bay fares, as many of that catch may be purchased by them, and entered free of duty at Boston."

The foregoing seems to embrace the principal points of inquiry suggested by your communication and instructions, and I trust that the same will be acceptable to the Department and the Government.

I have the honour to be, Sir,

Your most obedient servant,

(Signed,)

STEWART CAMPBELL.

HON. P. MITCHELL,

Minister of Marine and Fisheries.

No. 144.—1870, January 8: *Report of Committee of Privy Council of Canada approved by Governor-General in Council.*

The Committee having had under consideration the reports of the Minister of Marine and Fisheries, dated respectively the 15th and

20th ult., in connection with certain despatches from Lord Granville, on the subject of protecting the fisheries of Canada, beg to recommend:

231 That the system of granting fishing licences to foreign vessels, under the Act 31 Vic., c. 61, be discontinued, and that henceforth, foreign fishermen be not permitted to fish in the waters of Canada.

Also, that six suitable sailing vessels, similar to *La Canadienne*, in addition to the two vessels at present employed, to be chartered and equipped for the service of protecting the Canadian inshore fisheries from illegal encroachments; the vessels to be connected with the Police Force of Canada, and to form a marine branch of the same.

They further recommend that Her Majesty's Government be requested to maintain on the fishing stations of Canada, a sufficient naval force to prevent riotous combinations among foreign fishermen, and to protect the officers of the police in the execution of their duties.

With reference to Lord Granville's proposal to support the local force, by the presence of only one vessel of war, the Committee consider this measure of support would be inadequate, and hope that Her Majesty's Government may be induced to increase it.

Certified.

W. H. LEE,
Clerk Privy Council.

No. 145.—1870: *Instructions from Vice-Admiral Wellesley to Officers employed in Protection of Fisheries.*

INSTRUCTIONS FOR PROTECTION OF THE FISHERIES, 1870.

By George Greville Wellesley, Esquire, Companion of the Most Honourable Order of the Bath, Vice Admiral in Her Majesty's Fleet, and Commander-in-Chief of Her Majesty's Ships and Vessels employed, and to be employed, on the North American and West Indian Station.

To the respective Captains, Commanders and Commanding Officers of H. M. Ships employed in the protection of the Fisheries.

It being my intention to employ H. M. Ship under your command in the protection of the Fisheries, the following Instructions are furnished for your guidance in conducting that important duty, and they comprise what is necessary for your employment on any of the Stations to which you may be detached for that purpose.

1. The mode in which it is the decision of Her Majesty's Government that the United States fishermen are to be dealt with, is clearly set forth in the annexed letter (A) from the Colonial Secretary to the Lords Commissioners of the Admiralty, dated 12th April, 1866. In the margin of this letter are noted explanations for your guidance, which have received their Lordships sanction. (See also Article 7.)

2. The several Stations with their limits you will find described in the Appendix (B).

3. Your first duty on arriving on your Station will be to acquaint yourself by personal inquiry amongst the Fishermen and others on the spot, with such information in regard to the Fisheries as will enable you with the experience you will have gained at the end of the season, to make a full report on this staple of Colonial commerce, and of the best means to be adopted in the ensuing year for its effectual protection.

4. You are to make yourself thoroughly acquainted with the Coasts and the various Ports and anchorages where you will be able to seek shelter in bad or thick weather, so that you will experience no difficulty under such circumstances in making out the land when you close it.

5. A letter from the Lords Commissioners of the Admiralty on the subject of Pilotage is annexed (C) by which you are to be guided. To your report (Art. 3) is to be added one from your Navigating Officer relative to the Navigation and Pilotage of your Station.

6. You will regulate your cruising according to the information you may obtain from time to time giving your principal attention to that part of your Station on which you find the United States fishermen are chiefly engaged, and unless detained by stress of weather you are not to remain in harbour more than 48 hours at one time. During the night, where strong currents prevail and during fogs, it will be well to anchor whenever the weather, depth of water, and other circumstances permit, using your stream^a for the purpose in deep water.

You are to cruise as much as possible under sail, but you are to keep your fires banked in order that you may be prepared to use steam whenever the service renders it requisite that you should do so.

7. In reference to the second paragraph of marginal note G in the annexed letter (A), the Lords Commissioners of the Admiralty have decided that one previous warning will be sufficient before seizing any Vessel fishing in violation of the law. (See also Article 1.)

232 On boarding any Foreign fishing vessel for the purpose of warning her, the boarding Officer will inform the Master, in the presence of a competent witness, that if he is again found fishing or having fished within the prescribed limits, he will be subject to seizure.

8. You will keep a list of all Vessels boarded, in the following form; and you will take every opportunity of furnishing lists of the Foreign Vessels which you may have warned to Her Majesty's Ships and the Colonial Cruisers, in order that the law may not be evaded.

Boarded.		Name.					If Warned.		Remarks.
Date.	Where.	Vessel.	Under what Colours.	Owner.	Master.	Port belonging to.	Date.	Under what circumstances.	(If Master had been previously warned, to be so stated.)

^a *Qy.* steam.

10. Your proceedings are to be reported weekly for my information, accompanied by your Log and a Track Chart for the week.

Should no opportunity be presented of forwarding the Report at the expiration of the week, it is to be sealed and transmitted by the first opportunity which may occur subsequently.

11. Such Papers as are requisite for your information and guidance, arranged under the heads of the several Provinces, are added.

12. You will omit no precaution in your power to prevent collisions between the subjects of Her Majesty and those of the United States who may be brought into contact with each other in prosecuting the Fisheries in those places which, during the period the Reciprocity Treaty was in force, were common to both nations.

14. You are to remain on this service until recalled, but you will report specially to me when you consider your presence no longer required on your Station.

(Signed) GEORGE G. WELLESLEY.

Confidential.

1. The Lord Commissioners of the Admiralty have informed me that it is probable that a force of United States vessels of war will be sent to the Canadian fishing grounds this season to watch over the interests of American vessels; and I have therefore to impress on you the great importance which is attached by their Lordships to a cordial understanding being maintained between the officers commanding the cruisers of both countries, and you will consider it your duty to co-operate frankly and cordially with the United States officers in order to prevent if possible any misunderstanding or chance of collision between the American and English fishermen.

2. The Canadian Government have refused to continue the system formerly adopted of granting licences to foreigners for the in-shore fisheries, and have expressed their intention to employ Colonial cruisers to act as a police force in the prevention of any encroachments.

(Signed)

GEORGE G. WELLESLEY

Vice Admiral

H. M. S. ROYAL ALFRED, AT BERMUDA,

27th. April 1870.

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[Appendix (A), enclosed in above.]

NORTH AMERICAN FISHERIES.

Letter Respecting Instructions to be Sent to the Admiral on the North American Station, with Reference to the Determination of the Reciprocity Treaty.

Confidential.

Copy of a Letter from the Secretary of State for the Colonies to the Lords of the Admiralty.

DOWNING STREET, April 12th. 1866.

MY LORDS, The determination of the Reciprocity Treaty contracted in 1854 between Great Britain and the United States revives the 1st. Article of a Convention^a of the 20th. of October, 1818, with various Imperial and Colonial Acts enumerated in the margin,^b of which the operation had been suspended during the continuance of the Treaty by the Imperial Act 18 & 19 Vict., cap. 3, sec. 1, or otherwise.

The precise provisions of that Article will be seen by reference to the Convention. Its general result is as follows:

1. American fishermen may fish, "in common with the subjects of Her Britannic Majesty," in certain specified parts of Newfoundland and Labrador, and on the shores of the Magdalen Islands, with liberty to dry and cure fish on the shores of certain of the unsettled—or with the consent of the inhabitants of the settled bays, harbours, and creeks of Newfoundland and Labrador.

2. Except within the above limits American fishermen are not to take, dry, or cure fish on or within three miles of the coasts, bays, creeks, and harbours of British North America. But they may enter such bays and harbours for certain specified purposes under such restrictions as may be necessary to prevent abuse by fishing or otherwise.

1. With regard to Newfoundland and Labrador, the Convention does but continue within certain geographical limits, and subject to a qualification in respect to the curing of fish, the privileges which have

^a Copy annexed.

^b Imperial, 59 Geo. III, c. 38. Nova Scotian Revised Statutes (3rd Series), c. 94, ss. 1-18. New Brunswick, 16 Vict., c. 69, ss. 1-18. Prince Edward Island, 6 Vict., c. 14, declared to contain the Fishery Regulations by Order in Council of 3rd. September, 1844. (Copies annexed.)

hitherto been exercised under the Reciprocity Treaty. It does not, therefore, call for much observation. It is only requisite to say that although the privilege of drying and curing fish on the Magdalen Islands is not expressly given to American fishermen, Her Majesty's Government have no desire at present to exclude them from it, nor to impose any narrow construction on the word "unsettled." A bay containing a few isolated houses is not to be considered as "settled" for the purpose of this clause of the Convention.

On the other hand, naval officers should be aware that Americans who exercise their right of fishing in Colonial waters in common with subjects of Her Majesty, are also bound, in common with those subjects, to obey the law of the country, including such Colonial laws as have been passed to insure the peaceable and profitable enjoyment of the fisheries by all persons entitled thereto.

The enforcement of the Colonial laws must be left, as far as the exercise of rights on shore is concerned, to the Colonial authorities, by whom Her Majesty's Government desire they shall be enforced with great forbearance, especially during the present season. In all cases they must be enforced with much forbearance and consideration, and they must not be enforced at all by Imperial officers if they appear calculated to place the Americans at a disadvantage in comparison with British fishermen in the waters which, by the Treaty of 1818, are opened to vessels of the United States. On the contrary, their unequal operation should, in this case, be reported to their Lordships, a copy of the report being at the same time sent to the Governor of the Colony.

A. The Report here directed is to be forwarded to me in triplicate for transmission to the Lords Commissioners of the Admiralty.

II. Fuller explanation is necessary respecting that part of the Convention by which the United States renounce the right of fishing, except within the permitted limits—"on or within three miles of any of the coasts, bays, creeks, or harbours" of British North America, and are forbidden to enter such bays or harbours, except for certain defined purposes.

234 B. In all cases in which inconvenience would arise from the Clause in the Colonial Acts which prescribes the deliv-

The Act of Parliament (59 Geo. III, cap. 38), already mentioned, subjects to forfeiture any foreign vessel which is found

ery of the Vessel seized, "to the officer of the Colonial Revenue next to the place where seized," prosecute under this Act.

C. When prosecuting as above directed, avail yourself of the procedure authorised by the 103rd Clause of the Merchant Shipping Act.

An extract of a letter from the Under Secretary of State for the Colonies descriptive of the mode in which the combination of these two Acts is rendered effective for the purposes of prosecution is given herewith. See Extract from Colonial Office letter of 23rd June, 1866.

D. This will enable you to send the vessel for adjudication to *any* Admiralty Court, and consequently to that situated in the *Port most convenient* to you, *i. e.* a Vessel seized in Nova Scotian waters could be sent to Charlotte Town, Prince Edward Island for condemnation, and so of all the other Provinces respectively.

E. You may prosecute under the Colonial Acts when it will not be inconvenient to you, to adhere strictly to the Clause directing the delivery of the Vessel seized to the Revenue Officer *next to the place* where seized, but in no other case.

fishing, or having fished, or preparing to fish, within the prohibited limits, and authorizes the enforcement of this forfeiture by the like means and in the same Courts as may be resorted to under any Act of Parliament in the case of any offence against the laws relating to Customs, or the laws of trade and navigation.

The statutory mode of enforcing the law against Customs' offences committed in the Colonies will be found in the Act 16 and 17 Vict., cap. 107, and particularly in the 2nd, 183rd, 186th, and 223rd clauses. But as it would probably be held under this Act that a vessel could only be seized safely by a naval officer "duly employed for the prevention of smuggling" (section 233), it will be probably more convenient for naval officers to take advantage of the procedure authorized by the 103rd clause of the Merchant Shipping Act, which is a law relating to "trade and navigation."

Under that clause^a (of which a copy is annexed) any commissioned officer on full pay in the military or naval service of Her Majesty may seize any ship subject to forfeiture, and bring her for adjudication before any Court having Admiralty jurisdiction in Her Majesty's dominions.

It will probably be advisable, as a general rule, that officers of the navy should proceed against vessels engaged in unlawful fishing under the Act of Geo. III and the Merchant Shipping Act, which extends to all the closed waters of British North America, and do not require the officer's authority to be fortified by any Colonial commission or appointment. But more extended powers are conferred by the above-mentioned local Acts of Nova Scotia,

^a 17 and 18 Vict., c. 104, s. 103.

F. You will observe that the Colonial Acts prescribe the delivery of Vessels which are seized "to the Officers of the Colonial Revenue *next to the place where seized,*" and further prescribe the Court in which the forfeiture shall be prosecuted.

In all cases in which delay would ensue from delivering the Vessel over as above directed, you are to send the Vessel direct to the Port where the Court exists, in which the Vessel seized is to be prosecuted, and there to deliver her over to the Revenue Officers.

235 G. You are to make every proper allowance for mistakes which may have arisen in the position of the Fishing Vessels from thick weather or other sufficient causes, confining yourself in such cases to warning them off.

New Brunswick, and Prince Edward Island, on persons commissioned by the Lieutenant-Governors of these Colonies, and any officer who is permanently charged with the protection of the fisheries in the waters of any of these Colonies may find it useful to obtain such a commission.

It will invest him with a special authority in the waters of the Colony to which it relates, to bring into port any foreign vessel which continues within these waters for twenty-four hours after notice to quit them, and, in case she shall have been engaged in fishing, to prosecute her to condemnation. It will also enable him to prosecute the forfeiture of the vessel, if it shall be found to have prohibited goods on board. But this power it would be undesirable to exercise, as Her Majesty's Government do not at present desire officers of the navy to concern themselves with the prevention of smuggling.

These being the powers legally exercisable by officers of Her Majesty's navy, it follows to consider within what limits and under what conditions they should be exercised.

Her Majesty's Government are clearly of opinion, that by the Convention of 1818, the United States have renounced the right of fishing, not only within three miles of the Colonial Shores, but within three miles of a line drawn across the mouth of any British bay or creek. But the question what is a British bay or creek is one that has been the occasion of difficulty in former times.

It is, therefore, at present the wish of Her Majesty's Government neither to concede, nor, for the present, to enforce, any rights in this respect which are in their nature open to any serious question. Even before the conclusion of the Reciprocity Treaty,

You are to give every vessel warning only on one separate occasion of finding her in the act of fishing within the prohibited limits, after which, should you find the same Vessel committing a trespass for the second time, and are satisfied that the neglect of your warning is wilful and persevering, you are to seize her and send her into Port for condemnation. (See also Art. 7 of the Instructions)

In all such cases, you are to be careful that the Vessel seized is within three miles of the land, her position being determined by bearings taken in such a mode as will admit of their accuracy being sworn to in Court by three competent witnesses; and you are to have the same amount of evidence of the commission of the offence, whether that be of having fished, of fishing, or of preparing to fish, observing as regards this last offence, the evidence must be very conclusive to ensure condemnation.

In the event of making a seizure, you are, when practicable, to tow the Vessel into Port, being careful in all cases to remove her Crew with the exception of the Master, observing that when in tow her Colours are not to be hoisted. Should you not take the Vessel into Port yourself, her Crew are to be landed at the nearest Port where there is an American Consul.

H. By "substantial invasion of British rights," you are to understand such proceedings as are detrimental to the British fishermen in the prosecution of their calling. Any case of this description is to be reported to me, in order to its being dealt with as I may direct, and the same course is to be pursued in regard to the

Her Majesty's Government had consented to forego the exercise of its strict right to exclude American fishermen from the Bay of Fundy; and they are of opinion that, during the present season that right should not be exercised in the body of the Bay of Fundy, and that American fishermen should not be interfered with either by notice or otherwise, unless they are found within three miles of the shore or within three miles of a line drawn across the mouth of a bay or creek which is less than ten geographical miles in width, in conformity with the arrangement made with France in 1839. American vessels found within these limits should be warned that by engaging or preparing to engage in fishing they will be liable to forfeiture, and should receive the notice to depart which is contemplated by the laws of Nova Scotia, New Brunswick, and Prince Edward Island, if within the waters of one of these Colonies under circumstances of suspicion. But they should not be carried into port except after wilful and persevering neglect of the warnings which they may have received; and in case it should become necessary to proceed to forfeiture, cases should, if possible, be selected for that extreme step in which the offence of fishing has been committed within three miles of land.

Her Majesty's Government do not desire that the prohibition to enter British Bays should be generally insisted on, except when there is reason to apprehend some substantial invasion of British rights. And in particular, they do not desire American vessels to be prevented from navigating the Gut of Canso (from which Her Majesty's Government are advised they may be lawfully excluded), unless it shall appear

Navigation of the Gut of Canso, should you observe it to be injurious to the Colonial fishermen, or otherwise detrimental to British interests.

that this permission is used to the injury of Colonial fishermen, or for other improper objects.

I have it in command to make this communication to your Lordships as conveying the decision of Her Majesty's Government on this subject.

I have &c.,
(Signed) EDWARD CARDWELL.

No. 146.—1870, May 16: *Circular relating to Canadian In-shore Fisheries issued by Mr. Geo. S. Boutwell, United States Secretary of the Treasury.*

TREASURY DEPARTMENT, Washington, May 16, 1870.

SIR, In compliance with the request of the Secretary of State, you are hereby authorized and directed to inform all masters of fishing vessels, at the time of clearance from your port, that the authorities of the Dominion of Canada have terminated the system
236 of granting fishing licenses to foreign vessels, under which they have heretofore been permitted to fish within the maritime jurisdiction of the said Dominion, that is to say, within three marine miles of the shores thereof; and that all fishermen of the United States are prohibited from the use of such in-shore fisheries, except so far as stipulated in the first Article of the Treaty of October 20, 1818, between the United States and Great Britain, in virtue of which the fishermen of the United States have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours, and creeks, from Mount Joly, which was, when the Treaty was signed, on the southern coast of Labrador, to and through the straits of Belle Isle, and thence northwardly, indefinitely along the coast, without prejudice, however, to any exclusive rights of the Hudson's Bay Company; and have also liberty for ever to dry and cure fish in any of the unsettled bays, harbours and creeks of the southern part of the coast of Newfoundland, above described, and of the coast of Labrador, unless the same, or any portion thereof, be settled, in which case it is not lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground; and also, are admitted to enter any other bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever, subject to such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges reserved to them as above expressed.

The Canadian Law of the 22nd of May, 1868, 31 Victoria, Cap. 61, entitled "An Act respecting Fishing by Foreign Vessels," among other things, enacts that any commissioned officer of Her Majesty's Navy, serving on board of any vessel of Her Majesty's Navy, cruising and being in the waters of Canada for purpose of affording protection to Her Majesty's subjects engaged in the fisheries; or any commissioned officer of Her Majesty's Navy, fishery officer, or stipendiary magistrate on board of any vessel belonging to or in the service of the Government of Canada, and employed in the service of protecting the fisheries, or any officer of the customs of Canada, sheriff, magistrate, or other person duly commissioned for that purpose, may go on board of any ship, vessel, or boat within any harbour in Canada, or hovering (in British waters) within three marine miles of any of the coasts, bays, creeks, or harbours in Canada, and stay on board as long as she may remain within such place or distance. It also provides, that if such ship, vessel, or boat be bound elsewhere, and shall continue within such harbour or so hovering for twenty-four hours after the master shall have been required to depart, any one of such officers or persons as are above mentioned may bring such ship, vessel, or boat into port and search her cargo, and may also examine the master upon oath, touching the cargo and voyage, and if the master or person in command shall not truly answer the questions put to him in such examination, he shall forfeit four hundred dollars; and if such ship, vessel, or boat be foreign, or not navigated according to the laws of the United Kingdom or of Canada, and have been found fishing, or preparing to fish, or to have been fishing (in British waters) within three marine miles of any of the coasts, bays, creeks, or harbours of Canada, not included within the above mentioned limits, without a license, or after the expiration of the period named in the last license granted to such ship, vessel, or boat, under the first section of this Act, such ship, vessel, or boat, and the tackle, rigging, apparel, furniture, stores, and cargo thereof shall be forfeited. And that all goods, ships, vessels, and boats, and the tackle, rigging, apparel, furniture, stores, and cargo liable to forfeiture under this Act, may be seized and secured by any officers or persons mentioned in the second section of this Act; and every person opposing any officer or person in the execution of his duty under this Act, or aiding or abetting any other person in any opposition, shall forfeit eight hundred dollars, and shall be guilty of a misdemeanor, and upon conviction be liable to imprisonment for a term not exceeding two years. On the 8th of January, 1870, the Governor-General of the Dominion of Canada, in Council, ordered that suitable sailing vessels, similar to *La Canadienne*, be chartered and equipped for the service of protecting the Canadian in-shore fisheries against illegal encroachments by foreigners, these vessels to be connected with the police force of Canada, and to form a marine branch of the same. It is understood that by a change of the boundaries between Canada and Labrador, the Canadian territory now includes Mount Joly and a portion of the shore to the east thereof, which in the Treaty of 1818, was described as the southern coast of Labrador.

This municipal change of boundary does not, however, interfere with the rights of American fishermen, as defined by the Treaty, on that portion of what was the southern coast of Labrador, east of Mount Joly.

Very respectfully,

GEO. S. BOUTWELL, *Secretary*.

No. 147.—1870, June 8: Letter from Mr. Hamilton Fish, United States Secretary of State, to Mr. E. Thornton, British Minister at Washington.

DEPARTMENT OF STATE,
Washington, 8th June, 1870.

SIR: I have the honour to acknowledge the receipt of your note of the 3d instant, and of the papers accompanying it, giving the names of the British vessels to be employed in maintaining order at the Canadian Fisheries, and the instructions proposed to be issued by Vice Admiral Wellesley, to the Commanders of those vessels.

I beg leave to point out to you and to Her Majestys Government an apprehended discrepancy between the terms of the instructions thus communicated and those which were given by the Admiralty to the Vice Admiral, a copy of which, dated the 5th ultimo, accompanied your note of the 26th ultimo, and which direct that "no vessel should be seized (meaning fishing vessels of the United States) "unless it is evident and can be clearly proved that the offense of fishing has been committed and that the vessel is captured within three miles of land "

On the other hand, I find with the instructions issued by Vice Admiral Wellesley, and forming a part of them, a letter marked *Confidential*, from the Secretary of State for the Colonies to the Lords of the Admiralty, dated Downing Street, April 2d., 1866, in which is expressed the opinion of Her Majesty's Government, that the United States have renounced the right of fishing within three miles of a line drawn across the mouth of any British bay or creek; and also that American fishermen should not be interfered with either by notice or otherwise, unless they are found within three miles of a line drawn across the mouth of a bay or creek which is less than ten geographical miles in width, in conformity with the arrangement made with France in 1839, and that American vessels found within these limits should be warned that by engaging or preparing to engage in fishing they will be liable to forfeiture and should receive notice to depart "

The Vice Admiral communicated a copy of these instructions, which he proposed to issue immediately to the commander of the "Plover," to the Secretary of the Admiralty, on the 27th of April last, and though it is not doubted that on receipt of the later instructions addressed to him on the 5th ultimo, by the Lords Commissioners of the Admiralty he will modify the directions to his subordinates so that they will be in conformity with the views of the Admiralty, and without entering into any consideration of questions which might be suggested by the letter referred to, which I understand to be superseded by later instructions, I think it best to call your attention to the inconsistencies referred to in order to guard against misunderstandings and complications that might arise in the absence of modifications of the instructions communicated in your note of the 3d instant.

I have the honour to be with the highest consideration, Sir, your obedient servant,

HAMILTON FISH

EDWARD THORNTON Esqre C.B.

&c, &c, &c,

No. 148.—1870, June 9: *Circular relating to Canadian in-shore Fisheries, issued by Mr. Boutwell, United States Secretary of the Treasury.*

TREASURY DEPARTMENT, Washington, June 9th, 1870.

SIR,—In compliance with the request of the Secretary of State, you are hereby authorized and directed to inform all masters of fishing vessels, at the time of clearance from your port, that the authorities of the Dominion of Canada have terminated the system of granting fishing licences to foreign vessels, under which they have heretofore been permitted to fish within the maritime jurisdiction of the said Dominion, that is to say within three marine miles of the shore thereof; and that all fishermen of the United States are prohibited from the use of such in-shore fisheries, except so far as stipulated in the first article of the Treaty of October 20, 1818, between the United States and Great Britain, in virtue of which the fishermen of the United States have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands; on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands; on the shores of the Magdalen Islands; and also on the coasts, bays, harbours, and creeks, from Mount Joly, which was, when the Treaty was signed, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly, indefinitely along the coast, without prejudice, however, to any exclusive rights of the Hudson's Bay Company; and have also liberty for ever to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland, above described, and of the coast of Labrador, unless the same, or any portion thereof, be settled, in which case it is not lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground; and also, are admitted to enter any other bays or harbours, for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever, subject to such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges reserved to them as above expressed. Fishermen of the United States are bound to respect the British laws and regulations for the regulation and preservation of the fisheries to the same extent to which they are applicable to British or Canadian fishermen.

238 The Canadian law of the 22nd of May, 1868, 31 Victoria. cap.

61, entitled "An Act respecting Fishing by Foreign Vessels," and the Act assented to on the 12th of May, 1870, entitled "An Act to amend the Act respecting Fishing by Foreign Vessels, among other things, enact, that any commissioned officer of Her Majesty's navy, serving on board of any vessel of Her Majesty's navy, cruising and being in the waters of Canada, for the purpose of affording protection to Her Majesty's subjects engaged in the fisheries, or any commissioned officer of Her Majesty's navy, fishery officer, or stipendiary magistrate, on board of any vessel belonging to or in the

service of the Government of Canada, and employed in the service of protecting the fisheries, or any officer of the customs of Canada, sheriff, magistrate, or other person duly commissioned for that purpose, may go on board of any ship, vessel, or boat, within any harbour in Canada, or hovering (in British waters) within three marine miles of any of the coasts, bays, creeks, or harbours in Canada, and stay on board as long as she may remain within such place or distance; and that any one of such officers or persons as are above mentioned may bring any ship, vessel, or boat, being within any harbour in Canada or hovering (in British waters) within three marine miles of any of the coasts, bays, creeks, or harbours in Canada, into port, and search her cargo, and may also examine the master upon oath, touching the cargo and voyage; and if the master or person in command shall not truly answer the questions put to him in such examination, he shall forfeit four hundred dollars; and if such ship, vessel, or boat, be foreign, or not navigated according to the laws of the United Kingdom, or of Canada, and has been found fishing or preparing to fish, or to have been fishing (in British waters) within three marine miles of any of the coasts, bays, creeks, or harbours of Canada, not included within the above mentioned limits, without a licence, or after the expiration of the period named in the last licence granted to such ship, vessel, or boat, under the first section of this Act, such ship, vessel, or boat, and the tackle, rigging, apparel, furniture, stores, and cargo thereof, shall be forfeited. And that all goods, ships, vessels, and boats, and the tackle, rigging, apparel, furniture, stores, and cargo, liable to forfeiture under this Act, may be seized and secured by any officers or persons mentioned in the second section of this Act. And every person opposing any officer or person in the execution of his duty under this Act, or aiding, or abetting any other person in any opposition, shall forfeit eight hundred dollars, and shall be guilty of a misdemeanour, and upon conviction be liable to imprisonment for a term not exceeding two years.

It will be observed, that the warning formerly given is not required under the amended Act, but that vessels are liable to seizure without such warning.

On the 8th of January, 1870, the Governor General of the Dominion of Canada, in Council, ordered that suitable sailing vessels, similar to the "La Canadienne," be chartered and equipped for the service of protecting the Canadian in-shore fisheries against illegal encroachments by foreigners, these vessels to be connected with the police force of Canada, and to form a marine branch of the same. It is understood that, by a change of the boundaries between Canada and Labrador, the Canadian territory now includes Mount Joly and a portion of the shore to the east thereof, which in the Treaty of 1818 was described as the southern coast of Labrador. This municipal change of boundary does not, however, interfere with the rights of American fishermen, as defined by the Treaty, on that portion of what was the southern coast of Labrador, east of Mount Joly.

Very respectfully,

GEO. S. BOUTWELL,
Secretary of the Treasury.

No. 149.—1870, June 11: *Letter from Mr. Thornton, British Minister at Washington, to Mr. Fish, United States Secretary of State.*

WASHINGTON, 11th June, 1870.

SIR, I had the honour to receive yesterday your note of the 8th inst. relative to an apparent discrepancy between the instructions issued by Vice-Admiral Wellesley, inclosed in my note of the 3rd inst., and those given by the Admiralty to him, which accompanied my note of the 26th ult. You are, however, quite right in not doubting that Admiral Wellesley, on the receipt of later instructions addressed to him on the 5th ult., will have modified the directions to the officers under his command, so that they may be in conformity with the views of the Admiralty.

In confirmation of this I have since received a letter from Vice-Admiral Wellesley, dated the 30th ult., informing me that he had received instructions to the effect that officers of Her Majesty's ships employed in the protection of the fisheries should not seize any vessel unless it were evident and could be clearly proved that the offence of fishing had been committed and the vessel itself captured within three miles of land.

I avail myself at the same time of the opportunity to point out to you, in compliance with an instruction which I have received from the Earl of Clarendon, that the Circular of the 16th ult., of your hon. colleague the Secretary of the Treasury, respecting the Canadian

239 inshore fisheries may lead to future misunderstanding, inasmuch as it limits the maritime jurisdiction of the Dominion of Canada to three marine miles from the shores thereof, without regard to international usage which extends such jurisdiction over creeks and bays, or to the stipulations of the Treaty of 1818, in which the United States renounces the right of fishing within three miles, not of the coast only, but of the bays, creeks or harbours of Her Britannic Majesty's Dominions in America.

I have, &c.,

(Signed) E. THORNTON.

The Hon. H. FISH,

&c. &c. &c.

No. 150.—1870, June 30: *Letter from Mr. Fish, United States Secretary of State, to Mr. Thornton, British Minister at Washington.*

DEPARTMENT OF STATE,
WASHINGTON, 30th June, 1870,—

SIR; I have the honour to acknowledge the receipt of your note of the 11th instant, in which you confirm my impression that Admiral Wellesley will have modified the directions to the officers under his command engaged in the protection of the Canadian Fisheries so that they shall be in conformity with the views of the Admiralty, and in which you point out under instructions from the lamented Earl of Clarendon, that the circular of the 16th ultimo, issued by the Secretary of the Treasury of the United States respecting the Canadian inshore Fisheries may lead to further misunderstanding, inasmuch as it limits the maritime jurisdiction of the Dominion of Canada to three marine miles from the shores thereof.

In view of the claims heretofore presented by Her Majesty's Government, and which as it contends, are supported by the law of nations and the stipulations of the Treaty of 1818, as to the extent of British Maritime jurisdiction in the waters in which the Fisheries are prosecuted on the Eastern Coasts of North America, the President is pleased to recognise in the tenor of the Despatches and instructions which have been addressed by Her Majesty's Government to the Canadian authorities and to Admiral Wellesley, a generous spirit of amity which is reciprocated by the United States. Animated by that spirit he directs that Her Majesty's Government be informed that the description of the limit of Canadian Maritime jurisdiction contained in the circular in question and which was adopted before this Government was made acquainted with the nature of the instructions which it was proposed by Her Majesty's Government to issue, was used for the sake of brevity in expressing the interpretation which has been heretofore placed upon the 1st article of the Treaty of 1818, by this Government, and not with the expectation of renewing a controversial discussion upon the subject, which, under present circumstances, he would sincerely deprecate.

I have the honour to be, with the highest consideration, Sir,

Your obedient servant,

HAMILTON FISH

EDWARD THORNTON, Esqre., C. B.

&c &c &c

No. 151.—1870, July 21: *Letter from Mr. Thornton, British Minister at Washington, to Mr. Fish, United States Secretary of State.*

WASHINGTON, 21st July, 1870.

SIR, With reference to notes which I have addressed to you, and verbal statements which I have made to you to the effect that instructions have been given to the officers commanding Her Majesty's vessels of war and Canadian Government vessels employed in the protection of the Canadian fisheries not to capture United States fishing vessels unless found fishing within three miles of the coast from which they are prohibited or of a line drawn across bays whose mouths do not exceed six geographical miles in width, I have the honour to inform you that I have received directions from Earl Granville to explain to you that the instructions respecting the limits within which the prohibition of fishing is to be enforced against United States fishermen are not to be considered as constituting an arrangement between the Governments of the United States and Great Britain, by which Canadian rights are waived, or the United States fishermen invested with any privilege, but only as a temporary direction given by the British and Canadian Governments to their own officers, in hopes that the question may soon be settled, and in order to prevent any controversy arising on a subordinate point.

I have, &c.,

(Signed) E. THORNTON.

HON. HAMILTON FISH,

&c. &c. &c.

- 240 No. 152.—1870, November 5: Report of Hon. Peter Mitchell, Canadian Minister of Marine and Fisheries, on the Practice which, previous to the Reciprocity Treaty, prevailed respecting United States Fishing Vessels trading in Provincial Ports, &c.

DEPARTMENT OF MARINE AND FISHERIES,
OTTAWA, 5th November, 1870.

With reference to the Earl of Kimberley's confidential despatch of the 12th ultimo, requesting information as to what was the actual practice which prevailed previous to the Reciprocity Treaty between Great Britain and the United States, in regard to the exclusion of American fishermen from trading or effecting commercial operations in the ports of the different Provinces of British North America, the undersigned has the honor to state:

That the right to prevent American fishing vessels from resorting to Provincial bays and harbors, for purposes of trade, was actually asserted and carried out under the Imperial and Colonial statutes, enacted to give effect to the provisions of the Treaty of 1818, anterior to the Reciprocity Treaty of 1854.

Between the years 1817 and 1854 (Vide App. 4, pp. 107-10, Nova Scotia Journals, 1853), several United States fishing vessels were detained and seized by Imperial and Colonial officers for infractions of the Treaty, and violation of these statutes. Many of them were condemned. Among the specific offences of fishing, for which numerous seizures and confiscations took place during this period, American fishing vessels were accosted and detained for the following reasons:—

1. Anchoring or hovering in-shore during calm weather without any ostensible cause, having aboard ample supplies of wood and water;
2. Lying at anchor and remaining inside of the bays to clean and pack fish;
3. Purchasing and bartering bait;
4. Selling goods and buying supplies;
5. Landing and transshipping cargoes of fish.

The undersigned begs leave to refer, in the first place, to the Imperial instructions under which, antecedent to the convention of 1818, American fishing vessels were excluded from British bays and harbors in North America, conformable to the Treaty of 1783. The following Admiralty order for the governance of officers commanding vessels engaged in the protection of the fisheries and the prevention of illicit trade, signed by Rear-Admiral Milne, bears date the 12th May, 1817:—

On your meeting with any foreign vessel, fishing, or at anchor, in any of the harbors or creeks in His Majesty's North American Provinces, or within our maritime jurisdiction, you will seize and send such vessel so trespassing to Halifax, for adjudication, unless it should clearly appear that they have been obliged to put in there in consequence of distress, acquainting me with the cause of such seizure, and every other particular, to enable me to give all information to the Lord Commissioners of the Admiralty. (Vide British and Foreign State Papers, No. 7, 1819-20. p. 139.)

Under this instruction numbers of American fishing vessels were seized in Ragged Island Harbour, on the 8th of June, 1817, where

they pretended to have sought shelter. The seizures were objected to on behalf of the United States Government, on the ground that these vessels entered from a lawful and necessary motive; but, on investigation, it was found that, as explained by His Majesty's Government, they were in the habit of occupying, and at the time of seizure, actually occupied this harbour without any legitimate excuse. The fishing schooners *Nabby* and *Washington* were seized in 1818, and condemned for being at anchor in, and hovering near, a settled British harbour. The *Java*, *Independence*, *Magnolia*, and *Hart*, were detained and confiscated in 1839, for being in harbour without lawful cause, and cleaning fish on deck. In 1840, the fishing vessels *Papineau* and *Mary* were seized and sold for purchasing bait ashore.

The right of excluding American fishing vessels from the Provincial ports, bays, and harbours, except in case of distress, was thus enforced just before the convention, and some time after, for similarly resorting to British bays and harbours, except for the specified purposes arranged in the treaty of 1818, to purchase wood and obtain water, and for shelter and repairs. This right was formally and continuously asserted throughout the intervening period to 1852, when the distinct offence of trading for supplies and transshipping fish cargoes became the subject of specific instructions. The Collectors of Customs at some of the ports of Nova Scotia having granted permits to authorize such transactions, the Provincial officers in command of the fisheries protection service asked for positive instructions. They were, therefore, instructed by the Government of Nova Scotia, that United States fishing vessels, with or without permits, could not legally land freight, or frequent such ports and harbours for any purposes whatever, not described in the Treaty. The following official direction, dated at Halifax, the 28th of August, 1852, is signed by the then Provincial Secretary, the Honourable Joseph Howe (Vide App. 4, p. 141, Nova Scotia Journals, 1853):—

No American fishing vessels are entitled to commercial privileges in Provincial ports, but are subject to forfeiture if found engaged in traffic. The Colonial Collectors have no authority to permit freight to be landed from such vessels, which, under the Convention, can only enter our parts [ports] for the purposes specified therein, and for no other.

241 The question arose on the practise of taking on board articles necessary to fishing operations, landing fish for transshipment, and refitting in ports and harbours, at various places around the coast of Nova Scotia, and producing a written permission from some Customs' Collector.

During the same year, Vice-Admiral Seymour applied to the Admiralty for special instructions as to the powers of naval officers to seize or interfere with United States fishing vessels resorting to ports or harbors for other than the purposes defined in the Convention. (Vide App. 4, pp. 138–9, Nova Scotia Journals, 1853.) The matter was referred to the Law Advisers of the Crown. (Dated 25th September, 1852.) They pronounced the opinion that these officers were empowered under their instructions to “seize” American fishing vessels only for the offence of fishing within the prescribed limits, but the vessels might be warned off and compelled to depart, and could be seized by such officers or others, if so authorised by Order in Council,—the penalties or mode of procedure depending upon the local laws and regulations of each Colony. (App. 4, pp. 139–41.)

The legal opinion recited, adds that "independently of the express provisions of the statute," vessels infringing these laws, by resorting to ports or harbors for other than the purposes specified by the treaty, might be warned and compelled to depart by whatever force is reasonably necessary by persons authorized by the Colonial Governors, or the British Admiral.

The Imperial and Colonial Statutes now in force, provide for regulations in pursuance of the treaty to enforce the terms of the Convention; and instructions to Commanders of Marine Police Vessels, approved by Orders in Council, are such existing "Regulations" provided for by the Statutes as are deemed "*necessary to prevent*" American fishermen from abusing "*in any other manner whatever*" (besides fishing) the privileges reserved to them by the Convention.

The foregoing references should suffice to establish that the restriction in question is neither novel, strained, nor vexatious.

The whole, nevertheless, respectfully submitted.

P. MITCHELL,
Minister of Marine and Fisheries.

No. 153.—1870: *Extract from President's Message to United States Congress.*

* * * * *

The course pursued by the Canadian authorities towards the fishermen of the United States during the past season has not been marked by a friendly feeling. By the first Article of the Convention of 1818, between Great Britain and the United States, it was agreed that the inhabitants of the United States should have for ever, in common with British subjects, the right of taking fish in certain waters therein defined. In the waters not included in the limits named in the Convention (within three miles of parts of the British coast) it has been the custom for many years to give to intruding fishermen of the United States a reasonable warning of their violation of the technical rights of Great Britain. The Imperial Government is understood to have delegated the whole or a share of its jurisdiction or control of these in-shore fishing-grounds to the Colonial authority known as the Dominion of Canada, and this semi-independent but irresponsible agent has exercised its delegated powers in an unfriendly way. Vessels have been seized without notice or warning, in violation of the custom previously prevailing, and have been taken into the Colonial ports, their voyages broken up, and the vessels condemned. There is reason to believe that this unfriendly and vexatious treatment was designed to bear harshly upon the hardy fishermen of the United States, with a view to political effect upon this Government. The Statutes of the Dominion of Canada assume a still broader and more untenable jurisdiction over the vessels of the United States. They authorize officers or persons to bring vessels hovering within three marine miles of any of the coasts, bays, creeks, or harbours of Canada into port, to search the cargo, to examine the master on oath touching the cargo and voyage, and to inflict upon him a heavy pecuniary penalty if true answers are not given; and if such a vessel is found "preparing to fish" within three marine miles of any of such coasts, bays, creeks,

or harbours without a license, or after the expiration of the period named in the last license granted to it, they provide that the vessel, with her tackle, &c., shall be forfeited. It is not known that any condemnations have been made under this statute. Should the authorities of Canada attempt to enforce it, it will become my duty to take such steps as may be necessary to protect the rights of the citizens of the United States.

It has been claimed by Her Majesty's officers that the fishing vessels of the United States have no right to enter the open ports of the British possessions in North America, except for the purposes of shelter and repairing damages, of purchasing wood, and obtaining water; that they have no right to enter at the British Custom-houses or to trade there except in the purchase of wood and water; and that they must depart within twenty-four hours after notice to leave. It is not known that any seizure of a fishing vessel carrying the flag of the United States, has been made under this claim. So far as the claim is founded on an alleged construction of the Convention of 1818, it cannot be acquiesced in by the United States. It is hoped that it will not be insisted on by Her Majesty's Government.

242 During the Conferences which preceded the negotiation of the Convention of 1818, the British Commissioners proposed to expressly exclude the fishermen of the United States from "the privilege of carrying on trade with any of His Britannic Majesty's subjects residing within the limits assigned for their use;" and also that it should not be "lawful for the vessels of the United States, engaged in said fishery, to have on board any goods, wares, or merchandize whatever, except such as may be necessary for the prosecution of their voyage to and from the said fishing-grounds. And any vessel of the United States which shall contravene this regulation may be seized, condemned, and confiscated with her cargo."

This proposition, which is identical with the construction now put upon the language of the Convention, was emphatically rejected by the American Commissioners, and thereupon was abandoned by the British Plenipotentiaries, and Article I, as it stands in the Convention, was substituted.

If, however, it be said that this claim is founded on Provincial or Colonial Statutes, and not upon the Convention, this Government cannot but regard them as unfriendly, and in contravention of the spirit, if not of the letter, of the Treaty, for the faithful execution of which the Imperial Government is alone responsible.

Anticipating that an attempt may possibly be made by the Canadian authorities in the coming session to repeat their unneighbourly acts towards our fishermen, I recommend you to confer upon the Executive the power to suspend, by Proclamation, the operation of the laws authorizing the transit of goods, wares, and merchandize in bond across the territory of the United States to Canada; and further, should such an extreme measure become necessary, to suspend the operation of any laws whereby the vessels of the Dominion of Canada are permitted to enter the waters of the United States.

A like unfriendly disposition has been manifested on the part of Canada in the maintenance of a claim of right to exclude the citizens of the United States from the navigation of the St. Lawrence. This river constitutes a natural outlet to the ocean for eight States with an aggregate population of about seventeen million six hundred

thousand inhabitants, and with an aggregate tonnage of six hundred and sixty-one thousand three hundred and sixty-seven tons upon the waters which discharge into it. The foreign commerce of our ports on these waters is open to British competition, and the major part of it is done in British bottoms.

If the American seamen be excluded from this natural avenue to the ocean, the monopoly of the direct commerce of the Lake ports with the Atlantic would be in foreign hands; their vessels on Transatlantic voyages having an access to our Lake ports which would be denied to American vessels on similar voyages. To state such a proposition is to refute its justice.

During the administration of Mr. John Quincy Adams, Mr. Clay unanswerably demonstrated the natural right of the citizens of the United States to the navigation of this river, claiming that the Act of the Congress of Vienna, in opening the Rhine and other rivers to all nations, showed the judgment of European jurists and statesmen that the inhabitants of a country through which a navigable river passes have a natural right to enjoy the navigation of that river to and into the sea, even though passing through the territories of another Power. This right does not exclude the co-equal right of the Sovereign possessing the territory through which the river debouches into the sea to make such regulations relative to the police of the navigation as may be reasonably necessary; but those regulations should be framed in a liberal spirit of comity, and should not impose needless burdens upon the commerce which has the right of transit. It has been found in practice more advantageous to arrange these regulations by mutual agreement. The United States are ready to make any reasonable arrangement, as to the police of the St. Lawrence, which may be suggested by Great Britain.

If the claim made by Mr. Clay was just when the population of States bordering on the shores of the lakes was only three million four hundred thousand, it now derives greater force and equity from the increased population, wealth, production, and tonnage of the States on the Canadian frontier. Since Mr. Clay advanced his argument in behalf of our right the principle for which he contended has been frequently, and by various nations, recognized by law or by Treaty, and has been extended to several other great rivers. By the Treaty concluded at Mayence, in 1831, the Rhine was declared free from the point where it is first navigable into the sea. By the Convention between Spain and Portugal, concluded in 1835, the navigation of the Douro, throughout its whole extent, was made free for the subjects of both Crowns. In 1853 the Argentine Confederation by Treaty threw open the free navigation of the Parana and the Uruguay to the merchant vessels of all nations. In 1856 the Crimean War was closed by a Treaty which provided for the free navigation of the Danube. In 1858 Bolivia, by Treaty, declared that it regarded the rivers Amazon and La Plata, in accordance with fixed principles of national law, as highways or channels, opened by nature, for the commerce of all nations. In 1859 the Paraguay was made free by Treaty, and in December 1866, the Emperor of Brazil, by Imperial decree, declared the Amazon to be open, to the frontier of Brazil, to the merchant ships of all nations. The greatest living British authority on this subject, while

asserting the abstract right of the British claim, says: "It seems difficult to deny that Great Britain may ground her refusal upon strict *law*, but it is equally difficult to deny, first, that in doing so she exercises harshly an extreme and hard law; secondly, that her conduct with respect to the navigation of the St. Lawrence is in glaring and discreditable inconsistency with her conduct with respect to the navigation of the Mississippi. On the ground that she possessed a small domain, in which the Mississippi took its rise, she insisted on the right to navigate the entire volume of its waters. On the ground that she possesses both banks of the St. Lawrence, where it disembogues itself into the sea, she denies to the United States the right of navigation, though about one-half of the waters of the lakes Ontario, Erie, Huron, and Superior, and the whole of Lake Michigan, through which the river flows, are the property of the United States."

243 The whole nation is interested in securing cheap transportation from the agricultural States of the west to the Atlantic seaboard. To the citizens of those States it secures a greater return for their labour; to the inhabitants of the seaboard it affords cheaper food; to the nation, an increase in the annual surplus of wealth. It is hoped that the Government of Great Britain will see the justice of abandoning the narrow and inconsistent claim to which her Canadian Provinces have urged her adherence.

* * * * *

No. 154.—1870, December 27: *Report of Committee of the Privy Council of Canada.*

(Confidential.)

The Committee of the Privy Council, while engaged in the consideration of a Report from the Minister of Marine and fisheries, on various Despatches on the subject of the regulations for protecting the British fisheries in North America, which were referred to them by your Excellency for their advice, have learned, with considerable surprise, that the conduct of the Canadian Government with regard both to the protection of those fisheries and to the navigation of the River St. Lawrence, has been animadverted on by the President of the United States in his recent Message to Congress.

It is, in the opinion of the Committee of the Privy Council, a significant fact that the President of the United States has in his late Message adopted the unusual course of animadverting on the proceedings of Canada, which is styled, "this semi-independent Dominion," instead of remonstrating through the usual diplomatic channels against any acts committed by Canadian authorities in violation of the Treaty of 1818, under which the United States renounced all right on the part of their citizens to fish in British waters, with certain exceptions, which have not led to controversy.

Such a course is obviously calculated to produce uneasiness in the minds of Her Majesty's subjects in Great Britain, who—having comparatively little interest in the British American fisheries, and a very deep interest in maintaining friendly relations with the United States—must have experienced considerable anxiety on learning,

from such high authority as the President, that Canada had acted in an unfriendly way to the citizens of the United States.

It is, in the opinion of the Committee of the Privy Council, a circumstance that ought to be adverted to in connection with this most important subject, that in the same Message the President had previously stated it as his opinion, that "the time is not probably far distant when, in the natural course of events, the European political connection with this continent will cease," and had, when referring to the contemplated acquisition of San Domingo by the United States, given as one reason for such acquisition, "it is to promote honest means of paying our honest debts, without over-taxing the people." Her Majesty's Government cannot be unaware that the acquisition of Canada, and the consequent annihilation of British power and influence on this continent, is held by many influential American statesmen to be the "manifest destiny" of their country, and to be an object, the accomplishment of which they think themselves justified in promoting by every kind of pressure that they can bring to bear on Her Majesty's Canadian subjects. Under such circumstances, and with a distinct recommendation from the President of the United States to the Senate and House of Representatives, that they should confer upon the Executive the power to suspend the operation of the laws authorizing the transit of goods, wares, and merchandise, in bond, across the territory of the United States to Canada, and also to suspend the operation of any laws whereby Canadian vessels are permitted to enter the waters of the United States, the Committee of the Privy Council feel it their duty to request your Excellency to transmit to Her Majesty's Government their views on the subjects adverted to in the Message of the President of the United States, in which Canada is interested.

The Committee of the Privy Council readily acknowledge that the execution of the President's threat of abolishing the bonding system, and of excluding Canadian vessels from American waters, would inflict serious inconvenience and loss on Her Majesty's Canadian subjects; but they feel assured that such inconvenience and loss would be borne with fortitude by the people of the Dominion, and they entertain little doubt that such a policy as that which has been recommended by the President, avowedly in retaliation of the measures adopted by the Imperial and Canadian Governments for the protection of the British fisheries during last season, would ere long lead to a reaction in the United States, many of whose citizens would be as deeply injured as Her Majesty's Canadian subjects by a policy of non-intercourse.

The Committee of the Privy Council trust that Her Majesty's Government will not be influenced in the slightest degree by the threats of the President. They feel assured that Her Majesty's Government will believe that it is the earnest desire of the Government and people of Canada to maintain the most friendly relations with the citizens of the United States. They venture to hope that in the various discussions which have taken place between the Imperial and Canadian Governments, on the points in controversy between Great Britain and the United States, your Excellency's advisers have shown themselves ready and willing to regulate their policy by that of the Imperial Government.

244 Under present circumstances, it is more than ever important that there should be an entire concurrence of action, and, if possible, of opinion, between the two Governments, and the Committee of the Privy Council are convinced that this will best be secured by a full and frank expression of their views.

The recent message of the President of the United States affords, in the opinion of the Committee of the Privy Council, conclusive proof that the conciliatory policy regarding the fisheries which has prevailed since the abrogation of the Reciprocity Treaty has not been appreciated by the United States. Had the vigorous policy, announced in Secretary Sir John Pakington's dispatch of 27th May, 1852—and which, though it caused great irritation, and led to many threats, secured, nevertheless, the ratification of the Reciprocity Treaty—been resumed immediately on the abrogation of that treaty, the irritation which will never cease to exist so long as a single privilege is withheld from the American fishermen, would have been directed against the Government which had abrogated the treaty, and not against that of Canada. In the hope that conciliation would lead to important concessions to Canada, a temporizing policy has been pursued for years, and the result is that when very moderate restrictions are enforced the Chief Magistrate of the United States charges Canada with having acted in an unfriendly spirit.

The Committee of the Privy Council think it far from improbable that if the regulations, which were in existence prior to 1854, for protecting the British fisheries, had been enforced with equal vigour after the abrogation of the Reciprocity Treaty, that treaty would long ere this have been renewed in a form that would have been acceptable to Canada.

The recent message of the President is, in their opinion, far from discouraging. It proves how severely the American fishermen have felt the very moderate restrictions imposed on them last season, and how strong will be the pressure which they will bring to bear on their own Government to secure for them in some way the privilege of fishing in British waters. The President, no doubt, hopes that he will accomplish that object by threats, but should these prove unavailing he will probably resort to negotiation.

The Committee of the Privy Council are persuaded that concessions to the United States will invariably be followed by fresh demands.

So soon as Great Britain evinced a disposition to take a liberal view of the Headland question, a claim was set up that had never been previously thought of, that fishing vessels should be permitted to trade in Canadian ports, although the practical effect of such a concession would be to facilitate very greatly the illegal traffic of the American fishermen. But were this further concession made, the trespasses within the three mile limit would be stimulated, and if all other Canadian fishing rights were abandoned, the next demand would, probably, be for considerable cessions of territory. In the opinion of the Committee of the Privy Council it is advisable to adhere to the provisions of the Treaty of 1818. If the interpretation of that Treaty by the law officers of the Crown in England be disputed, a reference should be made to a friendly power, or to learned jurists impartially selected, to settle its true interpretation according to the principles of general and international law; but should such

a proposition not be entertained by the United States, then the Committee of the Privy Council maintain that the opinion of the law officers of the Crown should be acted on, and that the regulations which were in existence prior to 1854, should be enforced as promised by the Earl of Clarendon, in his Despatch to Sir F. Bruce, of 11th May, 1867.

The Committee of the Privy Council do not doubt that they will receive the support of Her Majesty's Government in enforcing the old regulations, and they were gratified to find that the Earl of Kimberley admitted, during Mr. Campbell's interview with his Lordship in July last, that the Canadians might reasonably expect that the state of things anterior to the Reciprocity Treaty should be reverted to.

Although your Excellency's advisers have been hitherto unwilling to object to refer the question relating to headlands, which has been so long in controversy between Great Britain and the United States, to a mixed Commission, in accordance with the proposal made by Mr. Adams, the United States Minister, at the Court of St. James', and conditionally assented to by the late Earl of Clarendon, they feel it their duty to point out that unless there should be some provision for umpirage, such a reference would be of no practical utility, and would be less likely to lead to a successful result than the mode already suggested.

The result of the proceedings of the St. Juan Boundary Commission does not afford much ground for anticipating a satisfactory solution of the question in controversy by a mixed Commission.

The Committee of the Privy Council must further observe, that unless there is a full concurrence of opinion between the Imperial and Canadian Governments, a joint commission on which both would be represented, might lead to misunderstanding.

The Committee of the Privy Council have no fear that the Imperial Government will abandon any of the rights of Canada without her consent; but they admit that Great Britain must decide on its own responsibility as to the extent of the support which it will give to Canada in enforcing its rights under the Treaty of 1818. Whatever may be the extent of that support, it seems highly desirable that before making any proposition to the United States, with a view to the constitution of a mixed Commission, there should be a clear understanding between the two Governments as to the subject of reference. It has never been imagined by the Canadian Government that any question was to be referred to the mixed Commission, except the definition of the waters in which American vessels could fish in accordance with the Treaty of 1818.

Since the correspondence between the Earl of Clarendon and Mr. Adams took place, an entirely new question has been raised by the United States which cannot properly be made a subject of reference to a mixed Commission. In direct contravention to the text of the

245 Treaty of 1818, and to the uniform practice prior to 1854, the American Government has made pretensions to the right of entering British harbours to procure bait and other supplies, and to transship their fish.

Most conclusive proof of the correctness of the practice which was in force prior to 1854, will be found in the fact that it appears by the protocols which were interchanged between the negotiators of the Treaty of 1818, that the United States proposed that trade in

"bait" should be permitted, that this was objected to by Great Britain, and abandoned by the United States. And yet Canada is now pressed to concede permission to the American fishermen to trade in "bait," although it must be apparent, to all conversant with the subject, that such a concession would afford great facilities for illicit traffic and the evasion of the treaty. It appears to the Committee of the Privy Council that the menacing tone adopted by the President of the United States, and the new demands which have been made, render it very undesirable to make any proposition at present for the settlement of the Headland question by a mixed Commission.

Far better will it be to adhere to the British construction of the treaty subject to a reference to a friendly power, as already suggested, and to act guardedly in enforcing the rights claimed by Great Britain.

The course recently adopted by the President affords, in the opinion of the Privy Council, a good opportunity for making a communication to the United States Government. It would obviously be most desirable that Her Majesty's Government should acquaint the Government of the United States that there was entire concurrence between the two Governments in the measures adopted during the last season for the protection of the fisheries, and that far from straining the interpretation of the Treaty of 1818, they had not enforced the rights secured by that treaty, as interpreted by the Crown law officers of Great Britain.

The President might be informed that the liberal course, followed since the termination of the Reciprocity Treaty, was adopted avowedly in the hope that it would lead to a free commercial intercourse between the two countries, and that it was, when all hope of obtaining from the United States concessions that would justify Canada in parting with her fisheries had been abandoned, that it was resolved to take effectual measures to protect Her Majesty's subjects in the Dominion in their rights, as acknowledged prior to 1854.

Her Majesty's Government can safely assure the President that the treaty has not in any case been enforced with greater rigour than it was prior to 1854; but that on the contrary, several temporary relaxations have been admitted, from an unwillingness to deprive the American fishermen hastily of privileges which they have lost, owing to the action of their own Government.

The Committee of the Privy Council have read the President's observations on the navigation of the River St. Lawrence with even greater surprise than those regarding the fisheries. The President refers to correspondence on the subject during the administration of the late Mr. John Quincy Adams, between forty and fifty years ago, and closes his remarks on the subject in the following words: "It is hoped that the Government of Great Britain will see the justice of abandoning the narrow and inconsistent claim to which her Canadian Provinces have urged her adherence."

The Committee of the Privy Council are not aware that any claim to the right to navigate the River St. Lawrence has been proposed by the United States since the negotiations of 1824 and 1826, on both which occasions the British Plenipotentiaries refused to enter into any negotiation, so long as the claim of right was preferred. They said, in 1824, "The American Plenipotentiary must be aware that a demand rested upon this principle, necessarily pre-

cludes those considerations of good neighborhood and mutual accommodation, with which the Government of Great Britain would otherwise have been anxious to enter upon the adjustment of this part of the negotiation. A right claimed without qualification, on the one side, affords no room for friendly concession on the other; total admission, or total rejection, is the only alternative which it presents." When Mr. Clay renewed the claim of right, in 1826-7, he was answered in precisely the same way, as appears from a letter addressed to him on the 21st of September, 1827, by Mr. Albert Gallatin: "The British Plenipotentiaries will not entertain any proposition respecting the navigation of the St. Lawrence, founded on the right claimed by the United States to navigate that river to the sea." In the case of the fisheries, as well as in that of the River St. Lawrence, the United States have rendered negotiations impracticable, by advancing claims of right which cannot be recognized.

Under the Reciprocity Treaty, which the United States saw fit to abrogate, the right to use, not only the River St. Lawrence, but the Canadian ship canals, was conceded to their citizens; and since the abrogation of that treaty, all applications by the United States Government, or by American citizens, for permission to use either the river or canals, have been granted, in return for which courtesy the American authorities have recently refused to permit a British vessel to navigate the Sault St. Marie Canal without any justifiable reason.

It is quite unnecessary to discuss the ground of the American claim to the free navigation of the River St. Lawrence, as for all practical purposes the concession of the right would be valueless unless accompanied by a permission to use the Canadian ship canals.

The Committee of the Privy Council have agreed upon a Minute which may afford Her Majesty's Government sufficient ground for making to the United States such a communication on the subject of the fisheries as they have suggested in this Report, and they respectfully submit it for your Excellency's approval.

Certified WM. H. LEE.
Clerk Privy Council Canada.

PRIVY COUNCIL CHAMBER,
Ottawa, 27th December, 1870.

246 No. 155.—1871, February 16: Letter from the Earl of Kimberley (British Colonial Secretary) to Lord Lisgar (Governor-General of Canada).

(Confidential.)

DOWNING STREET, February 16, 1871.

MY LORD, You have already been informed by Telegram of the views of Her Majesty's Government upon the Fishery Questions, but I think it will be convenient, with reference to the pending negotiations, that a somewhat fuller statement of those views should now be placed on record.

It would not be possible for Her Majesty's Government to pledge themselves to any foregone conclusion upon any particular point connected with these negotiations, but they have anxiously considered

the questions which concern Canada, and they feel confident that the Canadian Government will agree with them that a satisfactory termination of the difficulties which have arisen with the United States can only be attained by taking as broad and liberal a view as is consistent with the just rights and real interests of the Dominion.

As at present advised, Her Majesty's Government are of opinion that the right of Canada to exclude Americans from fishing in the waters within the limits of three marine miles of the coast is beyond dispute, and can only be ceded for an adequate consideration.

Should this consideration take the form of a money payment, it appears to Her Majesty's Government that such an arrangement would be more likely to work well than if any conditions were annexed to the exercise of the privilege of fishing within the Canadian waters.

The presence of a considerable number of cruisers would always be necessary to secure the performance of such conditions, and the enforcement of penalties for the non-observance of them would be certain to lead to disputes with the United States.

With respect to the question, What is a bay or creek, within the meaning of the first Article of the Treaty of 1818, Her Majesty's Government adhere to the interpretation which they have hitherto maintained of that Article; but they consider that the difference which has arisen with the United States on this point might be a fit subject for compromise.

The exclusion of American fishermen from resorting to Canadian ports, "except for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water," might be warranted by the letter of the Treaty of 1818, and by the terms of the Imperial Act 59 George III., cap. 38, but Her Majesty's Government feel bound to state that it seems to them an extreme measure, inconsistent with the general policy of the Empire, and they are disposed to concede this point to the United States' Government, under such restrictions as may be necessary to prevent smuggling, and to guard against any substantial invasion of the exclusive rights of fishing which may be reserved to British subjects.

In conclusion I have to state that Her Majesty fully appreciates the loyal and prompt manner in which the Canadian Government have assented to the appointment of the Commission which is about to sit at Washington. The high character and recognized ability of the British Commissioners afford ample security that the interests of Canada will be carefully protected during the forthcoming negotiations.

I am, &c.,
The Lord LISGAR,
&c. &c. &c.

(Signed) KIMBERLEY.

No. 156.—1871: *Judgments in the Court of Vice Admiralty of Judge Hazen in the Case of the "White Fawn," and of Sir Wm. Young in the case of the "J. H. Nickerson."*

HIS HONOR JUDGE HAZEN.

At the last sitting of this Court, Mr. Tuck, B. C., Proctor for the Crown, applied, on behalf of Sir John A. McDonald, the Attorney-General of the Dominion, for a monition, calling upon the owners of

the schooner and her cargo, to show cause why the *White Fawn* and the articles above enumerated with her tackle, etc., should not be considered as forfeited to the Crown for a violation of the Imperial Statute 59, George III., Cap. 38, and the Dominion Statutes 31 Vic., Cap. 61, and 33 Vic., Cap. 15.

The *White Fawn*, as it appears from her papers, was a new vessel of 64 tons, and registered at Gloucester, Massachusetts, in 1870, and owned in equal shares by Messrs. Somes, Friend, and Smith, of that place;

That she was duly licensed for one year, to be employed in the Coasting Trade and Fisheries, under the laws of the United States;

247 That by her "Fishery Shipping Paper," signed by the master and ten men, the usual agreement was entered into for pursuing the Cod and other Fisheries, with minute provisions for the division of the profits among the owners, skipper, and crew. These papers and other documents found on board, are all in perfect order, and not the slightest suspicion can be thrown upon them. The Seamen's Articles are dated 19th November, 1870:—On the 24th Nov., 1870, she arrived at Head Harbour, a small bay in the eastern end of Campobello, in the county of Charlotte, in this Province.

Captain Betts, a Fishery Officer, in command of the *Water Lily*, a vessel in the service of the Dominion, states that on the 25th November he was lying with his vessel at Head Harbor. Several other vessels, and among them the *White Fawn*, were lying in the harbor; that he went on board the *White Fawn*: He states a number of particulars respecting the vessel from her papers, and adds that the said vessel, *White Fawn*, had arrived at Head Harbor on the 24th Nov., and had been engaged purchasing fresh herrings, to be used as bait in trawl fishing; that there were on board about 5,000 herrings, which had been obtained and taken on board at Head Harbour; also 15 tons of ice, and all the materials and appliances for trawl fishing, and that the master admitted to him that the herring had been obtained at Head Harbour by him for the purpose of being used as bait for fishing. There are then some remarks as to the master being deceived as to the fact of the cutter being in the neighbourhood, which are not material; and, that deponent further understood that persons had been employed at Head Harbor to catch the herring for him; that he seized the schooner on the 2th, [sic], and arrived with her the same evening at St. John, and delivered her on the next day to the Collector of the Customs.

No reason is given for the delay which has taken place of more than two months in proceeding against the vessel, which was seized, as alleged by Captain Betts, for a violation of the terms of the Convention and the laws of Canada; her voyage was broken up, and her crew dispersed at the time of the seizure.

By the Imperial Statute, 59 George III., cap. 38, it is declared that if any foreign vessel, or person on board thereof, "shall be found to be fishing, or to have been fishing, or preparing to fish within such distance (three marine miles) of the coast, such vessel and cargo shall be forfeited."

The Dominion Statute, 31 Vic., Cap. 61, as amended by 33 Vic., Cap. 15, enacts: "If such foreign vessel is found fishing, or preparing to fish, or to have been fishing in British waters, within three marine

miles of the coast, such vessel, her tackle, etc., and cargo, shall be forfeited."

The *White Fawn* was a foreign vessel in British waters; in fact, within one of the Counties of this Province when she was seized. It is not alleged that she is subject to forfeiture for having entered Head Harbour for other purposes than shelter or obtaining wood and water. Under section III, of the Imperial Act, no forfeiture but a penalty can be inflicted for such entry. Nor is it alleged that she committed any infraction of the Customs or Revenue Laws. It is not stated that she had fished within the prescribed limits, or had been found fishing, but that she was "preparing to fish," having bought bait (an article no doubt very material if not necessary for successful fishing) from the inhabitants of Campobello. Assuming that the fact of such purchase establishes a "preparing to fish" under the Statutes (which I do not admit), I think, before a forfeiture could be incurred, it must be shown that the preparations were for an illegal fishing in British waters: hence, for aught which appears, the intention of the Master may have been to prosecute [prosecute] his fishing outside of the three-mile limit, in conformity with the Statutes; and it is not for the Court to impute fraud or an intention to infringe the provisions of our statutes to any person, British or foreign, in the absence of evidence of such fraud. He had a right, in common with all other persons, to pass with his vessel through the three miles, from our coast to the fishing grounds outside, which he might lawfully use, and, as I have already stated, there is no evidence of any intention to fish before he reached such grounds.

The construction sought to be put upon the statutes by the Crown officers would appear to be thus:—"A foreign vessel, being in British waters and purchasing from a British subject any article which may be used in prosecuting the fisheries, without its being shown that such article is to be used in illegal fishing in British waters, is liable to forfeiture as preparing to fish in British waters."

I cannot adopt such a construction. I think it harsh and unreasonable, and not warranted by the words of the statutes. It would subject a foreign vessel, which might be of great value, as in the present case, to forfeiture, with her cargo and outfits, for purchasing (while she was pursuing her voyage in British waters, as she lawfully might do, within three miles of our coast) of a British subject any article, however small in value (a cod-line or net for instance) without its being shown that there was any intention of using such articles in illegal fishing in British waters before she reached the fishing ground to which she might legally resort for fishing under the terms of the Statutes.

I construe the Statutes simply thus:—If a foreign vessel is found—1st, having taken fish; 2nd, fishing, although no fish have been taken; 3rd, "preparing to fish," (i.e.), with her crew arranging her nets, lines, and fishing tackle for fishing, though not actually applied to fishing, in British waters, in either of those cases specified in the statutes the forfeiture attaches.

I think the words "preparing to fish" were introduced for the purpose of preventing the escape of a foreign vessel which, though with intent of illegal fishing in British waters, had not taken fish or engaged in fishing by setting nets and lines, but was seized in the

very act of putting out her lines, nets, etc., into the water, and so preparing to fish. Without these a vessel so situated would escape seizure, inasmuch as the crew had neither caught fish nor been found fishing.

Taking this view of the Statutes, I am of the opinion that 248 the facts disclosed by the affidavits do not furnish legal grounds for the seizure of the American schooner *White Fawn*, by Captain Betts, the commander of the Dominion vessel *Water Lily*, and do not make out a *prima facie* case for condemnation in this Court, of the schooner, her tackle, &c., and cargo.

I may add that as the construction I have put upon the Statute differs from that adopted by the Crown Officers of the Dominion, it is satisfactory to know that the judgment of the Supreme Court may be obtained by information, filed there, as the Imperial Act 59, George III., Cap. 38, gave concurrent jurisdiction to that Court in cases of this nature.

* * * * *

Sir WILLIAM YOUNG.

This is an American fishing vessel of seventy tons burthen, owned at Salen, Massachusetts, and sailing under a Fishing License issued by the Collector of that Port, and dated March 25th, A. D., 1869. In the month of June 1870, she was seized by Captain Tory of the Dominion Schooner *Ida E.*, while in the North Bay of Ingonish, Cape Breton, about three or four cable lengths from the shore; and it appeared the offense charged against her was that she had run into that Bay for the purpose of procuring bait, had persisted in remaining there for that purpose after warning to depart therefrom, and not to return, and had procured or purchased bait while there. This case, therefore, differs essentially from the cases I have already decided. It comes within the charge of preparing to fish—a phrase to be found in all the British and Colonial Acts, but not in the Treaty of 1818. In giving judgment 10th February last, in the case of the *A. J. Franklin*, I referred to the case in hand, and stated that I would pronounce judgment in this also in a few days, which I was prepared to do. But it was intimated to the Court that some compromise or settlement might possibly take place in reference to the instructions that had been issued from time to time to the cruisers, and to the negotiations pending between the two Governments, and I have accordingly suspended judgment until now, when it has been formally moved for.

The same arguments [arguments] were urged at the hearing of this cause as in the case of the *Wampatuck* on the wisdom of the Treaty of 1818, and some severe strictures were passed on the spirit and tendency of the Two Dominion Acts of 1868 and 1870. To all such arguments and strictures the same answer must be given in this as in my former judgments. The libel sets out in separate articles these two acts with the treaty, and the Imperial Acts of 1819 and 1867, all of which are admitted without any questions raised thereon in the responsive allegation. I must take them, therefore, both on general principles and on the pleading, as binding on this court; and it is of no consequence whether the judge approves or disapproves of them.

A judge may sometimes intimate a desire that the enactments he is called upon to enforce should be modified or changed; but until they are repealed in whole or in part, they constitute the law, which it is his business and his duty to administer.

* * * * *

It being, then, clearly established that the "J. H. Nickerson" entered a British port, and was anchored within three marine miles of the coast off Cape Breton, for the purpose of purchasing or procuring bait, and did there purchase or procure it in June, 1870, the single question arises on the Treaty of 1818 and the Acts of the Imperial and Dominion Parliaments. Is this a sufficient ground for seizure and condemnation? This was said at the hearing to be a test case,—the most important that had come before the Court since the termination of the Reciprocity Treaty of 1854. But it has lost much of its importance since the hearing in February, and the present aspect of the question would scarcely justify the elaborate review which might otherwise have been reasonably expected. If the law should remain as it is, and the instructions issued from Downing Street on the 30th of April and by the Dominion Government on the 27th June, 1870, as communicated to Parliament, were to continue, no future seizure like the present could occur; and if the Treaty of 1818 and the Acts consequent thereon are superseded, this judgment ceases to have any value beyond its operation on the case in hand.

The first article of the Convention of 1818 must be construed, as all other instruments are, with a view to the surrounding circumstances and according to the plain meaning of the words employed. The subtleties and refinements that have been applied to it will find little favor with a Court governed by the rules of sound reason, nor will it attach too much value to the protocols and drafts or the history of the negotiations that preceded it. We must assume that it was drawn by able men and ratified by the governments of two great powers, who knew perfectly well what they were respectively gaining or conceding, and took care to express what they meant. After a formal renunciation by the United States of the liberty of fishing, theretofore enjoyed or claimed, within the prescribed limits of three marine miles of any of our bays or harbors, they guard themselves by this proviso: "Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and repairing damage therein, of purchasing wood and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent them taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

These privileges are explicitly and clearly defined, and to make assurance doubly sure, they are accompanied by a negative declaration excluding any other purpose beyond the purpose expressed. I confine myself to the single point that is before me. There is no

249 charge here of taking fish for bait or otherwise, nor of drying or curing fish, nor of obtaining supplies or trading. The defendants allege that the "Nickerson" entered the Bay of Ingonish and anchored within three marine miles of the shore for the purpose of obtaining water and taking off two of her men who had friends on shore. Neither the Master nor the crew on board thereof, in the words of the responsive allegation, "fishing, preparing

to fish, nor procuring bait wherewith to fish, nor having been fishing in British waters, within three marine miles of the coast." Had this been proved, it would have been a complete defense, nor would the Court have been disposed to narrow it as respects either water, provisions or wood. But the evidence conclusively shows that the allegation put in is untrue. The defendants have not claimed in their plea what their counsel claimed at the hearing, and their evidence has utterly failed them. The vessel went in, not to obtain water or men, as the allegation says, nor to obtain water and provisions, as their witness says; but to purchase or procure bait (which, as I take it, is a preparing to fish), and it was contended that they had a right to do so, and that no forfeiture accrued on such entering. The answer is, that if a privilege to enter our harbours for bait was to be conceded to American fishermen, it ought to have been in the Treaty, and it is too important a matter to have been accidentally overlooked. We know, indeed, from the State Papers that it was not overlooked,—that it was suggested and declined. But the Court, as I have already intimated, does not insist upon that as a reason for its judgment. What may be justly and fairly insisted on is that beyond the four purposes specified in the Treaty—shelter, repairs, water and wood,—here is another purpose or claim not specified; while the treaty itself declares that no such other purpose or claim shall be received to justify an entry. It appears to me an inevitable conclusion that the "J. H. Nickerson," in entering the Bay of Ingonish for the purpose of procuring bait, and evincing that purpose by purchasing or procuring bait while there, became liable to forfeiture, and upon the true construction of the Treaty and Acts of Parliament, was legally seized.

"I direct, therefore, the usual decree to be filed for condemnation of vessel and cargo, and for distribution of the proceeds according to the Dominion Act of 1871."

No. 157.—1872, March 6: *Circular issued by Mr. Geo. S. Boutwell.*

[No. 16.] Navigation Division, Circular No. 5.

RELATIVE TO THE FISHERIES ON THE COASTS OF THE BRITISH NORTH
AMERICAN COLONIES.

TREASURY DEPARTMENT,
Washington, D. C., March 6, 1872.

To Collectors of Customs:

As the season for fishing on the coast of the British Possessions in our vicinity is approaching, it is considered important that fishermen of the United States intending to pursue their business in the locality mentioned, should be thoroughly acquainted with the laws and regulations governing the matter, in order to avoid incurring the penalties for violations thereof. To that end the following Circular, issued by this Department June 9, 1870, is republished, as containing information still applicable.

You will please endeavour to bring the contents of the Circular to the attention of all parties concerned, at the same time notifying them that the provisions of the Treaty between the United States and Great Britain, proclaimed July 4, 1871, relating to the fisheries, will not go into effect until the laws required to carry them into operation shall have been passed by the various Governments mentioned in Article XXXIII, and warning them that their business must yet be carried on subject to the restrictions existing at the time of the ratification of the Treaty :

CIRCULAR.

* * * * *

In compliance with the request of the Secretary of State, you are hereby authorized and directed to inform all masters of fishing vessels, at the time of clearance from your port, that the authorities of the Dominion of Canada have terminated the system of granting fishing licenses to foreign vessels, under which they have heretofore been permitted to fish within the maritime jurisdiction of the said Dominion, that is to say, within three marine miles of the shores thereof; and that all fishermen of the United States are prohibited from the use of such in-shore fisheries, except so far as stipulated in the first Article of the Treaty of October 20, 1818, between the United States and Great Britain, in virtue of which the fishermen of the United States have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands; on the Western and Northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands; and, also, on the coasts, bays, harbours, and creeks, from Mount Joly, which was, when the Treaty was signed, on the southern coast of 250 Labrador, to and through the Straits of Belle Isle, and thence northwardly, indefinitely along the coast, without prejudice, however, to any exclusive rights of the Hudson's Bay Company; and, have also, liberty forever to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland, above described, and of the coast of Labrador, unless the same, or any portion thereof, be settled; in which case it is not lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground; and, also, are admitted to enter any other bays or harbours, for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever, subject to such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges reserved to them as above expressed. Fishermen of the United States are bound to respect the British laws and regulations for the regulation and preservation of the fisheries to the same extent to which they are applicable to British or Canadian fishermen.

The Canadian Law of the 22d of May, 1868, (31 Victoria, cap. 61), entitled "An Act respecting Fishing by Foreign Vessels," and the Act assented to on the 12th of May, 1870, entitled "An Act to amend the Act respecting Fishing by Foreign Vessels," among other things, enact, that any commissioned officer of Her Majesty's navy, serving on board of any vessel of Her Majesty's navy, cruizing and being in the waters of Canada, for the purpose of affording protection to Her Majesty's subjects engaged in the fisheries, or any commissioned officer of Her Majesty's navy, fishery officer, or stipendiary magistrate, on board of any vessel belonging to or in the service of the Government of Canada, and employed in the service of protecting the fisheries, or any officer of the Customs of Canada, sheriff, magistrate, or other person duly commissioned for that purpose, may go on board of any ship, vessel, or boat, within any harbour in Canada, or hovering (in British waters) within three marine miles of any of the coasts, bays, creeks, or harbours in Canada, and stay on board so long as she may remain within such place or distance; and that any one of such officers or persons, as are above mentioned, may bring any ship, vessel, or boat, being within any harbour in Canada, or hovering (in British waters) within three marine miles of any of the coasts, bays, creeks, or harbours in Canada, into port and search her cargo, and may also examine the master upon oath touch-

ing the cargo and voyage; and if the master or person in command shall not truly answer the questions put to him in such examination, he shall forfeit four hundred dollars; and if such ship, vessel, or boat be foreign, or not navigated according to the laws of the United Kingdom or of Canada, and has been found fishing, or preparing to fish, or to have been fishing (in British waters) within three marine miles of any of the coasts, bays, creeks, or harbours of Canada, not included within the above-mentioned limits, without a license, or after the expiration of the period named in the last license granted to such ship, vessel, or boat under the first section of this Act, such ship, vessel, or boat, and the tackle, rigging, apparel, furniture, stores, and cargo thereof, shall be forfeited. And that all goods, ships, vessels, and boats, and the tackle, rigging, apparel, and furniture, stores, and cargo liable to forfeiture under this Act may be seized and secured by any officers or persons mentioned in the second section of this Act. And every person opposing any officer or person in the execution of his duty under this Act, or aiding or abetting any other person in any opposition, shall forfeit eight hundred dollars, and shall be guilty of a misdemeanour, and upon conviction be liable to imprisonment for a term not exceeding two years.

It will be observed that the warning formerly given is not required under the Amended Act, but that vessels trespassing are liable to seizure without such warning.

"On the 8th January, 1870, the Governor General of the Dominion of Canada, in Council, ordered that suitable sailing vessels, similar to the "*La Canadienne*," be chartered and equipped for the service of protecting the Canadian in-shore fisheries against illegal encroachments by foreigners, these vessels to be connected with the police force of Canada, and to form a marine branch of the same. It is understood that, by a change of the boundaries between Canada and Labrador, the Canadian territory now includes Mount Joly and a portion of the shore to the east thereof, which, in the Treaty of 1818, was described as the southern coast of Labrador. This municipal change of boundary does not, however, interfere with the rights of American fishermen, as defined by the Treaty, on that portion of what was the southern Coast of Labrador, east of Mount Joly.

* * * * *

There is reason to apprehend that the Canadian authorities will adopt similar measures towards preventing encroachments upon the British fisheries during the season of 1872.

Very respectfully,

GEO. S. BOUTWELL,
Secretary of the Treasury.

251 No. 158.—1873, March 14: Letter from Mr. Fish (United States Secretary of State) to Sir E. Thornton (British Minister at Washington).

DEPARTMENT OF STATE. Washington, 14 March 1873.

SIR: I have the honour to acknowledge the receipt of your note of the 8th instant inclosing copy of a Report of the Committee of the Privy Council of Canada made to the Governor General of that Dominion, recommending that American vessels should not be prevented from fishing within the three mile limit before the Act of Congress giving effect to the Articles of the Treaty of Washington relating to Canada comes into effect, on the 1st of July next.

I am instructed by the President to express his appreciation of this liberal recommendation of the Committee of the Privy Council for removing the last impediment to the friendly relations which he desires to have subsist between two peoples so near neighbours and so bound to each other by the ties of commercial interest and of personal intercourse.

I shall be obliged if you will inform me whether the recommendation above referred to will be carried into effect, and if this Government will be at liberty to issue the circulars usual in such cases.

I have the honour to be with the highest consideration, Sir,
Your obedient servant,

HAMILTON FISH

The Right Honourable

Sir EDWARD THORNTON, K C B

&c. &c. &c.

No. 159.—1873, *June 23: Letter from Sir E. Thornton to Earl Granville (British Foreign Secretary).*

No. 274.

WASHINGTON, *June 23, 1873.*

MY LORD: On the receipt of your Lordship's despatch No. 176 of the 7th instant, I addressed a note, copy of which I have the honour to inclose, to Mr. Fish, proposing to him to sign a Protocol to extend Articles 18 to 25 of the Treaty of May 8, 1871 to the Colony of Newfoundland. In the note I forwarded a copy of the Act of the Legislature of that Colony with reference to the Treaty: and I may here observe that no date has been affixed to the copy of the Act which was transmitted to me in your Lordship's despatch above mentioned, so that in the event of Mr. Fish's agreeing to sign a Protocol, I should probably be obliged to telegraph for it so as to be able to insert it in the Protocol.

On the same day I saw Mr. Fish at the State Department and spoke to him about the Protocol. He replied that he doubted whether he could agree to sign a Protocol with the proviso contained at the end of the 1st section of the Newfoundland Act. He said that no restrictions with regard to the right of fishing had been inserted in the Treaty, nor in the Protocol which was signed on the 7th instant, and whilst he would certainly be disinclined to sign another Protocol for Newfoundland with the proviso of the Act without knowing the exact restrictions to which it referred, he should even hesitate to accept the Act in question as a law of the form required by the Treaty to carry into operation Articles 18 to 25, inasmuch as it spoke of restrictions to which the Treaty made no allusion.

I replied that I understood that the proviso merely referred to the seasons during which a particular class of fishing would be allowed, and that naturally the same restrictions would be enforced against Newfoundland as against American fishermen. I presumed that the same rule would apply in American waters where British subjects would be obliged to submit to the regulations already in force or which might hereafter be established with regard to the seasons and mode of fishing. I had observed that the Commissioner appointed to inquire into the cause of the decrease of fish on the coast of New England, had already recommended some stringent measures with a view to remedy the evil complained of, and I did not doubt that Congress would pass a law, adopting the Commissioner's recommendations.

Mr. Fish admitted that in both cases the fishermen of the two countries would have to observe the laws enacted by the country within whose jurisdiction they might be fishing, but that such restrictions had not formed part of the Treaty or of the laws of the different countries interested in the matter with the exception of Newfoundland, and that he thought there was no ground for this exception. He would however take the matter into consideration and inform me of the result of his deliberations.

In consequence of this conversation I on the following day 252 addressed to Mr. Fish a further note, copy of which is also inclosed, showing the nature of the restrictions alluded to in the proviso of the first section of the Newfoundland Act.

But I have not yet received an answer to either of these notes.

I have the honour to be with the highest respect, my Lord,

Your Lordship's most obedient humble servant,

EDWD. THORNTON.

The Earl Granville K. G.

&c. &c. &c.

No. 160.—1873, June 25: *Letter from Mr. Fish to Sir E. Thornton.*

DEPARTMENT OF STATE, Washington, 25 June 1873.

SIR: I have the honour to acknowledge the reception of your note of the 19th instant transmitting, in compliance with instructions from Earl Granville, a copy of an Act passed by the Legislature of Newfoundland to carry into effect Articles 18 to 25 of the Treaty of May 8, 1871. In this note you state that you are instructed to inquire whether the President of the United States will be prepared on the 1st of July next to issue a Proclamation with reference to Newfoundland in accordance with the 2nd section of a recent Act of Congress relating to the Treaty of Washington.

An examination of the Act passed by the Legislature of Newfoundland discloses that the suspension by that Legislature of the laws which operate to prevent the Articles referred to of the Treaty from taking full effect, is qualified, and is accompanied by a proviso that certain laws, rules and regulations relating to the time and manner of prosecuting the fisheries on the coasts of Newfoundland, are not to be in any way affected by such suspension.

From your note of 20th instant—I understand that from a Report made by the Attorney General of Newfoundland to the Governor, it would appear that the proviso referred to contemplates a restriction in point of time, of the herring fisheries on the western coast of the island.

The Treaty places no limitation of time, within the period during which the Articles relating to the fisheries are to remain in force, either upon the right of taking fish on the one hand, or of the exemption from duty of fish and fish oil, (as mentioned therein).

I regret, therefore, that the Act of the Legislature of Newfoundland, which reserves a right to restrict the American right of fishing, within certain periods of the year, does not appear to be such consent on the part of the Colony of Newfoundland to the application of the stipulations and provisions of Articles 18 to 25 of the Treaty, as is

contemplated by the Act of Congress to which you refer, and in accordance with which the Proclamation of the President is to issue.

I have the honour to be, with the highest consideration, Sir,
Your obedient servant

HAMILTON FISH

The Right Honourable

Sir EDWARD THORNTON, K. C. B.

&c. &c. &c.

No. 161.—1873, June 30: *Letter from Sir E. Thornton to Earl Granville.*

No. 286. Confidential.

WASHINGTON June 30, 1873.

MY LORD, With reference to my despatch No. 284 of to-day's date I have the honour to state that during a visit which I paid to Mr. Fish at the State Department on the 26th instant I inquired whether I was to infer from the tenor of his note of the previous day that American fishermen would not consider themselves bound to observe in the waters of Newfoundland the restrictions and regulations of police which might be established by that Colony with regard to the modes and seasons of fishing. I pointed out to him that such regulations, which were laid down with a view to the preservation of the fisheries for the benefit of all parties, would be enforced quite as much against British as against American fishermen, and I repeated that such restrictions, if they existed, would doubtless be enforced in American waters against British fishermen. I had observed that the United States Commissioner recently appointed to examine into the causes of the decrease of fish on the coasts of New England, had recommended some stringent regulations with a view to remedying the evil complained of. I did not doubt that Congress would take steps upon the subject, and that whatever laws might be passed would be enforced equally against British and American fishermen.

253 Mr. Fish replied that he could state confidentially his understanding that the jurisdiction gave the right of laying down reasonable police regulations, and that as a matter of course such regulations would be observed by all who fished in the waters in question; but the permission to fish granted by the Treaty was accompanied by no restriction except so far as to define the localities in which the fishing was to be carried on. The Proclamation therefore, which would be a consequence of the Treaty, ought not to contain any restrictions, which were not indeed comprised in any of the laws upon the subject except the Act of Newfoundland, nor in the Protocol signed on the 7th instant.

I have the honour to be, with the highest respect, my Lord,
Your Lordship's most obedient humble servant,

EDWD. THORNTON.

The Earl GRANVILLE. K G

&c &c &c

No. 162.—1873, July 5: *Telegram from Governor Hill of Newfoundland to Sir E. Thornton (British Minister at Washington). Received 3.10 July 5, 1873.*

ST. JOHN: NEWFOUNDLAND.

The proviso to which American Govt object, has relation to enactments as to time and mode of taking herring and salmon shown by experience to be necessary for the preservation of those fisheries and consequently for the common interest of all engaged in them. The Governor will in his Proclamation according to the powers vested in him by the second section of our Washington Treaty Act confirm this and so express it as to remove any possible objection to the terms of the Act which were not intended in any way to interfere with the bona fide operation of the Treaty—The Governor's powers by the second section are as follows—The Governor in Council by any order or orders to be made for that purpose may do anything further in accordance with the spirit and intention of the Treaty which shall be found necessary to be done on the part of this island to give full effect to the Treaty and any such order shall have the same effect as if the object thereof were expressly provided for by this Act—I shall send a copy of this telegram to the Earl of Kimberley—.

No. 163.—1873, July 10: *Letter from Sir E. Thornton to Governor Hill.*

WASHINGTON, July 10, 1873.

SIR, With reference to my letter of the 7th instant, I have the honour to inform your Excellency that Mr. Bancroft Davis, the Acting Secretary of State, this morning stated to me, on behalf of Mr. Fish, that the latter regretted that he was still unable, notwithstanding the explanations given in your Excellency's telegram of the 5th instant, to recommend to the President to issue a Proclamation for carrying into effect, with regard to Newfoundland, certain Articles of the Treaty of May 8, 1871, because the Act of Newfoundland was not a full consent to the Articles of the Treaty, nor such a consent as would allow the President, who must be guided by the provisions of the Act of Congress upon the subject, to issue the Proclamation in question.

Mr. Bancroft Davis added, that Mr. Fish admitted, that as the United States' authorities would expect British fishermen, in American waters, to observe the police regulations with regard to the fisheries, so the Government of the United States would make no objection to similar regulations being enforced against American fishermen in British waters; but it could not accept the Act of Newfoundland, which contained restrictions of which no mention had been made in the Treaty.

I have, &c.

(Signed)

EDWD. THORNTON.

254 No. 164.—1877: *Extracts from the proceedings of the Halifax Commission under the Treaty of Washington of 8 May, 1871.*

CASE OF HER MAJESTY'S GOVERNMENT.

[Under the heading "Canada" and title "Advantages derived by United States Citizens" is the following:]

3. *Transshipping cargoes and obtaining supplies, &c.*

Freedom to transfer cargoes, to outfit vessels, buy supplies, obtain ice, engage sailors, procure bait, and traffic generally in British ports and harbors, or to transact other business ashore, not necessarily connected with fishing pursuits, are secondary privileges which materially enhance the principal concessions to United States citizens. These advantages are indispensable to the success of foreign fishing on Canadian coasts. Without such facilities, fishing operations, both inside and outside of the inshores, cannot be conducted on an extensive and remunerative scale. Under the Reciprocity Treaty, these conveniences proved very important, more particularly as respects obtaining bait and transferring cargoes. The American fishermen then came inshore everywhere along the coast, and caught bait for themselves, instead of requiring, as previously, to buy, and preserve it in ice, saving thereby much time and expense. They also transshipped their fish and returned with their vessels to the fishing-ground; thus securing two or three fares in one season. Both of these, therefore, are distinct benefits. There are other indirect advantages attending these privileges, such as carrying on fishing operations nearer the coasts, and thereby avoiding risks to life and property, as well while fishing as in voyaging homeward and back; also having always at command a convenient and commodious base of operations. They procure cheap and regular supplies without loss of time, enabling them always to send off their cargoes of fish promptly by rail and steamers to meet the current market demand for domestic consumption or foreign export, instead of being compelled to "beat up" to Gloucester or Boston with each cargo, seldom returning for a second; and it may be remarked that all their freight-business in fish from provincial ports is carried on in American bottoms, thus creating a profitable business for United States citizens.

The advantages above described of being able to make second and third full fares, undoubtedly, in most instances, double the catch which can be made in British Canadian waters by a vessel during one season, and it therefore may be reasonably estimated that it enables United States fishermen to double their profits.

4. *Formation of fishing establishments.*

The privilege of establishing permanent fishing stations on the shores of the Canadian bays, creeks, and harbors, akin to that of landing to dry and cure fish, is of material advantage to United States citizens. Before the treaty the common practice with American vessels was to take away their cargoes of codfish in a green state and to dry them at home. Those codfish caught on the banks offshore are usually fine, well-conditioned fish, but, being cured in bulk instead

of being cured or packed ashore, are of inferior value. Apart from the fishing facilities and business conveniences, thus afforded to Americans for prosecuting both the deep-sea and inshore fisheries, there are climatic advantages connected with this privilege of a peculiar nature, which attach to it a special value. It is a fact universally known and undisputed, that codfish, for example, cured on our coasts, command a much higher price in foreign markets than those cured in the United States. This is due in a great measure to the salubrity of the climate and the proximity of the fishing grounds. Permanent curing establishments ashore also enable the fishermen to obtain more frequent "fares," and the dealers to carry on the business of curing and shipping on a much more extensive and economic scale, than if their operations were conducted afloat. There are further advantages derivable from permanent establishments ashore, such as the accumulation of stock and fresh fish preserved in snow or ice, and others kept in frozen and fresh state by artificial freezing; also, the preservation of fish in cans hermetically sealed. The great saving of cost and of substance, and the rapid preparation of a more saleable, more portable, and more nutritive article of food, which commend these improved methods of treating edible fishes to general adoption, will, undoubtedly, induce enterprising dealers to avail themselves very extensively of the remarkable opportunities which free access, and an assured footing on Canadian coasts, are calculated to afford. The broad effect of these increased facilities is to be found in the abundant and increasing supply to the American public of cheap and wholesome fish, which supply would certainly diminish or fail without the advantages secured by the Treaty of Washington.

5. Convenience of reciprocal free market.

A reciprocal free market for any needful commodity, such as fish, entering extensively into daily consumption by rich and poor, is so manifest an advantage to everybody concerned, the producer, the freighter, the seller, and consumer alike, that the remission of

255 Canadian duties on American-caught fish imported into Canada cannot, in our opinion, form a very material element for consideration. The benefits conferred by a cheap and abundant supply of food are evident, especially to countries where, as in the United States and Canada, the chief necessities of life are expensive, and it is so desirable to cheapen the means of living to the working classes.

6. Participation in improvements resulting from the Fisheries Protection Service of Canada.

In addition to the statutory enactments protecting the Canadian fisheries against foreigners, and regulating participation in them by the United States citizens, under treaty stipulations, the provincial governments have for many years past applied an organized system of municipal protection and restriction designed to preserve them from injury and to render them more productive. A marked increase in their produce during the last decade attests the gratifying results of these measures.

A large number of fishery officers is employed by the Government of the Dominion in the maritime states at an annual cost of about \$75,000. This staff is actively engaged under an organized system controlled by the department of marine and fisheries, in fostering and superintending fish culture in the rivers and estuaries. Regulations are enforced for the protection of these nurseries, and considerable expense has been incurred in adapting and improving the streams for the reproduction of river fish.

The intimate connection between a thriving condition of river and estuary fishings and an abundant supply in the neighbouring deep-sea fisheries has not, perhaps, as yet been sufficiently appreciated. It is, however, obvious that the supply of bait-fishes thus produced attracts the deep-sea fish in large numbers. Their resort is consequently nearer inshore than formerly, and the catch of the fishermen who have the privilege of inshore fishing is proportionately increased, while they pursue their operations in safer waters and within easier reach of supplies. In addition to the measures above described for the increase of the fisheries, special care has been devoted to the protection of the spawning-grounds of sea fishes, and the inshores now swarm with valuable fish of all kinds, which, owing to the expense incurred by the Canadian Government, are now abundant in places hitherto almost deserted.

It will also be necessary for the proper maintenance of these improvements and for the preservation of order in the fishing-grounds, as well in the interest of the United States as of the Canadian fishermen, to supplement the existing fisheries service by an additional number of officers and men, which will probably entail an increase of at least \$100,000 on the present expenditure.

In all these important advantages produced by the restrictions and taxation imposed on Canadians, United States fishermen will now share to the fullest extent, without having as yet in any way contributed toward their cost; it may then fairly be claimed that a portion of the award to be demanded of the United States Government shall be in consideration of their participation in the fruits of additional expenditure borne by Canadians to the annual extent, as shown above, of nearly \$200,000.

SUMMARY.

The privileges secured to United States citizens under Article XVIII of the Treaty of Washington, which have been above described particularly and in detail, may be summarized as follows:

1. The liberty of fishing in all inshore waters of the Dominion; the value of which shown by the kinds, quantity, and value of the fish annually taken by United States fishermen in those waters, as well as by the number of vessels, hands, and capital employed.

2. The liberty to land for the purpose of drying nets and curing fish, a privilege essential to the successful prosecution of fishing operations.

3. Access to the shores for purposes of bait, supply, &c., including the all-important advantage of transferring cargoes, which enables American fishermen to double their profits by securing two or more full fares during one season.

4. Participation in the improvements resulting from the fisheries service maintained by the Government of the Dominion.

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[Under the heading "Newfoundland," title "Advantages derived by United States Citizens," and sub-title "The privilege of procuring bait and supplies, refitting, drying, transshipping, &c.," there is the following:]

Apart from the immense value to United States fishermen of participation in the Newfoundland inshore fisheries, must be estimated the important privilege of procuring bait for the prosecution of the bank and deep-sea fisheries, which are capable of unlimited expansion. With Newfoundland as a basis of operations, the right of procuring bait, refitting their vessels, drying and curing fish, procuring ice in abundance for the preservation of bait, liberty of transshipping their cargoes, &c., an almost continuous prosecution of the bank fishery is secured to them. By means of these advantages United States fishermen have acquired, by the Treaty of Washington, all the requisite facilities for increasing their fishing operations to such an extent as to enable them to supply the demand for fish food in the United States markets, and largely to furnish the other fish-markets of the world, and thereby exercise a competition which must inevitably prejudice Newfoundland exporters. It must be remembered, in contrast with the foregoing, that United States fishing craft, before the conclusion of the Treaty of Washington, could only avail themselves of the coast of Newfoundland for obtaining a supply of wood and water, for shelter, and for necessary repairs in case of accident, *and for no other purpose whatever*; they therefore prosecuted the bank fishery under great disadvantages, notwithstanding which, owing to the failure of the United States local fisheries, and the consequent necessity of providing new fishing grounds, the bank fisheries have developed into a lucrative source of employment to the fishermen of the United States. That this position is appreciated by those actively engaged in the bank fisheries is attested by the statements of competent witnesses, whose evidence will be laid before the Commission.

It is impossible to offer more convincing testimony as to the value to the United States fishermen of securing the right to use the coast of Newfoundland as a basis of operations for the bank fisheries than is contained in the declaration of one who has been for six years so occupied, sailing from the ports of Salem and Gloucester, in Massachusetts, and who declares that it is of the greatest importance to United States fishermen to procure from Newfoundland the bait necessary for those fisheries, and that such benefits can hardly be overestimated; that there will be, during the season of 1876, upwards of 200 United States vessels in Fortune Bay for bait, and that there will be upwards of 300 vessels from the United States engaged in the Grand Bank fishery; that owing to the great advantage of being able to run into Newfoundland for bait of different kinds, they are enabled to make four trips during the season; that the capelin, which may be considered as a bait peculiar to Newfoundland, is the best which can be used for this fishery, and that a vessel would probably be enabled to make two trips during the capelin season, which extends over a period of about six weeks. The same experienced deponent is

of opinion that the bank fisheries are capable of immense expansion and development, and that the privilege of getting bait on the coast of Newfoundland is indispensable for the accomplishment of this object.

As an instance of the demand for bait supplies derived from the Newfoundland inshore fisheries, it may be useful to state that the average amount of this article consumed by the French fishermen, who only prosecute the Bank fisheries during a period of about six months of the year, is from \$120,000 to \$160,000 annually. The herring, capelin, and squid amply meet these requirements and are supplied by the people of Fortune and Placentia Bays, the produce of the Islands of St. Pierre and Miquelon being insufficient to meet the demand.

It is evident from the above considerations that not only are the United States fishermen almost entirely dependent on the bait supply from Newfoundland, now open to them for the successful prosecution of the Bank fisheries, but also that they are enabled, through the privileges conceded to them by the Treaty of Washington, to largely increase the number of their trips, and thus considerably augment the profits of the enterprise. This substantial advantage is secured at the risk, as before mentioned, of hereafter depleting the bait supplies of the Newfoundland inshores, and it is but just that a substantial equivalent should be paid by those who profit thereby.

We are therefore warranted in submitting to the Commissioners that not only should the present actual advantages derived on this head by United States fishermen be taken into consideration, but also the probable effect of the concessions made in their favor. The inevitable consequence of these concessions will be to attract a larger amount of United States capital and enterprise following the profits already made in this direction, and the effect will be to inflict an injury on the local fishermen, both by the increased demand on their sources of supply and by competition with them in their trade with foreign markets.

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EXTRACT FROM THE ANSWER OF THE UNITED STATES OF AMERICA TO THE CASE OF HER BRITANNIC MAJESTY'S GOVERNMENT.

I.

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* * * For the purposes of fishing, the territorial waters of every country along the sea-coast extend three miles from low-water mark; and beyond is the open ocean, free to all. In the case of bays and gulfs, such only are territorial waters as do not exceed six miles in width at the mouth, upon a straight line measured from headland to headland. All larger bodies of water, connected with the open sea, form a part of it. And wherever the mouth of a bay, gulf, or inlet exceeds the maximum width of six miles at its mouth, and so loses the character of territorial or inland waters, the jurisdictional or proprietary line for the purpose of excluding foreigners from fishing is measured along the shore of the bay, according to its sinuosities, and the limit of exclusion is three miles from low-water mark.

* * * * *

III.

It is proposed next to consider the value of the advantages which the United States derive from the provisions of Article XVII. This will be done in the light of the principles already laid down, which, it is trusted, have been established to the satisfaction of the Commissioners.

The only material concession is that of fishing within British territorial waters over which jurisdiction exists to such an extent as to authorize the exclusion of the rest of mankind. Such jurisdiction only exists within three miles from low-water mark, both on the shores of the sea and within bays less than six miles wide between their headlands, for all bays and gulfs of larger size are parts of the open ocean; and whatever lies beyond is the gift of God to all, incapable of being monopolized by any kingdom, or state, or people.

The necessity of reiterating and emphasizing these positions arises from the surprising circumstance that the Case of Her Majesty's Government throughout completely and studiously ignores any such distinction. "From the Bay of Fundy to the Gulf of Saint Lawrence inclusive," over "an area of many thousands of square miles," it claims the whole as British property (p. 18). This is not done, indeed, in formal and explicit terms; if it had been, the pretension would have been more easily refuted, or rather its extravagance would have refuted itself. But all the assertions as to value, and all the statistics of the case, though vague and indefinite, nevertheless are based constantly upon this untenable and long since exploded theory. The affirmative lies upon Her Majesty's Government to show the value to American fishermen of the inshore fisheries as separated and distinguished from those of the deep sea; but this distinction the British Case nowhere attempts to draw. The United States insist that the true issue cannot be evaded thus; and that the party claiming compensation is bound, by every principle of law, equity, and justice, to show, with some degree of definiteness and precision, wherein consist the privileges which are made the foundation of an enormous pecuniary demand.

(1.) The fisheries pursued by the United States fishermen in the waters adjacent to the British provinces on the Atlantic coast are the halibut and cod fishery, and the mackerel and herring fishery. The halibut and cod fisheries include hake, haddock, cusk, and pollack. These fish are caught exclusively on the banks, far beyond the jurisdiction of any nation. *The cod-fishery, therefore, is solely a deep-sea fishery, and not a subject within the cognizance of this Commission.* This appears even by the inspection of the maps attached to the British Case, highly colored and partial as those are believed to be, they having been drawn and marked without any discrimination between territorial waters and the open sea. Moreover, it will appear in evidence, conclusively, that there is substantially no inshore cod-fishing done by the Americans.

Nor do they land on the shores to dry their nets or cure their fish. These customs belonged to the primitive mode of catching codfish practised by former generations of fishermen, and have been disused for many years past. Codfish are now salted for temporary preservation on shipboard, but are cured in large establishments at home by fish packers and curers, who make this a separate business, and to whom the fish are sold from the vessels in a green state.

(2.) Nor do the American cod fishermen fish for bait to any considerable extent in the territorial waters of the British dominions. Their vessels are so large, and their outfit is so expensive, that they find it more economical when the first supply of bait, which is always brought from home, is exhausted, to purchase fresh bait of the Canadians, who fish for it in open boats or small craft near their own homes, to which they return every night. The best bait for cod and other similar fish is the frozen herring, large quantiles of which, of a quality too poor for any other use, are taken in seines by the Canadians and sold to the United States fishermen. The importance of this and other kinds of traffic to the poor inhabitants of the Canadian fishing villages, and the destitution to which they were reduced, when, from motives of policy, and to affect the negotiations between the two Governments, it was broken up by the Canadian authorities, will appear from their own testimony and from official documents. This subject will receive attention hereafter. *Suffice it now to observe that the claim of Great Britain to be compensated for allowing United States fishermen to buy bait and other supplies of British subjects finds no semblance of foundation in the treaty, by which no right of traffic is conceded.* The United States are not aware that the former inhospitable statutes have ever been repealed. Their enforcement may be renewed at any moment, and the only security against such a course is the fact that such uncivilized legislation is far more inconvenient and injurious to the Canadians than it can possibly be to American fishermen. It will appear in the sequel that, in the unanimous opinion of that portion of the Canadians who reside on the seacoast, the benefits of such commercial intercourse are at least as great to themselves as to foreign fishermen.

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IV.

It is next proposed to consider the advantages derived by British subjects from the provisions of the Treaty of Washington.

In the first place, the admission of American fishermen into British waters is no detriment, but a positive advantage, to colonial fishermen; they catch more fish, make more money, and are improved in all their material circumstances, by the presence of foreign fishermen.

258 The large quantities of the best bait thrown over from American vessels attract myriads of fish, so that Canadians prefer to fish side by side with them; and, when doing so, make a larger catch than they otherwise could. The returns of the product of the British fisheries conclusively show that the presence of foreign fishermen cannot possibly have done them any injury.

Secondly. The incidental benefits arising from traffic with American fishermen are of vital importance to the inhabitants of the British maritime provinces. When, after the abrogation of the Reciprocity Treaty, the Canadian authorities saw fit to prohibit such commercial intercourse, the disastrous consequences which ensued are thus depicted by the Hon. Stewart Campbell, M.P., in his letter to the department of marine and fisheries, in 1869:

The principal source of inconvenience and grievance on the part of the British traders and subjects, generally, in the maritime provinces, who are connected with the fisheries, is to be found in the great change of circumstances brought

about by the abrogation of the Reciprocity Treaty. During the existence of that Treaty, the entire freedom with which that branch of industry represented by the fisheries was pursued, on the part of the subjects of the United States of America, on the coasts of the British provinces, naturally brought these foreigners into most intimate business relations with merchants, traders, and others, in many localities of the maritime portion of the Dominion, and especially at and in the vicinity of the Straits of Canso. The great body of the large fleet of American fishermen, numbering several hundred vessels, which annually passed through that strait to the Gulf of Saint Lawrence, in the prosecution of the fisheries, and especially the mackerel fishery, was invariably in the habit of procuring much of the requisite supplies for the voyage at the several ports in that strait. The business thus created largely benefited not only those directly engaged in commercial pursuits, but was also of immense advantage to other classes of the inhabitants of several of the adjacent counties of Nova Scotia. The constant demand for, and ready disposal at remunerative prices to the American fishing vessels of, a large quantity of farm produce, and other products of industry in the shape of barrels, hoops, lumber, wood, &c., was at once the character and result of the intercourse which subsisted during the existence of the Reciprocity Treaty.

And here I may offer some observations as to what, in my judgment, would be the probable effects of dealing with the American fishermen in the more liberal spirit of cheap licences. In a former part of this communication, I have referred to the active and advantageous business relations subsisting between them and the merchants, traders, and others, in the eastern counties of Nova Scotia, and particularly at the Strait of Canso, during the existence of the Reciprocity Treaty, and pointed out the very prosperous condition of our own people during that period. Much depression has prevailed since its abrogation, caused principally by the exaction of a high rate of tonnage dues, which has induced the Americans to transfer their former business relations to Prince Edward Island, where the terms of the Convention of 1818 are practically permitted to be unrecognized.

The value of this trade during the period of that treaty is thus stated by Sir John A. Macdonald in the debate in the Dominion Parliament, May 3, 1872:

The people of Nova Scotia and the other provinces found that the treaty, while it yielded a nominal right, conferred many and solid advantages. A great trade, which they had never anticipated, sprung up in consequence of the admission of American fishermen; and, instead of the ruin they feared, they gained so much in every respect that they desired a continuance of the treaty, and lamented its repeal. It was found, too, that the people of Prince Edward Island also experienced a great advantage from the treaty, in respect to trade in coarse grains with the United States, which was largely increased by the permission granted to Americans to frequent their coasts for fishing purposes. In that colony, too, there had been apprehensions—and he doubted not they were sincere—that the treaty would not be really beneficial to the people; but when the privileges given to citizens of the United States were freely enjoyed by them, they in return, brought so many benefits that we heard no complaints from the colony. No injury was done to the fishermen of the island; on the contrary, the trade which grew up was found to be profitable in many different ways. More goods were imported than ever before; commerce was brisk; stores were opened, and profits made which never would have been realized but for the existence of the treaty.

In the same debate, Mr. Power, of Halifax, who was described by another speaker as “a man who had devoted his whole life to enterprises connected with the fisheries of the maritime provinces, who had given them the most careful study and attention, and had become possessed of every information concerning them,” declared that—

The harbors on the entire line of coast were visited by United States vessels, for the purpose of obtaining supplies of bait, ice, &c., for the deep-sea and other fisheries; and, if we wished to have the protection effectual, we would prevent this. *He might, however, say that he had always been opposed to United States vessels being prevented from obtaining these supplies from our*

people. *It looked too much like the cutting off the nose to be revenged on the face. The value of articles supplied in this way was very large, and the revenue, as well as the inhabitants, was benefited by it; while the only injury that would be done to the Americans by prohibiting the trade was to oblige them to bring the supplies with them from home, or drive them to Prince Edward's Island, where every facility was readily given them. He had understood that, until the treaty was finally ratified, it was the intention of the Government to prevent American vessels from landing their catch in ports of the Dominion. He much doubted the wisdom of this restriction. It might be all well enough if they were not permitted to do so in Prince Edward's Island. That island lay almost in the centre of the fishing-grounds; and there they were allowed to take all supplies they might require, and land their fish, which was reshipped in American steamers that plied weekly between Charlottetown and Boston. Such action on the part of the government would hardly form any restriction to the Americans while they had Prince Edward's Island open to them, and would only deprive our people of the Strait of Canso of the advantage of storage and harbor attendant on the landing of cargoes, and our vessels of the benefit of the freighting of them to the United States.*

The condition of things in 1870 appears from the reports of Vice-Admiral Fanshawe, and the other officers in command of the war vessels cruising off the Canadian coast, for the protection of the fisheries. (Canadian Report of the Department of Marine and Fisheries, 1870, pp. 324, 338, 339, 341, and 349.) Admiral Fanshawe says:

The strong interest that both the resident British traders and the United States fishermen have in maintaining the trade, would, in my opinion, render its suppression extremely difficult, even were it thought judicious to continue the attempt; while the combination between these two bodies to evade British law, and the sympathies arising therefrom, must be very undesirable.

The commander of Her Majesty's gunboat Britomart, in his report on the fisheries of the Bay of Fundy, says:

The inhabitants on the Nova Scotia coast, from St. Mary's Bay to Cape Sable, I believe, prefer the Americans coming in; as they are in the habit of selling them stores, bait, and ice, and give them every information as to my movements.

259 Wherever I went, I found the people most anxious whether the Americans were still going to be allowed to come and purchase the frozen herrings, if they were not, they had no other market for them, and the duty was so heavy they could not afford to take them into American ports themselves. At the same time, they wished to have the Americans prevented from fishing on their coasts.

The commander of Her Majesty's ship Plover, in his report from Prince Edward's Island, in the same year, says:

Every facility is given in the ports of this island to foreigners for obtaining and replenishing their stock of stores and necessities for fishing. This, if the treaty is intended to be strictly enforced, should not be allowed; as, if it is wished to drive the United States fishermen from these waters, they will then be obliged to return home for supplies.

H. E. Betts, commander government schooner Ella G. McLean, says:

I anchored off port Mulgrave and procured wood and water. Here the feeling is very much against the law that prevents the American fishermen procuring supplies, such as bait, barrels, provisions, &c. One house, whose receipts in 1864 and 1865 were about \$80,000 each year, this year was reduced to \$10,000, the principal part of which was "stolen." They advocate the return to the license system, doing away with the twenty-four hours' notice there used to be, and having these schooners to rigidly enforce the law, and to instantly seize any vessel fishing inside the limits without a license. They suggest that the proceeds of the licenses might be used as a set-off against the American duty of \$2 a barrel, by dividing it at so much, per barrel amongst our fishermen, as a bounty; thus putting our fishermen on nearly equal terms with the Americans as regards a market for their fish.

The anticipation that the Treaty of Washington would so operate as to remove the distress existing in the maritime provinces at the date of its negotiation have been fully realized, as will appear by the testimony to be laid before the Commission. It also appears that several thousands of British fishermen [*Sic.*] find lucrative employment on board American fishing-vessels.

The benefits thus far alluded to are only indirectly and remotely within the scope and cognizance of this Commission. They are brought to its attention chiefly to refute the claim, that it is an advantage to the United States to be able to enter the harbors of the provinces and traffic with the inhabitants. No doubt all such advantages are mutual and reciprocal. They only show that, in this instance as in so many others, a system of freedom, rather than one of repression, proves the best for all mankind.

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SPEECHES OF COUNSEL.

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Mr. Foster. I will read the motion that was presented on the 1st instant:

The Counsel and Agent of the United States ask the Honourable Commissioners to rule declaring that it is not competent for this Commission to award any compensation for commercial intercourse between the two countries, and that the advantages resulting from the practice of purchasing bait, ice, supplies, &c., and from being allowed to transship cargoes in British waters, do not constitute a foundation for award of compensation, and shall be wholly excluded from the consideration of this tribunal.

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[In support of this Mr. Foster urged in part as follows:—]

. . . We say first, that you have no jurisdiction over such matters as a subject of compensation, because the treaty confers none upon you and nothing of the kind is denominated in the bond. We say secondly, that we have no vested rights under the treaty, regarding commercial intercourse of this description; and that as regards such intercourse, the inhabitants of the United States stand in the same relation to the subjects of Her Majesty as they did before this treaty was negotiated. These two points, though running somewhat together are nevertheless distinct. And we base our contention upon the plain language of the treaty, in which not one word can be found relating to the right to buy or sell, to traffic or transfer cargoes; the whole language is limited to the privilege of the inshore fisheries, both in Article 18, where these privileges are conferred, and in Article 22, which provides for the appointment of this Commission. . .

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[Mr. Foster urged that the question was one not of fishery but of commercial relations. He referred to the commercial treaties of 1794, 1815, 1818 and 1827, and added:—]

Gentlemen, such I understand to be the footing on which commercial intercourse stands between the two countries to-day, if there is any treaty that governs commerce between the British North American Provinces and the United States. And if this is not the case, the relations between the two countries stand upon that comity and commercial freedom which exist between all civilized countries. The

effect of these provisions, to employ an illustration, is this: If the Government of Newfoundland chooses to prohibit its own people from exporting fish for bait, in which export, it is testified, they carry on a trade of £40,000 or £50,000 annually with St. Pierre, it can also, by the same law, prohibit United States citizens from carrying away such articles, but not otherwise. As I understand the effect of

260 this commercial clause, whatever may be exported from the British Provinces by anybody—by their own citizens, by Frenchmen, or by citizens of other nations at peace with them—may also be exported by citizens of the United States on the same terms, as to export duty, that apply to the rest of the world. If, then, Newfoundland sees fit to conclude that the sale of bait fish:—caplin, or herring, or squid—and ice is injurious to its interests, and therefore forbid its export altogether, that prohibition may extend to the citizens of the United States; but the citizens of the United States have there the same privileges with the rest of the world; they cannot be excluded from the right to buy and take bait out of the harbours of Newfoundland, unless the rest of the world is also so excluded. However, this is of remote consequence, and perhaps of no consequence, to the subject under discussion.

The material thing is this: Under the treaty of Washington we cannot prevent such legislation. The treaty of Washington confers upon us no right whatever to buy anything in Her Majesty's dominions. The treaty of Washington is a treaty relating to fishing and to nothing else. . .

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. . . You will observe that the United States renounced the right to the inshore fisheries in 1818, but these are regained by the provisions of the 18th Article of the treaty of Washington. The United States retained the right of resorting to British ports for shelter, repairs, and purchasing wood and water, subject to such regulations as would prevent their citizens drying fish on the shore; and the object of this article is to add to the inshore fisheries the right to dry nets and cure fish on the shore, and this superadded right is limited to parts of the coast where it does not interfere with private property, or the similar rights of British fishermen. Now, what argument can be constructed from provisions like these to infer the creation of an affirmative commercial privilege or the right to purchase supplies and tranship cargoes, I am at a loss to imagine. It seems to me that if I were required to maintain that under the right conceded to dry nets and cure fish on unoccupied and unowned shores and coasts, taking care not to interfere with British fishermen, couched in language like that, the United States had obtained a right to buy what the policy of the British Government might forbid to be sold, I should not have one word to say for myself. I cannot conceive how a commercial privilege can be founded upon that language, or how you can construct an argument upon that language in support of its existence. . .

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[On behalf of Canada Mr. Thomson said in part as follows:—]

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. . . The framers of the Convention of 1818 were very cautious as to its wording; the framers of the treaty of Washington had that convention before them, and it must, therefore, I think, be fairly assumed that if it had been the intention of either of the High Con-

tracting Parties, in this instance, that the Americans should simply have the bare rights named in the treaty, and nothing else, they would have followed the example set before them by the convention of 1818 and used these strong negative words, "and for no other purpose whatever." I say that this argument is a fair and just one; of course its weight is to be determined by this tribunal. . . .

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. . . But there is another matter to be considered, and it is this: In 1854, the Reciprocity Treaty was passed, and under that treaty the Americans came in to fish on our coasts generally. They exercised the same rights as they do now, and no person then ever complained of them for buying bait under the terms of that treaty, though it did not in express terms authorize their purchase of bait or their getting supplies of any kind on our shores; still they did so. By a kind of common consensus of opinion, it was understood that they had a right to do so, and no person complained of it. And in view of the course which then was pursued, this treaty was framed. Mr. Foster has put this case: Suppose that when the Joint High Commissioners were sitting, the British representative had proposed that the value of the rights of transhipment, and of buying bait, and of having commercial intercourse with our people should be taken into consideration by this tribunal, then, had this been the case. it would have been met by a well-bred shrug from the Earl of Ripon. and Professor Bernard. This may possibly be so; but I can say, I think it would have been very strange indeed if our Commissioners had said to the American Commissioners: Under the treaty which we propose you shall have the right to fish in our waters on equal terms with our fishermen, and have the right to land and cure your fish, and the right also to dry your nets on the land, but the moment that you take one step farther, the moment that you buy a pound of ice, and the moment that you presume to buy a single fish for the purpose of bait in our waters, and the moment you attempt to exercise any commercial privilege whatever, and above all, the moment you undertake to tranship one single cargo, that moment your vessel will be forfeited, and the cargo as well. I think that if this had been stated, there would have been something more perhaps than a well-bred shrug from the American Commissioners. . . .

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. . . Moreover, I think I can establish that this latter view is not taken by the Americans on this subject. On page 467 of Mr. Sabine's Report, the following language is used: "It is argued that if the liberty of landing on the shores of the Magdalen Islands"—Your Excellency and Your Honors will recollect that while the Americans have the right to fish around the Magdalen Islands, they have no right to land on these shores, though our evidence has shown
261 that, as a rule, they have landed on these islands, both before and since the negotiation of this Treaty, and have dragged their nets on the shore, and fished for bait in this way. Mr. Sabine states:

It is argued that, "if the liberty of landing on the shores of the Magdalen Islands had been intended to be conceded, such an important concession would have been the subject of express stipulation," &c., it may not be amiss to consider the suggestion. And I reply that if "a description of the inland extent of the shore over which" we may use nets and seines in catching the herring if

[is] necessary, it is equally necessary to define our rights of drying and curing the cod elsewhere, and as stipulated in the Convention. Both are *shore* rights, and both are left without [without] condition or limitation as to the quantity of beach and upland that may be appropriated by our fishermen. It was proclaimed in the House of Commons, more than two centuries ago, by Coke—that giant of the law—that “FREE FISHING” included “ALL ITS INCIDENTS.” The thought may be useful to the Queen’s Advocate and Her Majesty’s Attorney-General when next they transmit an opinion across the Atlantic which is to affect their own reputation and the reputation of their country. The right to take fish “on the shores of the Magdalen Islands,” without conditions annexed to the grant, whatever these profoundly ignorant advisers of the Crown of England may say to the contrary, includes, by its very nature and necessity, all the “incidents” of a “free fishery,” and all the privileges in use by, and common among fishermen, and all the facilities and accommodations, on the land and on the sea, which conduce to the safety of the men employed in the fishery, and to an economical and advantageous prosecution of it.

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... Now Her Majesty’s Government does not object to your deciding in so many words that these things are not subjects of compensation, if that be the judgment of the Court. I have advanced very feebly the views which I think ought to govern your decision upon the point, namely, that these are identical privileges which may fairly be constructed, in view of the way in which this Treaty is framed, and as inseparable from the right given to the Americans under the Treaty of Washington. But I confess that I shall not be at all dissatisfied should this tribunal decide otherwise. If it be the desire of the American Government that this tribunal shall keep within the very letter, and disregard what I have argued is the spirit of the Treaty, and determine just merely the value of the fisheries themselves, and of landing on the shores to dry nets, very well I have no objection and we will accept such a decision. But Her Majesty’s Government wish it to be distinctly understood that that is not the view they have held or wish to be compelled to hold of this Treaty. If, however, pressed as you are to determine the question in this way by the Government of the United States, and in view of the declaration you have made to determine it according to the very right of the matter, you can conscientiously arrive at the conclusion for which they ask, we shall not regret it at all.

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[Mr. Weatherbe, in the same interests, said in part as follows:—]

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The simple question we are now discussing is this: Whether certain things are to be taken into consideration as incidental to the mere act of taking fish out of the water. What I understand the argument of the United States to be now is, that by the treaty of Washington the American fishermen have the right of taking fish out of British waters and landing to dry their nets and cure their fish, and nothing else. The right to land to dry their nets and cure their fish they admit are subjects for compensation. But what does taking fish mean? It means taking them out of the water and landing them on the deck and nothing more, it is contended. We contend that by a fair and reasonable construction of the words, the United States have obtained the privilege of *carrying on the fishery*. Can it be doubted that this was the intention when the words were adopted. Are we asking for any strained construction by the tribunal? I think not.

By the Convention of 1818 the United States renounce, forever thereafter, the liberty to United States fishermen of fishing in certain British waters, or ever entering these waters, except for shelter and for wood and water. "*For no other purpose whatever*" is the sweeping language of the treaty. I presume we are to have very little difference of opinion as to the intention of the clause containing these words. That clause of the convention of 1818 was fully considered by the Joint High Commission who framed the treaty of Washington. What do those Commissioners say? That language has been cited. In addition to the liberty secured by that convention, the privilege is granted of taking fish. The treaty of Washington permits the liberty of taking fish and of landing to dry nets and cure fish. This tribunal is invited to decide that it is not competent for them to award anything in relation to the incidental and necessary requirements to carry on the fisheries.

Is it contended there was an oversight in framing the treaty of Washington? Is there an absence of words necessary to secure the full enjoyment of our fisheries to United States fishermen? Was that absence intentional? The learned Counsel for the United States have not stated their views upon this point. Can it be possible that those who represented the United States in framing the treaty of Washington intended the result which would follow the success of the present motion. Can it be possible that both parties intended that result? If this is an oversight, who are to suffer? The compensation is to be reduced, we are told. But if the United States treasury is to be saved, are the United States fishermen to suffer? Or is the award to be reduced for the want of privileges and the fishermen to continue illegally to enjoy all the privileges? This matter has not been fully explained. I must admit, if there has been an oversight here—if so great an error has occurred—the tribunal is powerless to correct the error or to grant full compensation.

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262 [In reply, Mr. Trescot (U. S.) said in part, as follows:—]

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If I understand the British counsel correctly, they admit that the construction for which we contend is a fair construction. They seem to think that a broader and more liberal interpretation would be more in conformity with what they consider to be the spirit of this discussion, but all of them appear to admit that if we choose to stand on that language we have the right to do it, and they do not object that it should be enforced. They seem to think, however, that certain consequences would follow, of which they have apprehensions for us. That is our matter. The consequences that flow from the interpretation will be confined to us, and are matters we must look to. At present the only question is, whether we have the right to say to Your Honors that you are limited in your award to a certain and specific series of items. I think, honestly, we have drifted very far from the common-sense view of this case. As to the technical argument, if we are to go into it, it might be insisted, first, that, under the treaty of 1818, if a fisherman went into a colonial port and bought a load of coal for his cabin stove he violated the treaty, because it only gave him the right to go in and buy wood; or when a fisherman bought ice, he was

only buying water in another shape, and therefore that, when he had the right to buy water, he had the right to buy ice. I do not, however, suppose that this is the kind of arguments your Honors propose to consider. It appears to me that if we look at the history of this negotiation, we see with perfect distinctness what the Commission is intended to do. When the High Commission met, and the question of the fisheries came up, what was the condition of the facts? We were annoyed and worried to death by our fishermen not being allowed to go within three miles of the Canadian shore and by their being watched by cutters. The idea of not being allowed to buy bait, fish, and ice, which we had done ever since the fisheries existed, never crossed our minds. We knew what had been the established custom for over half a century, from the earliest existence of the fisheries. We read your advertisements offering all these things for sale as an inducement to come into your ports. We had the declaration of Her Majesty's Colonial Secretary, that whatever might be the technical right, he would not consent to colonial legislation, which deprived us and you of this natural and profitable exchange, and we knew that in the extreme application of your laws, you had not attempted to confiscate or punish United States fishermen for such purchases. It never occurred to us that this was a question in discussion. What we wanted to do was to arrange the question as to the inshore fisheries. . . .

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. . . Now, with regard to the treaty itself there are only two points which I propose to submit to the Commission. I contend in the first place that if the interpretation for which the British Counsel contend is true, viz, that by the treaty of 1818 we were excluded from certain rights, and by the treaty of 1871 we were admitted to them, then we must find out from what we were excluded by the treaty of 1818 and to what we were admitted by the treaty of 1871. I contend that the language of the treaty of 1818 is explicit. (Quotes from Convention.)

Now, I hold that that limitation, that prohibitive permission to go into the harbours, was confined entirely to fishermen engaged in the inshore fishery. That treaty had no reference to any other fishery whatever. It was a treaty confined to inshore fishermen and inshore fisheries, and we agreed that we should be allowed to fish inshore at certain places, and if we would renounce the fishery within three miles at certain places we should enter the ports within those three-mile fisheries which we agreed to renounce, for the purpose of getting wood, water, &c. The limitation and permission go together, and are confined simply to those engaged in the three-mile fishery. I contend that to-day, under that treaty, the Bankers are not referred to, and they have the right to enter any port of Newfoundland and buy bait and ice and tranship their cargoes without reference to that treaty. I insist that it is a treaty referring to a special class of people; that those people are not included who are excluded from the three-mile limit, and if they are not so included they have the right to go to any port and purchase the articles they require. In other words, while the British Government might say that none of the inshore fishermen should enter the harbours, except for wood and water, yet the Bankers from Newfoundland had a perfect right to go into

port for any reason whatever, unless some commercial regulation between the United States and Great Britain forbade them. With regard to the construction that is to be placed upon the articles of the Treaty of 1871, Mr. Thomson seems very much surprised at the construction we have put upon it. Here is the arrangement. (Quotes from Convention of 1818 and Treaty of 1871.)

Does that take away the prohibition? Surely if it had been intended to remove that prohibition it would have been stated. In addition to your right to fish on certain coasts and enter certain harbours only for wood and water, that treaty says you shall have the right "to take fish of every kind, except shell-fish, on the sea-coasts and shores and in the bays, harbours, and creeks of the Province of Quebec, Nova Scotia, and New Brunswick, and the Colony of Prince Edward Island and of the several islands thereto adjacent, without being restricted to any distance from the shore, with permission to land upon the said coasts and shores and islands, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish." "Drying their nets and curing their fish." That is all; that is the whole additional treaty privilege, and I can see no power of construction in this Commission by which it can add to treaty stipulation the foreign words "and buy ice, bait, supplies, and tranship." . . .

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263 [Mr. Dana, in the same interest, said in part, as follows:—]

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. . . The only question of late has been whether Great Britain has the right, without any treaty, to exclude us from three miles of the coast. That was Mr. Adams's famous argument with Earl Bathurst. We said in the treaty of 1818 that, as a right, we no longer claimed it. That is the meaning of the treaty—that having claimed it as a right inherent in us, either because we did not lose it at the time of the Revolution, or from the nature of fisheries, or on some other ground, we no longer claimed it as a right which cannot be taken away from us but at the point of the bayonet. But while we say we will not go within the three miles to fish without permission, it must not be held that vessels cannot go there for shelter and repairs and for wood and water, but may be put under such regulations as will prevent us from doing anything further. It is entirely a matter for Great Britain to determine what regulations we should be placed under, in those respects, and she has seen fit to make none. . . .

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. . . Suppose I were to concede that we had no right to buy bait or ice or supplies, or tranship cargoes anywhere on these coasts, certainly that ends the argument, because we cannot be called upon to pay for something which we have not got. If the proper construction of the treaty of 1818 is that fishermen have no right as fishermen and by the general law, irrespective of the consent of the Crown, to buy bait, ice, and supplies, and tranship cargoes in British dominions, then I concede that, as regards American fishermen fishing within the three-mile limit, we have not those rights. Why are we, then, in the exercise of them? In that case, by the concession of the Crown.

There is, however, no statute against fishermen buying bait, obtaining supplies, bartering or transshipping fish, if they comply with the fiscal regulations of the Government regarding all trade and commerce. If a fisherman has violated no statute or rule respecting trade, commerce, and navigation in this realm, there is no statute which can condemn him, because he is a fisherman, for having bought bait and supplies and transhipped cargoes. So long as there is no statute prohibiting it, our fishermen have gone on exercising that privilege, not believing they were excluded from it by the treaty of 1818, whether they were correct or not. It is in that view only that the facts regarding seizures are of any importance; but yet we may make our answer at once and say, whether we have the right to do those things or not, we do not pretend that it was given to us by the treaty of 1871. . . .

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I have put the argument of the Counsel for the Crown as strong as I could put it; they say you exercise that right now and you did not exercise it before. Our answer is simply that we have always exercised it, and that we have done it irrespective of the treaty of 1854 or of the treaty of 1878 [*sic*]. We have never been interfered with in exercising it. There is no case of condemnation of a vessel for exercising that right; and if there had been a good many, it would have made no difference to your Honors, because the judgments would have been simply the provincial interpretation of the treaty given *ex parte*, and it is certain that no act of Great Britain has ever sanctioned the position that the United States had not this right, irrespective of treaties. Then, as has been suggested by my colleagues—and I follow the suggestion merely—the whole correspondence between the Governor-General and the head of the Colonial Office, and between the United States Government and the British Government, shows that Great Britain never intended that American fishermen should be excluded from the use of those liberties or rights, whatever be our claim to them, or whether we had them as of right or not. These privileges are those which fishermen have always exercised, and it has only been as population increased and fiscal laws have become important and the inhabitants have become more apprehensive in regard to vessels hovering about the coast, that nations have enacted laws restricting persons in the exercise of those rights. The learned Counsel in support of his argument cited *Phillimore, I*, page 224, *Kent's Commentaries*, vol. 1, pages 32 to 36; and *Wheaton's Int. Law* (Dana's ed.), sections 167, 169, and 170.

* * * * *

We are satisfied that the United States are permitted by the British Government to do those acts, whether it be from comity, from regard to the necessities of fishermen, from policy, or from some other reason, I know not, and so long as we are not disturbed we are content. If we are disturbed, the question will then arise, not before this tribunal, but between the two nations, whether we are properly disturbed by Great Britain; and if we should come to the conclusion on both sides, that there being a dispute on that subject which should be properly settled, then it is to be hoped that the Governments will find no difficulty in settling it; but this tribunal will discharge its entire duty when it declares that under article 18 of the

Washington treaty no such rights or privileges are conceded to the United States.

* * * * *

The Commission retired to deliberate, and on their return the President read the following decision:

The Commission having considered the motion submitted by the Agent of the United States at the conference held on the 1st instant, decided—

That it is not within the competence of this tribunal to award compensation for commercial intercourse between the two countries, nor for the purchasing bait, ice, supplies, &c., &c. nor for the permission to transship cargoes in British waters.

SIR ALEXANDER T. GALT. Mr. President, as this Commission has been unanimous on this question, I desire, with the permission
264 of my colleagues, but without committing them to the same line of argument which has convinced myself, to state the grounds upon which I feel it my duty to acquiesce in the decision. I listened with very great pleasure to the extremely able arguments made on both sides, and I find that the effect of the motion, and of the argument which has been given upon it, is to limit the power of this tribunal to certain specified points. This definition is undoubtedly important in its consequences. It eliminates from the consideration of the Commission an important part of the case submitted on behalf of Her Majesty's Government; and this is undoubtedly the case so far as this part forms a direct claim for compensation; but, at the same time, it has the further important effect that it defines and limits the rights conceded to the citizens of the United States under the Treaty of Washington. Now, I have not been insensible to the importance of the considerations that have been addressed to us by the counsel for the Crown in reference to the inconvenience that may arise from the decision at which this tribunal has arrived. I can foresee that, under certain circumstances, those inconveniences may become exceedingly great, but I cannot resist the position taken by the counsel of the United States in stating that, if such inconveniences arise, they are matters which properly fall within the control and judgment of the two governments, and not within that of this Commission. On the other hand, I cannot fail to see that, while this is admitted, a remote and contingent inconvenience, a very important difficulty, and one of a very serious character, would arise if from any cause this Commission were to exceed the powers which are given to the Commissioners under the Treaty of Washington.

The difficulty would at once arise that any award whatever which it made, be it good or bad, be it favourable to the one party or to the other, would have been vitiated by our having acted *ultra vires*. I do not find, either, that there would be any ready escape from such a position. The treaty affords no machinery by which this question in regard to the fisheries can be adjudicated upon if this Commission should, from any unfortunate cause, be allowed to lapse; therefore, with regard to the two inconveniences in question, the one which strikes at the root of the whole treaty is that which ought to weigh with me, if I were placed in such a position as to be obliged to weigh such inconveniences; but, as I shall state before I conclude, there are other and stronger considerations present to my mind. I have in common with my colleagues entered into a solemn obligation to decide judicially upon all questions coming before this tribunal, and

I feel it incumbent upon me, therefore, to give every possible weight, every due weight, to whatever may be said on either side, and I certainly have hitherto endeavoured to do so, and I have done so in this case. I shall endeavour to pursue the same course, acting under the same considerations, in the future. At the same time, I confess to a great feeling of disappointment that such an important part of the question connected with the settlement of the fisheries dispute should apparently be removed, or partly removed, from the possible consideration and adjudication of this tribunal, and I am bound to say that my conviction of the intention of the parties to the Treaty of Washington is that this was not their purpose at the time.

I have listened with very great attention to the arguments presented on behalf of the United States, but I do not think that they have correctly stated the position of the two parties at the time when the Treaty of Washington was entered into. The history of this case begins, as has been stated by counsel, as far back as 1783, but by common consent the Convention of 1818 is the treaty by which the fishery rights of the two countries have subsisted. Under the Convention of 1818 certain things were forbidden to the United States fishermen, and the United States renounced the right to do anything except what they were permitted to do by the words of that treaty. They renounced forever any liberty of taking, drying, or curing fish, &c., "provided that the American fishermen shall be permitted to enter the said bays or harbors for the purpose of shelter, and of repairing damages therein, of purchasing wood and obtaining water, and for no other purpose whatever." By the imperial Act 59, George the Third, Chapter 38, and by several colonial statutes, restrictions and definitions were imposed or were established with regard to offences arising from infringements of those privileges conferred upon American citizens, though it has not been shown that the seizures which took place prior to 1854 were for trading or for obtaining supplies, or for any other benefit referred to in the motion, still it is undoubted that arising out of this legislation great irritation arose between the two countries, and this resulted in the adoption of what is known as the Reciprocity Treaty in 1854. That the Reciprocity Treaty was understood to have removed all those restrictions is unquestionably shown to be the case, to my mind, by the action taken by Great Britain and the colonies when the treaty came into force.

Immediately afterward, all statutes which had operated against the American fishermen were suspended, and the greatest possible freedom of intercourse existed during the continuation of that treaty. At the termination of the Reciprocity Treaty, and in support of the view that it was supposed to have given those privileges, we find the whole of these enactments revived, and we also find that subsequently more stringent statutes were passed by the Dominion of Canada in this relation. Now, it is important in the history of this case to consider what effect was produced by those statutes; and we find in a most important public document, that is the annual message of President Grant to Congress, in 1870, that this legislation on the part of the colonies was made the subject of the gravest possible complaint. The President states that:

The course pursued by the Canadian authorities toward the fishermen of the United States during the last season has not been marked by a friendly feeling. By the first article of the Convention of 1818, between Great Britain and the

United States, it was agreed that the inhabitants of the United States should have forever, in common with British subjects, the right of taking fish in certain waters therein defined. In the waters not included in the limits named in the convention, within three miles of parts of the British coast, it has been the custom for twenty years to give to intruding fishermen of the United States a reasonable warning of their violation of the technical rights of Great Britain. The Imperial Government is understood to have delegated the whole or a share of its jurisdiction or control of these inshore fishery-grounds to the colonial authority, known as the Dominion of Canada, and this semi-independent but irresponsible agent has exercised its delegated powers in an unfriendly way—vessels have been seized without notice or warning, in violation of the custom previously prevailing, and have been taken into the colonial ports, their voyages broken up, and the vessel condemned. There is reason to believe that this unfriendly and vexatious treatment was designed to bear harshly upon the hardy fishermen of the United States, with a view to political effect upon the government.

That is not all. The President went further, and made a second complaint in this language:

The statutes of the Dominion of Canada assume a still broader and more untenable jurisdiction over the vessels of the United States; they authorize officers or persons to bring vessels hovering within three marine miles of any of the coasts, bays, creeks, or harbors of Canada into port, to search the cargo, to examine the master on oath touching the cargo and voyage, and to inflict upon him a heavy pecuniary penalty if true answers are not given, and if such a vessel is found preparing to fish within three marine miles of any of such coasts, bays, creeks, or harbors, without a license, or after the expiration of the period named in the last license granted to it, they provide that the vessel with her tackle, &c., shall be forfeited. It is not known that any condemnations have been made under this statute. Should the authorities of Canada attempt to enforce it it will become my duty to take such steps as may be necessary to protect the rights of the citizens of the United States.

The President further goes on to say:

It has been claimed by Her Majesty's officials that the fishing-vessels of the United States have no right to enter the open ports of the British possessions in North America, except for the purpose of shelter and repairing damages, of purchasing wood and obtaining water; that they have no right to enter at the British Customs-houses, or to trade there, except for the purchase of wood or water, and that they must depart within twenty-four hours after notice to leave. It is not known that any seizure of a fishing-vessel carrying the flag of the United States has been made under this claim.

These were complaints which were made in the annual message of President Grant in 1870; and he concludes by suggesting to Congress the course that should be taken in reference to this matter, in the following words:

Anticipating that an attempt may possibly be made by the Canadian authorities in the coming season to repeat their unneighborly acts towards our fishermen, I recommend you to confer upon the Executive the power to suspend by proclamation the operation of the laws authorizing the transit of goods, wares, and merchandize in bond across the territory of the United States to Canada; and further, should such an extreme measure become necessary, to suspend the operation of any laws whereby the vessels of the Dominion of Canada are permitted to enter the waters of the United States.

It is, therefore, plainly evident that disagreements were in existence at that time with regard to the fisheries, and that the fear that they would produce serious complications between the two countries was present in the minds of the President and Government of the United States. Well, the history of the case goes on to show that these complaints made by President Grant were the foundation of the negotiations which led to the adoption of the Washington Treaty; and it is important to observe, on examining that treaty, that the means whereby President Grant proposed to Congress to insure the repeal of

these so-called unfriendly acts on the part of Canada, by repealing the bonded system, and by putting on other restrictions, which President Grant proposed to apply to that particular purpose, are, by the clauses of the Washington Treaty, dealt with for the term of that treaty in another way, and for other considerations; therefore, to my mind, it leaves me in this position, in endeavouring to interpret the intentions of the parties to the Washington Treaty, that it must necessarily have been supposed that, as in the case of the Reciprocity Treaty, so in the case of the Washington Treaty, the rights of traffic and of obtaining bait and supplies were conferred, being incidental to the fishing privilege. It could scarcely be otherwise, because in the case of the Reciprocity Treaty commercial advantages were the compensation which the United States offered to Great Britain for the concession of the privilege of fishing in her waters; while, by the Washington Treaty, compensation in money, exclusively of the free admission of fish, is to be made the measure of the difference in value; therefore I quite believe that the intention of the parties to the treaty was to direct this tribunal to consider all the points relating to the fisheries, which have been set forth in the British case. But I am now met by the most authoritative statement as to what were the intentions of the parties to the treaty. There can be no stronger or better evidence of what the United States proposed to acquire under the Washington Treaty than the authoritative statement which has been made by their Agent before us here, and by their counsel. We are now distinctly told that it was not the intention of the United States, in any way, by that treaty, to provide for the continuation of these incidental privileges, and that the United States are prepared to take the whole responsibility, and to run all the risk of the re-enactment of the vexatious statutes, to which reference has been made.

I cannot resist the argument that has been put before me, in reference to the true, rigid, and strict interpretation of the clauses of the Treaty of Washington. I therefore cannot escape, by any known rule concerning the interpretation of treaties, from the conclusion that the contention offered by the Agent of the United States must be acquiesced in.

There is no escape from it. The responsibility is accepted by and must rest upon those who appeal to the strict words of the treaty as their justification. I therefore, while I regret that this tribunal does not find itself in a position to give full consideration to all the points that may be brought up on behalf of the Crown, as proof of the advantages which the United States derive from their admission to fish in British waters, still feel myself, under the obligation which I have incurred, required to assent to the decision which has been communicated to the Agents of the two governments by the president of this tribunal.

266 *Extract from closing argument of Hon. William H. Trescot, on behalf of the United States.*

* * * In the treaty of 1871 we have reached a settlement which it depends upon your decision to make the foundation of a firm and lasting Union. Putting aside for the moment the technical pleadings

and testimony, what is the complaint and claim of the Dominion? It is that where they have made of the fishery a common property, opened what they consider a valuable industry to the free use of both countries, they are not met in the same spirit, and other industries, to them of equal or greater value, are not opened by us with the same friendly liberality. I can find no answer to this complaint, no reply to this demand, but that furnished by the British Case, your own claim to receive a money compensation in the place of what you think we ought to have given. If a money compensation is recompense—if these unequal advantages, as you call them, can be equalized by a money payment, carefully, closely, but adequately estimated—then we have bought the right to the inshore fisheries, and we can do what we will with our own. Then we owe no obligation to liberality of sentiment or community of interest; then we are bound to no moderation in the use of our privilege, and if purse-seining and trawling and gurry-poison and eager competition destroy your fishing, as you say they will, we have paid the damages beforehand; and when at the end of twelve years we count the cost, and find that we have paid exorbitantly for that which was profitless, do you think we will be ready to renew the trade, and where and how will we recover the loss?

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Extract from closing argument of Hon. Richard H. Dana, Jr., on behalf of United States.

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Now, your honors will allow me a word, and I hope you will not think it out of place—it is an interesting subject; I do not think it is quite out of place, and I will not be long about it—on the nature of this right which England claimed in 1818, to exclude us from the three miles, by virtue of some supposed principle of international law. I have stated my opinion upon it; but your honors will be pleased to observe, that on that, as upon the subject of headlands, on an essential part of it, without which it can never be put in execution, there is no fixed international law. I have taken pains to study the subject; have examined it carefully since I came here, and I think I have examined most of the authorities. I do not find one who pledges himself to the three-mile line. It is always “three miles,” or “the cannon-shot.” Now, “the cannon-shot” is the more scientific, though not the more practical, mode of determining the question, because it was the length of the arm of the nation bordering upon the sea, and she could exercise her rights so far as the length of her arm could be extended. That was the cannon-shot, and that, at that time, was about three miles. It is now many more miles. We soon began to find out that it would not do to rest it upon the cannon-shot. It is best to have something certain. But international writers have arrived at no further stage than this, to say that it is “three miles, or the cannon-shot.” When they are called upon to determine what are the rights of bordering nations, they say, “to the extent of three miles, or the cannon shot.” But upon the question, “How is the three-mile line to be determined?” we find everything

utterly afloat and undecided. My purpose in making these remarks is, in part, to show your honors what a precarious position a state holds which undertakes to set up this right of exclusion and to put it in execution. The international law makes no attempt to define what is "coast." We know well enough what a straight coast is, and what a curved coast is; but the moment they come to bays, harbors, gulfs, and seas, they are utterly afloat—as much as the sea-weed that is swimming up and down their channels. They make no attempt to define it, either by distance or by political or natural geography. They say at once, "It is difficult, where there are seas and bays." Names will not help us. The Bay of Bengal is not national property; it is not the King's chamber; nor is the Bay of Biscay, nor the Gulf of Saint Lawrence, nor the Gulf of Mexico. Names will not help us. An inlet of the sea may be called a "bay," and it may be two miles wide at its entrance; or it may be called a "bay," and it may take a month's passage in an old-fashioned sailing vessel to sail from one headland to the other. What is to be done about it? If there is to be a three-mile line from the coast, the natural result is, that that three-mile line should follow the bays. The result then would be that a bay more than six miles wide was an international bay; one six miles wide, or less, was a territorial bay. That is the natural result. Well, nations do not seem to have been contented with this. France has made a treaty with England saying that anything less than ten miles wide shall be a territorial bay.

The difficulties on that subject are inherent, and, to my mind, they are insuperable. England claimed to exclude us from fishing in the Bay of Fundy, and it was left to referees, of whom Mr. Joshua Bates was umpire, and they decided that the Bay of Fundy was not a territorial bay of Great Britain, but a part of the high seas. This decision was put partly upon its width; but the real ground was, that one of the assumed headlands belonged to the United States, and it was necessary to pass the headland in order to get to one of the towns of the United States. For these special reasons, the Bay of Fundy, whatever its width, was held to be a public and international bay.

Then look at Bristol Channel. That question came up in the case of *Queen v. Cunningham*. A crime was committed by Cunningham in the Bristol Channel, more than three miles from the shore of Glamorganshire, on the north side, and more than three miles
267 from Devonshire and Somersetshire, on the south side. Cunningham was indicted for a crime committed in Glamorganshire. The place where the vessel lay was high up in the channel, somewhere about 90 miles from its mouth, and yet not as far up as the river Severn. The question was, whether that was a part of the realm of Great Britain, so that a man could be indicted for a crime committed there. Now, there is a great deal of wisdom in the decision made in that case. The court say, substantially, that each case is a case *sui generis*. It depends upon its own circumstances. Englishmen and Welshmen had always inhabited both banks of the Bristol Channel. Though more than ten miles in width at its entrance, it still flowed up into the heart of Great Britain; houses, farms, towns, factories, churches, court-houses, jails—everything on its banks; and it seemed a preposterous idea, and I admit it, that in

time of war two foreign ships could sail up that Bristol Channel and fight out their battle to their own content, on the ground that they did not go within three miles of the shore. I think it would have been preposterous to say that a foreign vessel could have sailed up the center of that channel, and defied the fleets and armies of Great Britain, and all her custom-house cutters, on the ground that she was flying the American or the French flag, and the deck was a part of the soil under that flag. Well, it was a question of political geography, not of natural geography. It was a question of its own circumstances. It was decided to be a part of the realm of Great Britain. I do not know that anybody can object to the decision.

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No. 165.—1877, *December 13: Extract from Report Mr. Dwight Foster (Agent of the United States) to the United States Secretary of State.*

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During the progress of the evidence offered for Her Britannic Majesty, it became obvious that a very large, if not the greater, part of the British claim was based upon alleged advantages of a commercial character, which, whether valuable or not, were certainly not secured to the citizens of the United States by the articles of the treaty of 1871.

I therefore, on the 1st of September, made the following motion, for the purpose of excluding these pretended advantages from consideration, and thus relieving us from the necessity of swelling an already enormous volume of testimony by evidence on points clearly irrelevant to the true issue:

The counsel and Agent of the United States ask the honorable Commissioners to rule and declare that it is not competent for this Commission to award any compensation for commercial intercourse between the two countries, and that the advantages resulting from the practice of purchasing bait, ice, supplies, &c., and from being allowed to transship cargoes in British waters, do not constitute a foundation for award of compensation, and shall be wholly excluded from the consideration of this tribunal.

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No. 166.—1878, *February 11: Letter from Governor Sir J. Glover of Newfoundland to the Earl of Carnarvon (British Colonial Secretary).*

GOVERNMENT HOUSE, *February 11, 1878.*

MY LORD, I regret to have to report the destruction of an American seine by our fishermen in Fortune Bay on the 6th ultimo, the news of which only reached me through a cable telegram from London on the 4th instant.

2. On receipt of this intelligence I at once caused an inquiry to be instituted to ascertain the truth of the report, but the result of the inquiry has not yet reached me from Fortune Bay. I have the honour to inclose the only information I have as yet been able to obtain, viz., the deposition of the master of a vessel who was present at the time.

3. It would appear that the Americans were guilty of three illegal acts, viz. :—

1st. As regards the time in which a seine may be used.

(See Acts 1876, cap. 6, in Amendment of Consolidated Statutes, 1872, cap. 102).

2nd. In barring (same Act).

3rd. By putting out nets or seines between 12 o'clock on Saturday night and 12 o'clock on Sunday night.

(Acts 1876, cap. 6, sec. 4.)

4. As two out of the five seines were removed by our people without injury or damage, and two by the Americans themselves, I conclude that opposition was raised on the part of the American owner to the removal of the fifth.

5. I inclose the opinion of the Attorney-General, which that gentleman has placed in my hands, and I hope to be enabled to send full information by the next mail.

I have, &c.,

(Signed)

JOHN H. GLOVER.

268 No. 167.—1878, March 2: *Letter from Mr. Evarts (United States Secretary of State) to Sir E. Thornton (British Minister at Washington).*

DEPARTMENT OF STATE,

Washington, March 2, 1878.

SIR, I have the honour to bring to your notice the fact that complaints have been recently made to this Department of interference with American fishermen engaged in the herring fishery on the coast of Newfoundland. In some instances these complaints have been forwarded to the Department through the United States' Consuls at St. John's and other ports of that Colony. The representations made by the Consuls are, however, of a general nature based upon statements made to them by the fishermen immediately interested, and consequently the officers in question have been instructed to collect and forward more detailed and specific information, and such further information I will do myself the honour to transmit to you so soon as the reports from the Consuls shall have been received.

Still more recently similar complaints have been received through the collector of the port of Gloucester, Massachusetts, supported by the sworn statements of the masters of eight fishing schooners of that port, and from the statements thus forwarded it appears that in January of the present year those vessels had reached the neighbourhood of Long Harbour, and were actively engaged in the herring fishery, and that most of the seines were full of fish and ready for landing, when, in one instance, two seines belonging to the schooners "Ontario" and "New England" respectively were cut by an enraged crowd of over 200 men, and the whole catch, estimated at not less than 5,000 barrels of herring suffered to run out to sea. Other instances are given, only less in quantity and value, the proceedings resulting in the vessels—eight in number—being obliged to abandon the fishing-grounds on that coast and return to their home port in ballast. When it is remarked at what considerable expense the preparations are made for a season's fishing in these waters, many of the men-mariners, as

well as the masters, embarking their all in the enterprise, the serious character of their losses may be partially understood.

The President has deemed it proper, in view of the possible complications to which a continuance of these lawless proceedings might give rise, to bring the subject directly to the attention of Her Majesty's Government with a view to an early investigation of the facts and the adoption of such measures on its part as may be deemed advisable to prevent a recurrence of the acts complained of; and the Minister of the United States at London has been accordingly instructed to take the necessary steps in that direction. Meantime, I have deemed it right to transmit the facts, so far as they are already known, for your information.

I have, &c.

(Signed)

WM. M. EVARTS.

No. 168.—1878, *September 28: Letter from Mr. Evarts to Mr. Welsh (United States Minister at London).*

DEPARTMENT OF STATE,
Washington, September 28, 1878.

SIR, I received in due course your despatch of the 24th August ultimo, inclosing Lord Salisbury's reply of the British Government to the representations that had been made to it as early as March last by you, under instructions from the Department.

I must understand Lord Salisbury's note accompanying the copy of Captain Sullivan's Report, which he communicates to this Government, as adopting that naval officer's conclusions of fact respecting the violent injuries which our fishing fleet suffered at the hands of the Newfoundland fishing population at Fortune Bay in January of this year, as the answer which Her Majesty's Government makes to the representations laid before it on our part, verified by the sworn statements of numerous and respectable witnesses.

His Lordship has not placed in our possession the proofs or depositions which form the basis of Captain Sullivan's conclusions of facts, and I am unable, therefore, to say whether, upon their consideration, the view which this Government takes of these transactions, upon the sworn statements of our own respectable citizens, would be at all modified. In the absence of these means of correcting any mistakes or false impressions which our informants may have fallen into in their narrative of the facts, it is impossible to accept Captain Sullivan's judgment upon undisclosed evidence as possessing judicial weight.

You will, therefore, lay before Her Majesty's Government the desire which this Government feels to be able to give due weight to this opposing evidence, before insisting upon the very grave view of these injuries which, at present, its unquestionable duty to the interests which have suffered them, and its confidence in the competency and sobriety of the proofs in our possession, compels this Government to take. Should Her Majesty's Government place a copy of the evidence upon which Captain Sullivan bases his Report in your hands, you will lose no time in transmitting it for consideration. I regret that any further delay should thus intervene to prevent an immediate consideration of the facts in

the matter by the two Governments in the presence of the same evidence of those facts for their scrutiny and judgment.

But, a careful attention to Lord Salisbury's note discovers what must be regarded as an expression of his views, at least of the authority of Provincial legislation and administrative jurisdiction over our fishermen within the three-mile line, and of the restrictive limitations upon their rights in these fishing-grounds under the Treaty of Washington. Upon any aspect of the evidence, on one side and the other, as qualifying the violent acts from which our fishing fleet has suffered at the hands of the Newfoundland coast fishermen, the views thus intimated seem to this Government wholly inadmissible, and do not permit the least delay, on our part, in frankly stating the grounds of our exception to them.

The Report of Captain Sullivan presents, as a justificatory support of the action of the Newfoundland shore fishermen in breaking up the operations of our fishing fleet inside the three-mile line, at the times covered by these transactions, the violation of certain municipal legislation of the Newfoundland Government which, it is alleged, our fishermen were in the act of committing when the violent interruption of their industry occurred.

I do not stop to point out the serious distinction between the official and judicial execution of any such laws and the orderly enforcement of their penalties after solemn trial of the right, and the rage and predominant force of a volunteer multitude driving off our peaceful occupants of these fishing grounds pursuing their industry under a claim of right secured to them by Treaty. I reserve this matter for a complete examination when the conflicting proofs are in my possession. I shall assume, for my present purpose, that the manner of exerting this supposed provincial authority was official, judicial, and unexceptionable.

I will state these justifications for the disturbance of our fishing fleet in Captain Sullivan's own language, that I may not even inadvertently impute to Lord Salisbury's apparent adoption of them any greater significance than their very language fairly imports.

Captain Sullivan assigns the following violations of law by our fishermen as the grounds of rightful interference with them on the occasion in question:—

1. That the Americans were using seines for catching herring on the 6th January, 1878, in direct violation of title xxvii, chap. 102, sect. 1 of the Consolidated Statutes of Newfoundland, viz, "No person shall haul or take herring by or in a seine, or other such contrivance, on or near any part of the coast of this Colony or of its dependencies, or in any of the bays, harbours, or other places therein, at any time between the 20th day of October and the 25th day of April."

2. That the American captains were setting and putting out seines, and hauling and taking herring, on Sunday, the 6th day of January, in direct violation of sect. 4, chap. vii of the Act passed 26th April, 1876, entitled "An Act to amend the Law relating to the Coast Fisheries," viz, "No person shall, between the hours of 12 o'clock on Saturday night and 12 o'clock on Sunday night, haul or take any herring, caplin, or squid with net seines, bunts, or any such contrivances for the purpose of such hauling or taking."

3. That they were barring fish, in direct violation of the continuance of the same Act—title xxvii, chap. 102, sect. 1 of the Consolidated Statutes of Newfoundland—"or at any time use a seine or other contrivance for the catching or taking of herrings, except by way of shooting and forthwith hauling the same."

4. That, contrary to the terms of the Treaty of Washington, in which it is expressly provided that they do not interfere with the rights of private prop-

erty, or with British fishermen in the peaceable use of any part of the said coasts in their occupancy for the same purpose (see Article XVIII of the above-named Treaty). they were fishing illegally, interfering with the rights of British fishermen and their peaceable use of that part of the coast then occupied by them, and of which they were actually in possession, their seines and boats, their huts, gardens, and land granted by Government, being situated thereon.

The facts which enter into the offences imputed under the first, second, and third heads of Captain Sullivan's statement, and such offences thus made out, would seem to be the only warrant for his conclusion under his fourth head, that the United States' fishermen have exceeded their Treaty right, and, in their actual prosecution of their fishing, were, when interrupted by the force complained of, interfering with the rights of private property, or with British fishermen in the peaceable use of that part of the coast then being in their occupancy for the same purpose, contrary to the proviso of Article XVIII of the Treaty of Washington.

It is no part of my present purpose to point out that this alleged infraction of the reserved rights of the local fishermen does not justify the methods of correction or redress used to drive off our fishermen and break up their prosecution of the fishing. This may be reserved also for discussion when both Governments have a fuller knowledge of the actual circumstances of the transaction.

In transmitting to you a copy of Captain Sullivan's Report, Lord Salisbury says: "You will perceive that the Report in question appears to demonstrate conclusively that the United States' fishermen on this occasion had committed three distinct breaches of the law, &c."

In this observation of Lord Salisbury this Government cannot fail to see a necessary imputation that Her Majesty's Government concedes that in the prosecution of the right of fishing accorded to the United States by Article XVIII of the Treaty, our fishermen are subject to the local regulations which govern the coast population of Newfoundland in their prosecution of their fishing industry, whatever those regulations may be, and whether enacted before or since the Treaty of Washington.

The three particulars in which our fishermen are supposed
270 to be constrained by actual legislation of the province cover in principle every degree of regulation of our fishing industry within the three-mile line which can well be conceived. But they are in themselves so important and so serious a limitation of the right secured by the Treaty as practically to exclude our fishermen from any profitable pursuit of the right, which, I need not add, is equivalent to annulling or cancelling, by the Provincial Government, of the privilege accorded by the Treaty with the British Government.

If our fishing fleet is subject to the Sunday laws of Newfoundland, made for the coast population; if it is excluded from the fishing-grounds for half the year, from October to April; if our "seines and other contrivances" for catching fish are subject to the regulation of the Legislature of Newfoundland, it is not easy to see what firm or valuable measures for the privilege of Article XVIII as conceded to the United States, this Government can promise to its citizens under the guarantee of the Treaty.

It would not, under any circumstances, be admissible for one Government to subject the persons, the property, and the interests of its fishermen to the unregulated regulations of another Government, upon the suggestion that such authority will not be oppressively or capriciously exercised, nor would any Government accept as an adequate guarantee of the proper exercise of such authority over its citizens by a foreign Government, that presumptively regulations would be uniform in their operation upon the subjects of both Governments in similar case. If there are to be regulations of a common enjoyment, they must be authenticated by a common or a joint authority.

But, most manifestly, the subject of the regulation of the enjoyment of the shore fishery by the resident Provincial population, and of the inshore fishery by our fleet of fishing-cruizers, does not tolerate the control of so divergent and competing interests by the domestic legislation of the Province. Protecting and nursing the domestic interest at the expense of the foreign interest, on the ordinary motives of human conduct, necessarily shape and animate the local legislation. The evidence before the Halifax Commission makes it obvious that, to exclude our fishermen from catching bait, and thus compel them to go without bait, or buy bait at the will and price of the Provincial fishermen, is the interest of the local fishermen, and will be the guide and motive of such domestic legislation as is now brought to the notice of this Government.

You will, therefore, say to Lord Salisbury that this Government cannot but express its entire dissent from the view of the subject that his Lordship's note seems to indicate. This Government conceives that the fishery rights of the United States, conceded by the Treaty of Washington, are to be exercised wholly free from the restraints and regulations of the Statutes of Newfoundland, now set up as authority over our fishermen, and from any other regulations of fishing now in force or that may hereafter be enacted by that Government.

It may be said that a just participation in this common fishery by the two parties entitled thereto, may, in the common interest of preserving the fishery and preventing conflicts between the fishermen, require regulation by some competent authority. This may be conceded. But should such occasion present itself to the common appreciation of the two Governments, it need not be said that such competent authority can only be found in a Joint Convention, that shall receive the approval of Her Majesty's Government and our own. Until this arrangement shall be consummated, this Government must regard the pretension that the legislation of Newfoundland can regulate our fishermen's enjoyment of the Treaty right as striking at the Treaty itself. It asserts an authority on one side and a submission on the other, which has not been proposed to us by Her Majesty's Government, and has not been accepted by this Government. I cannot doubt that Lord Salisbury will agree that the insertion of any such element in the Treaty of Washington would never have been accepted by this Government, if it could reasonably be thought possible that it could have been proposed by Her Majesty's Government. The insertion of any such proposition by construction now is equally at variance with the views of this Government.

The representations made to this Government by the interests of our citizens affected, leave no room to doubt that this assertion of

authority is as serious and extensive in practical relations as it is in principle. The rude application made to the twenty vessels in Fortune Bay of this asserted authority, in January last, drove them from the profitable prosecution of their projected cruizes. By the same reason the entire inshore fishery is held by us upon the same tenure of dependence upon the Parliament of the Dominion or the Legislatures of the several Provinces.

I cannot but regret that this vital question has presented itself so unexpectedly to this Government, and at a date so near the period at which this Government, upon a comparison of views with Her Majesty's Government, is to pass upon the conformity of the proceedings of the Halifax Commission with the requirements of the Treaty of Washington. The present question is wholly aside from the considerations bearing upon that subject, and which furnishes the topic of my recent dispatch.

In the opinion of this Government it is essential that we should at once invite the attention of Lord Salisbury to the question of Provincial control over the fishermen of the United States, in their prosecution of the privilege secured to them by the Treaty. So grave a question, in its bearing upon the obligations of this Government under the Treaty, makes it necessary that the President should ask from Her Majesty's Government a frank avowal or disavowal of the paramount authority of Provincial legislation to regulate the enjoyment by our people of the inshore fishery, which seems to be intimated, if not asserted, in Lord Salisbury's note.

Before the receipt of a reply from Her Majesty's Government it would be premature to consider what should be the course of this Government should this limitation upon the Treaty privileges of the United States be insisted upon by the British Government as their construction of the Treaty.

271 You will communicate this despatch to Lord Salisbury by reading the same to him, and leaving with him a copy.

I am, &c.

(Signed) WM. M. EVARTS.

No. 169.—1878, November 7: *Letter from the Marquis of Salisbury (British Foreign Secretary) to Mr. Welsh.*

FOREIGN OFFICE, November 7, 1878.

SIR, Her Majesty's Government have had under their consideration the despatch from Mr. Evarts, dated the 28th September, and communicated to me on the 12th ultimo, respecting the complaints made by the Government of the United States of the injuries sustained by American fishermen in Fortune Bay in January last.

This despatch is in reply to my letter of the 23rd August, in which I forwarded a copy of the Report furnished by Captain Sullivan, of Her Majesty's ship "Sirius," on the occurrences in question. Mr. Evarts now remarks that the United States' Government have not been put in possession of the depositions which form the basis of that Report, and are unable, therefore, to say whether, upon their consideration, the view which the Government of the United States takes

of these transactions upon the sworn statements of their own citizens would be at all modified.

Her Majesty's Government have not had the opportunity of considering the statements in question; but the depositions which accompanied Captain Sullivan's Report, and which I now have the honour to forward, appeared to them, in the absence of other testimony, to be conclusive as regards the facts of the case.

Apart, however, from the facts, in respect to which there appears to be a material divergence between the evidence collected by the United States' Government and that collected by the Colonial authorities, Mr. Evarts takes exception to my letters of the 23rd on the ground of my statement that the United States' fishermen concerned have been guilty of breaches of the law. From this he infers an opinion on my part that it is competent for a British authority to pass laws, in supersession of the Treaty, binding American fishermen within the three-mile limit. In pointing out that the American fishermen had broken the law within the territorial limits of Her Majesty's dominions, I had no intention of inferentially laying down any principles of international law; and no advantage would, I think, be gained by doing so to a greater extent than the facts in question absolutely require.

I hardly believe, however, that Mr. Evarts would in discussion adhere to the broad doctrine which some portions of his language would appear to convey, that no British authority has a right to pass any kind of laws binding Americans who are fishing in British waters; for if that contention be just, the same disability applies *à fortiori* to any other Power, and the waters must be delivered over to anarchy. On the other hand, Her Majesty's Government will readily admit—what is, indeed, self-evident—that British sovereignty, as regards those waters, is limited in its scope by the engagements of the Treaty of Washington, which cannot be modified or affected by any municipal legislation. I cannot anticipate that with regard to these principles any difference will be found to exist between the views of the two Governments.

If, however, it be admitted that the Newfoundland Legislature have the right of binding Americans who fish within their waters by any laws which do not contravene existing Treaties, it must further be conceded that the duty of determining the existence of any such contravention must be undertaken by the Governments, and cannot be remitted to the discretion of each individual fisherman. For such a discretion, if exercised on one side can hardly be refused on the other. If any American fisherman may violently break a law which he believes to be contrary to Treaty, a Newfoundland fisherman may violently maintain it if he believes it to be in accordance with Treaty. As the points in issue are frequently subtle, and require considerable legal knowledge, nothing but confusion and disorder could result from such a mode of deciding the interpretation of the Treaty.

Her Majesty's Government prefer the view that the law enacted by the Legislature of the country, whatever it may be, ought to be obeyed by natives and foreigners alike who are sojourning within the territorial limits of its jurisdiction; but that if a law has inadvertently been passed which is in any degree or respect at variance with rights conferred on a foreign Power by Treaty, the correction of the mistake so committed, at the earliest period after its existence

shall have been ascertained and recognized, is a matter of international obligation.

It is not explicitly stated in Mr. Evarts' despatch that he considers any recent Acts of the Colonial Legislature to be inconsistent with the rights acquired by the United States under the Treaty of Washington. But if that is the case, Her Majesty's Government will, in a friendly spirit, consider any representations he may think it right to make upon the subject, with the hope of coming to a satisfactory understanding.

I have, &c.

(Signed) SALISBURY

272 No. 170.—1879, August 1: Letter from Mr. Evarts to Mr. Welsh.

DEPARTMENT OF STATE,
Washington, August 1, 1879.

JOHN WELSH, Esquire &c &c &c

SIR, You will readily understand that the pressure of current business, especially during the regular and special sessions of Congress, has prevented so immediate attention to the claims of the Fortune Bay fishermen, as definitely laid before me in their proofs completed during the session, as would enable me to give in reply a full consideration to the despatch of Lord Salisbury of the date of November 7, 1878, in reply to mine to you of 28th September, 1878.

But other and stronger reasons have also induced me to postpone until now any discussion of the questions, arising out of the occurrences to which those despatches referred.

It so happened that the transactions of which certain citizens of the United States complain, were brought fully to the attention of the Government about the same time at which it became my duty to lay before Her Britannic Majesty's Government the views of the United States Government as to the award then recently made by the Commission on the Fisheries, which had just closed its sittings at Halifax. While the character of the complaint and the interests of the citizens of the United States rendered it necessary that the subject should be submitted to the consideration of Her Britannic Majesty's Government at the earliest possible moment, in order to the prevention of any further and graver misunderstanding and the avoidance of any serious interruption to an important industry, I was exceedingly unwilling that the questions arising under the award and those provoked by the occurrences in Newfoundland should be confused with each other, and least of all would I have been willing that the simultaneous presentment of the views of this Government should be construed as indicating any desire on our part to connect the settlement of these complaints with the satisfaction or abrogation of the Halifax award.

I also deemed it not inadvisable, in the interests of such a solution as I am sure is desired by the good sense and good temper of both Governments, that time should be allowed for the extinguishment of the local irritation, both here and in Newfoundland, which these transactions seem to have excited, and that another fishing season

should more clearly indicate whether the rights to which the citizens of the United States were entitled under the Treaty were denied or diminished by the pretensions and acts of the Colonial authorities, or whether their infraction was accidental and temporary. As soon as the violence to which citizens of the United States had been subjected in Newfoundland, was brought to the attention of this Department, I instructed you, on 2nd March, 1878, to represent the matter to Her Britannic Majesty's Government, and upon such representation you were informed that a prompt investigation would be ordered for the information of that Government. On August 23, 1878, Lord Salisbury conveyed to you, to be transmitted to your Government, the result of that investigation, in the shape of a Report from Captain Sullivan, of Her Majesty's ship "Sirius." In furnishing you with this Report, Lord Salisbury, on behalf of Her Britannic Majesty's Government, said: "You will perceive that the Report in question appears to demonstrate conclusively that the United States fishermen on this occasion had committed three distinct breaches of the law, and that no violence was used by the Newfoundland fishermen, except in the case of one vessel whose master refused to comply with the request which was made to him, that he should desist from fishing on Sunday, in violation of the law of the Colony and of the local custom, and who threatened the Newfoundland fishermen with a revolver, as detailed in paragraphs five and six of Captain Sullivan's Report."

The three breaches of the law there reported by Captain Sullivan, and assumed by Lord Salisbury as conclusively established, were: 1. The use of seines, and the use of them also at a time prohibited by a Colonial Statute; 2. Fishing upon a day—Sunday—forbidden by the same local law; and 3. Barring fish, in violation of the same local legislation. In addition, Captain Sullivan reported that the United States fishermen were, contrary to terms of the Treaty of Washington, "fishing illegally, interfering with the rights of British fishermen and their peaceful use of that part of the coast then occupied by them, and of which they were actually in possession; their seines and boats, their huts and gardens, and land granted by Government, being situated thereon." Yours containing this despatch and the accompanying Report was received on 4th September, 1878, and on the 28th of the same month you were instructed that it was impossible for this Government duly to appreciate the value of Captain Sullivan's Report, until it was permitted to see the testimony upon which the conclusions of that Report professed to rest. And you were further directed to say that, putting aside for after examination the variations of fact, it seemed to this Government that the assumption of the Report was, that the United States fishermen were fishing illegally, because their fishing was being conducted at a time and by methods forbidden by certain Colonial statutes; that the language of Lord Salisbury in communicating the Report with his approval, indicated the intention of Her Britannic Majesty's Government to maintain the position, that the Treaty privileges secured to United States fishermen by the Treaty of 1871 were held subject to such limitations as might be imposed upon their exercise by Colonial legislation; and "that so grave a question, in its bearing upon the obligations of this Government under the Treaty, makes it necessary, that the President should ask from Her Majesty's Government a frank avowal or disavowal of the paramount authority of provincial

legislation to regulate the enjoyment by our people of the inshore fishery which seems to be intimated, if not asserted, in Lord Salisbury's note."

273 In reply to this communication, Lord Salisbury, 7th November, 1878, transmitted to you, the depositions which accompanied Captain Sullivan's Report, and said: "In pointing out that the American fishermen had broken the law within the territorial limits of Her Majesty's domains, I had no intention of inferentially laying down any principles of international law, and no advantage would, I think, be gained by doing so to a greater extent than the facts in question absolutely require. . . . Her Majesty's Government will readily admit what is, indeed, self-evident, that British sovereignty, as regards those waters, is limited in its scope by the engagements of the Treaty of Washington, which cannot be modified or affected by any municipal legislation." It is with the greatest pleasure that the United States Government receives this language as "the frank disavowal," which it asked, "of the paramount authority of provincial legislation to regulate the enjoyment by our people of the inshore fishery." Removing, as this explicit language does, the only serious difficulty which threatened to embarrass this discussion, I am now at liberty to resume the consideration of these differences in the same spirit and with the same hopes so fully and properly expressed in the concluding paragraph of Lord Salisbury's despatch. He says, "It is not explicitly stated in Mr. Evarts' despatch that he considers any recent Acts of the Colonial Legislature to be inconsistent with the rights acquired by the United States under the Treaty of Washington. But, if that is the case, Her Majesty's Government will, in a friendly spirit, consider any representations he may think it right to make upon the subject, with the hope of coming to a satisfactory understanding."

It is the purpose, therefore, of the present despatch to convey to you, in order that they may be submitted to Her Britannic Majesty's Government, the conclusions which have been reached by the Government of the United States as to the rights secured to its citizens, under the Treaty of 1871, in the herring fishery upon the Newfoundland coast, and the extent to which those rights have been infringed by the transactions in Fortune Bay on January 6, 1878.

Before doing so, however, I deem it proper, in order to clear the argument of all unnecessary issues, to correct what I consider certain misapprehensions of the views of this Government contained in Lord Salisbury's despatch of 7th November, 1878. The Secretary for Foreign Affairs of Her Britannic Majesty says:—

"If, however, it be admitted that the Newfoundland Legislature have the right of binding Americans who fish within their waters by any laws which do not contravene existing Treaties, it must be further conceded that the duty of determining the existence of such contravention must be undertaken by the Governments, and cannot be remitted to the discretion of each individual fisherman. For such discretion, if exercised on one side, can hardly be refused on the other. If any American fisherman may violently break a law which he believes to be contrary to Treaty, a Newfoundland fisherman may violently maintain it if he believes it to be in accordance with Treaty." His Lordship can scarcely have intended this last proposition to be taken in its literal significance. An infraction of law may be

accompanied by violence which affects the person or property of an individual, and that individual may be warranted in resisting such illegal violence, so far as it directly affects him, without reference to the relation of the act of violence to the law which it infringes, but simply as a forcible invasion of his rights of person or property. But that the infraction of a general municipal law, with or without violence, can be corrected and punished by a mob, without official character or direction, and who assume both to interpret and administer the law in controversy, is a proposition which does not require the reply of elaborate argument between two Governments whose daily life depends upon the steady application of the sound and safe principles of English jurisprudence. However this may be, the Government of the United States cannot for a moment admit that the conduct of the United States fishermen in Fortune Bay was in any—the remotest—degree a violent breach of law. Granting any and all the force which may be claimed for the Colonial Legislature, the action of the United States fishermen was the peaceable prosecution of an innocent industry, to which they thought they were entitled. Its pursuit invaded no man's rights, committed violence upon no man's person, and if trespassing beyond its lawful limits could have been promptly and quietly stopped by the interference and representation of the lawfully-constituted authorities. They were acting under the provisions of the very statute which they are alleged to have violated, for it seems to have escaped the attention of Lord Salisbury that section 28 of the title of the Consolidated Acts referred to, contains the provision that "Nothing in this chapter shall affect the rights and privileges granted by Treaty to the subjects of any State or Power in amity with Her Majesty." They were engaged, as I shall hereafter demonstrate, in a lawful industry, guaranteed by the Treaty of 1871, in a method which was recognized as legitimate by the award of the Halifax Commission, the privilege to exercise which their Government had agreed to pay for. They were forcibly stopped, not by legal authorities, but by mob violence. They made no resistance, withdrew from the fishing grounds, and represented the outrage to their Government, thus acting in entire conformity with the principle so justly stated by Lord Salisbury himself, that "if it be admitted, however, that the Newfoundland Legislature have the right of binding Americans who fish within their waters by any laws which do not contravene existing Treaties, it must be further conceded that the duty of determining the existence of such contravention must be undertaken by the Governments, and cannot be remitted to the judgment of each individual fisherman." There is another passage of Lord Salisbury's despatch to which I should call your attention. Lord Salisbury says, "I hardly believe, however, that Mr. Evarts would in discussion adhere to the broad doctrine which some portion of his language would appear to convey, that no British authority has the right to pass any kind of laws binding Americans who are fishing in British waters; for if that contention be just, the same disability applies *a fortiori* to any other Powers, and the waters must be delivered over to anarchy." I certainly cannot recall any language of mine, in this correspondence, which is capable of so extraordinary a construction. I have

274 nowhere taken any position larger or broader than that which Lord Salisbury says: "Her Majesty's Government will readily

admit, what is, indeed, self-evident, that British sovereignty, as regards those waters, is limited in its scope by the engagements of the Treaty of Washington, which cannot be affected or modified by any municipal legislation." I have never denied the full authority and jurisdiction either of the Imperial or Colonial Governments over their territorial waters, except so far as by Treaty that authority and jurisdiction have been deliberately limited by these Governments themselves. Under no claim or authority suggested or advocated by me, could any other Government demand exemption from the provisions of British or Colonial law, unless that exemption was secured by Treaty, and if these "waters must be delivered over to anarchy," it will not be in consequence of any pretensions of the United States Government, but because the British Government has, by its own Treaties, to use Lord Salisbury's phrase, limited the scope of British sovereignty. I am not aware of any such Treaty engagements with other Powers, but, if there are, it would be neither my privilege or duty to consider or criticize their consequences, where the interests of the United States are not concerned.

After a careful comparison of all the depositions furnished to both Governments, the United States Government is of opinion that the following facts will not be disputed:—

1. That twenty-two vessels belonging to citizens of the United States, viz., Fred. P. Frye, Mary and M., Lizzie and Namari, Edward E. Webster, W. E. McDonald, Crest of the Wave, F. A. Smith, Hereward, Moses Adams, Charles E. Warren, Moro Castle, Wildfire, Maud and Effie, Isaac Rich, Bunker Hill, Bonanza, H. M. Rogers, Moses Knowlton, John W. Bray, Maud B. Wetherell, New England, and Ontario, went from Gloucester, a town in Massachusetts, United States, to Fortune Bay, in Newfoundland, in the winter of 1877-78, for the purpose of procuring herring.

2. That these vessels waited at Fortune Bay for several weeks (from about December 15, 1877, to January 6, 1878, for the expected arrival of shoals of herring in that harbour.

3. That on Sunday, January 6, 1878, the herring entered the Bay in great numbers, and that four of the vessels sent their boats with seines to commence fishing operations, and the others were proceeding to follow.

4. That the parties thus seining were compelled by a large and violent mob of the inhabitants of Newfoundland to take up their seines, discharge the fish already inclosed, and abandon their fishery, and that in one case at least the seine was absolutely destroyed.

5. That these seines were being used in the interest of all the United States vessels waiting for cargoes in the harbour, and that the catch undisturbed would have been sufficient to load all of them with profitable cargoes. The great quantity of fish in the harbour, and the fact that the United States vessels, if permitted to fish, would all have obtained full cargoes is admitted in the British depositions.

If the Americans had been allowed to secure all the herrings in the Bay for themselves, which they could have done that day, they would have filled all their vessels, and the neighbouring fishermen would have lost all chance on the follow week-days. (Deposition of James Searwell.)

The Americans, by hauling herring that day, when the Englishmen could not, were robbing them of their lawful and just chance of securing their share in them; and, further, had they secured all they had barred, they would, I believe, have filled every vessels of theirs in the Bay. (Deposition of John Cluett.)

See also affidavits of the United States Captains.

6. That, in consequence of this violence, all the vessels abandoned the fishing-grounds, some without cargoes, some with very small cargoes purchased from the natives, and their voyages were a loss to their owners.

7. That the seining was conducted at a distance from any land or fishing privilege or the occupation of any British subject (See affidavits of Willard G. Rode, Charles Doyle, and Michael B. Murray.)

8. That none of the United States vessels made any further attempts to fish; but three or four, which were delayed in the neighbourhood, purchased small supplies of herring (See British depositions of John Saunders and Silas Fudge, wherein is stated that the United States vessels only remained a few days, and that after January 6 no fish came into the harbour.) All the United States affidavits show that the United States vessels were afraid to use their seines after this, and that they left almost immediately, most of them coming home in ballast.

The provisions of the Treaty of Washington (1871), by which the right to prosecute this fishery was secured to the citizens of the United States, are very simple and very explicit.

The language of the Treaty is as follows:—

XVIII. It is agreed by the High Contracting Parties, that in addition to the liberties secured to the United States fishermen by the Convention between the United States and Great Britain, signed at London on the 20th day of October, 1818, of taking, curing, and drying fish on certain coasts of the British North American Colonies, therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty, for the term of years mentioned in Article XXXIII of this Treaty, to take fish of every kind, except shell fish, on the sea coast and shores and in the bays, harbours, and creeks of the provinces of Quebec, &c.

XXXII. It is further agreed that the provisions and stipulations of Articles XVIII to XXV of this Treaty, inclusive, shall extend to the Colony of Newfoundland, so far as they are applicable.

275 Title XXVII, chapter 102, of the Consolidated Acts of Newfoundland, provides:—

Section 1. That no person shall take herring on the coast of Newfoundland, by a seine or other such contrivance, at any time between the 20th day of October and the 12th day of April, in any year, or at any time use a seine except by way of shooting and forthwith hauling the same.

Section 2. That no person shall, at any time between the 20th day of December and the 1st day of April in any year, catch or take herring with seine of less than 2½ inches mesh, &c.

Section 4. No person shall, between the 20th day of April and the 20th day of October in any year, haul, catch, or take herring or other bait, for exportation, within one mile measured by the shore or across the water of any settlement situate between Cape *Chapeau Rouge* and Point Emajer, near Cape Ray.

The Act of 1876 provides that “no person shall, between the hours of twelve o’clock on Saturday night and twelve o’clock on Sunday night, haul or take any herring, caplin, or squid, with net, seine, bunts, or any such contrivance, for the purpose of such hauling or taking.”

It seems scarcely necessary to do more than place the provisions of the Treaty and the provisions of these laws in contrast, and apply the principle, so precisely and justly announced by Lord Salisbury as self-evident, “That British sovereignty, as regards these waters, is limited in its scope by the engagements of the Treaty of Washington, which cannot be modified or affected by any municipal legislation.” For it will not be denied that the Treaty privilege of “taking

fish of every kind, except shell-fish, on the sea coast and shores, in the bays, harbours, and creeks" of Newfoundland, is both seriously "modified" and injuriously affected by "municipal legislation," which closes such fishery absolutely for seven months of the year, prescribes a special method of exercise, forbids exportation for five months, and in certain localities absolutely limits the three-mile area which it was the express purpose of the Treaty to open.

But this is not all. When the Treaty of 1871 was negotiated, the British Government contended that the privilege extended to United States fishermen, of free fishing within the three-mile territorial limit, was so much more valuable than the equivalent offered in the Treaty, that a money compensation should be added to equalize the exchange. The Halifax Commission was appointed for the special purpose of determining that compensation, and, in order to do so, instituted an exhaustive examination of the history and value of the Colonial fisheries, including the herring fishery of Newfoundland. Before that Commission, the United States Government contended that the frozen herring fishery in Fortune Bay, Newfoundland, the very fishery now under discussion, was not a fishery but a traffic; that the United States vessels which went there for herring always took out trading permits from the United States custom-houses, which no other fishermen did; that the herring were caught by the natives in their nets, and sold to the vessels, the captains of which froze the herring after purchase, and transported them to market; and that, consequently, this was a trade, a commerce beneficial to the Newfoundlanders, and not to be debited to the United States account of advantages gained by the Treaty. To this the British Government replied, that whatever the character of the business had been, the Treaty now gave the United States fishermen the right to catch as well as purchase herring; that the superior character of the United States vessels, the larger capacity and more efficient instrumentality of the seines used by the United States fishermen, together with their enterprise and energy, would all induce the United States fishermen to catch herring for themselves, and thus the Treaty gave certain privileges to the United States fishermen which inflicted upon the original proprietor a certain amount of loss and damage, from this dangerous competition, which, in justice to their interests, required compensation. The exercise of these privileges, therefore, as stated in the British Case, as evidenced in the British testimony, as maintained in the British argument, for which the British Government demanded and received compensation, is the British construction of the extent of the liberty to fish in common, guaranteed by the Treaty.

Mr. Whiteway, then Attorney-General of Newfoundland, and one of the British Counsel before the Commission, said in his argument:—

And now one word with regard to the winter herring-fishery in Fortune Bay. It appears that from forty to fifty United States vessels proceed there between the months of November and February taking from thence cargoes of frozen-herring of from 500 to 800 or 1,000 barrels. According to the evidence, these herrings have hitherto generally been obtained by purchase. It is hardly possible, then, to conceive that the Americans will continue to buy, possessing, as they now do, the right to catch.

The British Case states the argument as to the Newfoundland fisheries in the following language:—

It is asserted, on the part of Her Majesty's Government, that the actual use which may be made of this privilege at the present moment, is not so much in

question as the actual value of it to those who may, if they will, use it. It is possible, and even probable, that the United States fishermen may at any moment avail themselves of the privilege of fishing in Newfoundland inshore waters, to a much larger extent than they do at present; but even if they should not do so, it would not relieve them from the obligation of making the just payment for a right which they have acquired subject to the condition of making that payment. The case may be not inaptly illustrated by the somewhat analogous one of a tenancy of shooting or fishing privileges; it is not because the tenant fails to exercise the rights, which he has acquired by virtue of his lease, that the proprietor should be debarred from the recovery of his rent.

276 There is a marked contrast to the advantage of the United States citizens between the privilege of access to fisheries the most valuable and productive in the world, and the barren right accorded to the inhabitants of Newfoundland of fishing in the exhausted and pre-occupied waters of the United States north of the 39th parallel of north latitude, in which there is no field for lucrative operations, even if British subjects desired to resort to them; and there are strong grounds for believing that year by year, as United States fishermen resort in greater numbers to the coasts of Newfoundland, for the purpose of procuring bait and supplies, they will become more intimately acquainted with the resources of the inshore fisheries, and their unlimited capacity for extension and development. As a matter of fact, United States vessels have, since the Washington Treaty, come into operation, been successfully engaged in these fisheries; and it is but reasonable to anticipate that, as the advantages to be derived from them become more widely known, larger numbers of United States fishermen will engage in them.

A participation by fishermen of the United States in the freedom of these waters must, notwithstanding their wonderfully reproductive capacity, tell materially on the local catch, and while affording to the United States fishermen a profitable employment, must seriously interfere with local success. The extra amount of bait, also, which is required for the supply of the United States demand for bank fishery must have the effect of diminishing the supply of cod for the inshores, as it is well known that the presence of that fish is caused by the attraction offered by a large quantity of bait fishes, and as this quantity diminishes the cod will resort in fewer number to the coast.

The effect of this diminution may not, in all probability, be apparent for some years to come, and whilst United States fishermen will have the liberty of enjoying the fisheries for several years in their present teeming and remunerative state, the effects of over-fishing may, after their right to participate in them has lapsed, become seriously prejudicial to the interests of the local fishermen.

II.—*The privilege of procuring bait and supplies, refitting, drying, transhipping, &c.*

Apart from the immense value to United States fishermen of participation in the Newfoundland inshore fisheries, must be estimated the important privilege of procuring bait for the prosecution of the bank and deep-sea fisheries, which are capable of unlimited expansion. With Newfoundland as a basis of operations, the right of procuring bait, refitting their vessels, drying and curing fish, procuring ice in abundance for the preservation of bait, liberty of transshipping their cargoes, &c., an almost continuous prosecution of the bank fishery is secured to them. By means of these advantages, United States fishermen have acquired, by the Treaty of Washington, all the requisite facilities for increasing their fishing operations to such an extent as to enable them to supply the demand for fish food in the United States markets, and largely to furnish the other fish markets of the world, and thereby exercise a competition which must inevitably prejudice Newfoundland exporters. It must be remembered, in contrast with the foregoing, that United States fishing craft, before the conclusion of the Treaty of Washington, could only avail themselves of the coast of Newfoundland, for obtaining a supply of wood and water, for shelter and for necessary repairs in case of accident, and for no other purpose whatever; they, therefore, prosecuted the bank fishery under great disadvantages, notwithstanding which, owing to the failure of the United States local fisheries, and the consequent necessity of providing new fishing grounds, the bank fisheries have developed into a lucrative source of employment to the fishermen of the United States. That this position is appreciated by those actively engaged in the bank fishery is attested by the statements of competent witnesses, whose evidence will be laid before the Commission.

And in the reply of the British Government, referring to the same Newfoundland fisheries, is the following declaration:

As regards the herring fishery on the coast of Newfoundland, it is availed of, to a considerable extent, by the United States fishermen, and evidence will be adduced of large exportations of them in American vessels, particularly from Fortune Bay and the neighbourhood, both to European and their own markets.

The presence of United States fishermen upon the coast of Newfoundland, so far from being an advantage, as is assumed in the answer, operates most prejudicially to Newfoundland fishermen. Bait is not thrown overboard to attract the fish, as asserted, but the United States bank fishing vessels, visiting the coast in such large numbers as they do, for the purpose of obtaining bait, sweep the coast, creeks, and inlets, thereby diminishing the supply of bait for local catch, and scaring it from the grounds, where it would otherwise be an attraction for cod.

In support of these views, the most abundant testimony was produced by the British Government, showing the extent of the United States herring fishery, the character and construction of the seines used, the time when the vessels came and left, and the employment of the native fishermen by the United States vessels. And it follows unanswerably that upon the existence of that fishery between the months of October and April (the very time prohibited by the Colonial law), and upon the use of just such seines as were used by the complainants in this case (the very seines forbidden by the Colonial law), and because the increasing direct fishery of the United States vessels was interfering with native methods and native profits, the British Government demanded and received compensation for the damages thus alleged to proceed from "the liberty to take fish of every kind" secured by the Treaty. This Government cannot anticipate that the British Government will now contend that the
 277 time and the method for which it asked and received compensation are forbidden by the terms of the very Treaty under which it made the claim and received the payment. Indeed, the language of Lord Salisbury justifies the Government of the United States in drawing the conclusion that between itself and Her Britannic Majesty's Government there is no substantial difference in the construction of the privilege of the Treaty of 1871, and that, in the future, the Colonial regulation of the fisheries, with which, as far as their own interests are concerned, we have neither right nor desire to intermeddle, will not be allowed to modify or affect the rights which have been guaranteed to citizens of the United States.

You will therefore say to Lord Salisbury, that the Government of the United States considers that the engagements of the Treaty of 1871 contravened by the local legislation of Newfoundland, by the prohibition of the use of seines, by the closing of the fishery with seines between October and April, by the forbidding of fishing for the purpose of exportation between December and April, by the prohibition to fish on Sunday, by the allowance of nets of only a specified mesh, and by the limitation of the area of fishing between Cape Ray and Cape Chapeau Rouge. Of course, this is only upon the supposition that such laws are considered as applying to United States fishermen: as local regulations for native fishermen, we have no concern with them. The contravention consists in excluding United States fishermen during the very times in which they have been used to pursue this industry, and forbidding the methods by which alone it can profitably be carried on. The exclusion of the

time from October to April covers the only season in which frozen herring can be procured, while the prohibition of the seines would interfere with the vessels, who, occupied in cod-fishing during the summer, go to Fortune Bay in the winter, and would consequently have to make a complete change in their fishing gear, or depend entirely upon purchase from the natives for their supply. The prohibition of work on Sunday is impossible under the conditions of the fishery. The vessels must be at Fortune Bay at a certain time, and leave for market at a certain time. The entrance of the shoals of herring is uncertain, and the time they stay equally so. Whenever they come they must be caught, and the evidence in this very case, shows that after Sunday, the 6th of January, there was no other influx of these fish, and that prohibition on that day would have been equivalent to shutting out the fishermen for the season.

If I am correct in the views hitherto expressed, it follows that the United States Government must consider the United States fishermen as engaged in a lawful industry, from which they were driven by lawless violence, at great loss and damage to them; and that as this was in violation of rights guaranteed by the Treaty of Washington between Great Britain and the United States, they have reasonable ground to expect, at the hands of Her Britannic Majesty's Government, proper compensation for the loss they have sustained. The United States Government, of course, desires to avoid an exaggerated estimate of the loss, which has actually sustained, but thinks you will find the elements for a fair calculation in the sworn statement of the owners, copies of which are herewith sent.

You will find in the printed pamphlet which accompanies this, and which is the statement submitted to this Department on behalf of twenty of the vessels, the expense of each vessel in preparation for the fishery and her estimated loss and damage. The same statement with regard to the two vessels, "New England" and "Ontario," not included in this list of twenty, you will find attached hereto, thus making a complete statement for the twenty-two vessels which were in Fortune Bay on the 6th January, 1878, and the Government of the United States sees no reason to doubt the accuracy of these estimates. I find upon examining the testimony of one of the most intelligent of the Newfoundland witnesses called before the Halifax Commission by the British Government, Judge Bennett, formerly Speaker of the Colonial House, and himself largely interested in the business, that he estimates the Fortune Bay business in frozen herring, in the former years of purchase, at 20 to 25,000 barrels for the season, and that it was increasing, and this is confirmed by others. The evidence in this case shows that the catch which the United States fishing fleet had on this occasion actually realized was exceptionally large, and would have supplied profitable cargoes for all of them. When to this is added the fact that the whole winter was lost, and these vessels compelled to return home in ballast, that this violence had such an effect upon this special fishery, that in the winter of 1878-79, it has been almost entirely abandoned, and the former fleet of twenty-six vessels has been reduced to eight, none of whom went provided with seines, but were compelled to purchase their fish of the inhabitants of Newfoundland, the United States Government is of opinion that \$105,305.02 may be presented as an estimate of the loss as claimed, and you will consider that amount

as being what this Government will regard as adequate compensation for loss and damage.

In conclusion, I would not be doing justice to the wishes and opinions of the United States Government if I did not express its profound regret at the apparent conflict of interests which the exercise of its Treaty privileges appears to have developed. There is no intention on the part of this Government that these privileges should be abused, and no desire that their full and free enjoyment should harm the Colonial fishermen. While the differing interests and methods of the shore fishery and the vessel fishery make it impossible that the regulation of the one should be entirely given to the other, yet if the mutual obligations of the Treaty of 1871 are to be maintained, the United States Government would gladly co-operate with the Government of Her Britannic Majesty in any effort to make those regulations a matter of reciprocal convenience and right, a means of preserving the fisheries at their highest point of production, and of conciliating a community of interest by a just proportion of advantages and profits.

I am, Sir, Your obedient servant,

(Signed)

WM. M. EVARTS.

278 No. 171.—1880, April 3: *Despatch from the Marquis of Salisbury to Mr. Hoppin (United States Minister at London).*

FOREIGN OFFICE, April 3, 1880.

SIR, In the note which I had the honour to address to you on the 12th February last I explained the reason why a certain time has unavoidably elapsed before Her Majesty's Government were in a position to reply to Mr. Welsh's notes of the 13th August last, in which he preferred, on the part of your Government, a claim for 105,305 dols. 2 c. as compensation to some United States' fishermen on account of losses stated to have been sustained by them through certain occurrences which took place at Fortune Bay, Newfoundland, on the 6th January, 1878. The delay which has arisen has been occasioned by the necessity of instituting a very careful inquiry into the circumstances of the case, to which, in all its bearings, Her Majesty's Government were anxious to give the fullest consideration before coming to a decision. Her Majesty's Government having now completed that inquiry so far as lies within their power, I beg leave to request you to be so good as to communicate to your Government the following observations in the case.

In considering whether compensation can properly be demanded and paid in this case, regard must be had to the facts as established, and to the intent and effect of the Articles of the Treaty of Washington and the Convention of 1818 which are applicable to those facts.

The facts, so far as they are known to Her Majesty's Government, are disclosed by the affidavits contained in the inclosed printed paper, which, for convenience of reference, have been numbered in consecutive order. Nos. 1 and 2 were received by Her Majesty's Government from his Excellency the Governor of Newfoundland; Nos. 3 to 10, inclusive, were attached to the Report made by Captain Sullivan, of Her Majesty's ship "Sirius," who was instructed to make an inquiry

into the case. These were communicated to Mr. Welsh with my note of the 7th November, 1878. Nos. 11 to 16, inclusive, are the affidavits of the United States' fishermen, printed in the "New York Herald" of the 28th January, 1878, and were received from Her Majesty's Minister at Washington. They have not been received officially from the Government of the United States, but Her Majesty's Government see no reason to doubt their authenticity. Nos. 17 to 22 were annexed to Mr. Welsh's note of the 13th August last.

A careful examination of the above evidence shows that on the day in question a large number of the crews of the United States' fishing vessels came on shore, and from the beach barred the herrings, the ends of their seines being secured to the shore. That the fishermen of the locality remonstrated against these proceedings, and upon their remonstrance proving unavailing, removed the nets by force.

Such being the facts, the following two questions arise:—

1. Have United States' fishermen the right to use the strand for purposes of actual fishing?

2. Have they the right to take herrings with a seine at the season of the year in question, or to use a seine at any season of the year for the purpose of barring herrings on the coast of Newfoundland?

The answers to the above questions depend on the interpretation of the Treaties.

With regard to the first question, namely, the right to the strand-fishery, I would observe that Article I of the Convention between Great Britain and the United States of the 20th October, 1818, secured to citizens of the United States the right, *in common with British subjects*, to take fish of every kind on certain specified portions of the coast of Newfoundland, and to use the shore *for the purposes of purchasing wood and obtaining water, and for no other purpose whatever*.

Articles XVIII and XXXII of the Treaty of Washington super-added to the above-mentioned privileges the right for United States' fishermen to take fish of every kind (with certain exceptions not relevant to the present case) on all portions of the coast of that island, and permission to land *for the purpose of drying their nets and curing their fish*, "provided that in so doing they do not interfere with the rights of private property or with British fishermen in the peaceable use of any part of the said coast in their occupancy for the same purpose."

Thus, whilst absolute freedom in the matter of fishing in territorial waters is granted, the right to use the shore for four specified purposes alone is mentioned in the Treaty Articles from which United States' fishermen derive their privileges, viz., to purchase wood, to obtain water, to dry nets, and cure fish.

The citizens of the United States are thus by clear implication absolutely precluded from the use of the shore in the direct act of catching fish. This view was maintained in the strongest manner before the Halifax Commission by the United States' Agent, who, with reference to the proper interpretation to be placed on the Treaty stipulations, used the following language:

No rights to do anything upon the land are conferred upon the citizens of the United States under this Treaty, with the single exception of the right to dry nets and cure fish on the shores of the Magdalen Islands, if we did not possess that before. No right to land for the purpose of seining from the shore; no

279 right to the "strand fishery" as it has been called; no right to do anything except, water-borne on our vessels, to go within the limits which had been previously forbidden.

So far as the herring trade goes, we could not, if we were disposed to, carry it on successfully under the provisions of the Treaty; for this herring trade is substantially a seining from the shore—a strand fishing, as it is called—and we have no right anywhere conferred by this Treaty to go ashore and seine herring any more than we have to establish fish-traps.

Her Majesty's Government, therefore, cannot anticipate that any difference of opinion will be found to exist between the two Governments on this point.

The incident now under discussion occurred on that part of the shore of Fortune Bay which is called Tickle Beach, Long Harbour. On this Beach is situated the fishing settlement of Mark Bolt, a British fisherman, who, in his evidence taken upon oath, deposed as follows: "The ground I occupy was granted me for life by Government, and for which I have to pay a fee. There are two families on the Beach; there were three in winter. Our living is dependent on our fishing off this settlement. If these large American seines are allowed to be hauled it forces me away from the place."

John Saunders, another British fisherman of Tickle Beach, deposed that the United States' fishermen hauled their seine on the beach immediately in front of his property.

The United States' fishermen, therefore, on the occasion in question, not only exceeded the limits of their Treaty privileges by fishing from the shore, but they "interfered with the rights of private property and with British fishermen in the peaceable use of that part of the coast in their occupancy for the same purpose," contrary to the express provisions of Articles XVIII and XXXII of the treaty of Washington. Further, they used seines for the purpose of in-barring herrings, and this leads me to the consideration of the second question, viz.: whether United States fishermen have the right to take herrings with a seine at the season of the year in question, or to use a seine at any season of the year for the purpose of barring herrings on the coast of Newfoundland.

The in-barring of herrings is a practice most injurious, and, if continued, calculated in time to destroy the fishery; consequently it has been prohibited by Statute since 1862.

In my note to Mr. Welsh of the 7th November, 1878, I stated "that British sovereignty as regards these waters is limited in its scope by the engagements of the Treaty of Washington, which cannot be modified or affected by any municipal legislation;" and Her Majesty's Government fully admit that United States' fishermen have the right of participation on the Newfoundland inshore fisheries, *in common* with British subjects, as specified in Article XVIII of that Treaty. But it cannot be claimed, consistently with this right of participation in common with the British fishermen, that the United States' fishermen have any other, and still less that they have greater, rights than the British fishermen had at the date of the Treaty.

If, then, at the date of the signature of the Treaty of Washington certain restraints were by the municipal law imposed upon the British fishermen, the United States' fishermen were, by the express terms of the Treaty, equally subjected to those restraints; and the obligation to observe, in common with the British, the then existing local laws and regulations which is implied by the words "in common," at-

tached to the United States' citizens as soon as they claimed the benefit of the Treaty.

That such was the view entertained by the Government of the United States during the existence of the Reciprocity Treaty, under which United States' fishermen enjoy precisely the same rights of fishing as they do now under the Treaty of Washington, is proved conclusively by the Circular issued on the 28th March, 1856, to the Collector of Customs at Boston, which so thoroughly expressed the views of Her Majesty's Government on this point that I quote it here *in extenso*:—

Mr. Marcy to Mr. Peaslee.

(Circular.)

DEPARTMENT OF STATE,
Washington, March 28, 1856.

SIR, It is understood that there are certain Acts of the British North American Colonial Legislatures, and also, perhaps, executive regulations intended to prevent the wanton destruction of the fish which frequent the coasts of the Colonies, and injuries to the fishing thereon. It is deemed reasonable and desirable that both United States' and British fishermen should pay a like respect to such laws and regulations, which are designed to preserve and increase the productiveness of the fisheries on those coasts. Such being the object of these laws and regulations, the observance of them is enforced upon the citizens of the United States in the like manner as they are observed by British subjects. By granting the mutual use of the inshore fisheries, neither party has yielded its right to civic jurisdiction over a marine league along its coasts.

Its laws are as obligatory upon the citizens or subjects of the other as upon its own. The laws of the British provinces, not in conflict with the provisions of the Reciprocity Treaty, would be as binding upon the citizens of the United States within that jurisdiction as upon British subjects. Should they be so framed or executed as to make any discrimination in favour of British fishermen, or to impair the rights secured to American fishermen by that Treaty, those injuriously affected by them will appeal to this Government for redress. In presenting complaints of this kind, should there be cause for doing so, they are requested to furnish the Department of State with a copy of the law or regulation which is alleged injuriously to affect their rights, or to make an unfair discrimination between the fishermen of the respective countries, or with a statement of any supposed grievance in the execution of such law or regulation, in order that the matter may be arranged by the two Governments.

280 You will make this direction known to the masters of such fishing-vessels as belong to your port in such manner as you may deem most advisable.

(Signed) W. L. MARCY.

I have the honour to inclose a copy of an Act passed by the Colonial Legislature of Newfoundland, on the 27th March, 1862, for the protection of the herring and salmon fisheries on the coast, and a copy of Cap. 102 of the Consolidated Statutes of Newfoundland, passed in 1872. The first section of the Act of 1862 prohibited the taking of herrings with a seine between the 20th day of October and the 12th day of April, and further prohibited the use of seines at any time for the purpose of barring herrings. These regulations, which were in force at the date of the Treaty of Washington, were not abolished, but confirmed by the subsequent Statutes, and are binding under the Treaty upon the citizens of the United States in common with British subjects.

The United States' fishermen, therefore, in landing for the purpose of fishing at Tickle Beach, in using a seine at a prohibited time, and in barring herrings with seines from the shore, exceeded their Treaty privileges and were engaged in unlawful acts.

Her Majesty's Government have no wish to insist on any illiberal construction of the language of the Treaty, and would not consider it necessary to make any formal complaint on the subject of a casual infringement of the letter of its stipulations which did not involve any substantial detriment to British interests, and to the fishery in general.

An excess on the part of the United States' fishermen of the precise limits of the rights secured to them might proceed as much from ignorance as from wilfulness; but the present claim for compensation is based on losses resulting from a collision which was the direct consequence of such excess, and Her Majesty's Government feel bound to point to the fact that the United States' fishermen were the first and real cause of the mischief by overstepping the limits of the privileges secured to them, in a manner gravely prejudicial to the rights of other fishermen.

For the reasons above stated Her Majesty's Government are of opinion that, under the circumstances of the case as at present within their knowledge, the claim advanced by the United States' fishermen for compensation on account of the losses stated to have been sustained by them on the occasion in question is one which should not be entertained.

Mr. Evarts will not require to be assured that Her Majesty's Government, while unable to admit the contention of the United States' Government on the present occasion, are fully sensible of the evils arising from any difference of opinion between the two Governments in regard to the fishery rights of their respective subjects. They have always admitted the incompetence of the Colonial or the Imperial Legislature to limit by subsequent legislation the advantages secured by Treaty to the subjects of another Power. If it should be the opinion of the Government of the United States that any Act of the Colonial Legislature subsequent in date to the Treaty of Washington has trespassed upon the rights enjoyed by the citizens of the United States in virtue of that instrument, Her Majesty's Government will consider any communication addressed to them in that view with a cordial and anxious desire to remove all just grounds of complaint.

I am, &c

(Signed)

SALISBURY.

No. 172.—1880, May 17: *Report of the United States' Secretary of State on the Occurrences at Fortune Bay.*

DEPARTMENT OF STATE,
Washington, May 17, 1880.

To the President:

The Secretary of State, to whom were referred the Resolution of the House of Representatives of the 27th of April ultimo, requesting the President, "If not inconsistent with the public interest, to transmit to this House copies of all correspondence not now communicated with the English Government relating to the alleged interference with American fishermen in Fortune Bay on the 6th of January, 1878," and a Resolution of the Senate of the 28th of the

same month on the same subject, has the honour to lay before the President the correspondence as called for.

In connection with these papers and for the better understanding of the subject to which this correspondence relates, I submit for your consideration the valuable Report of Collector F. J. Babson and Alfred D. Foster, Esq., of their visit on board the naval steamship Kearsarge to the provincial inshore fisheries, under the instructions of the Department, during the summer of last year, as well as their instructions under which this cruise of the Kearsarge was planned. This correspondence with the British Government and this intelligent exposition of the attempted exercise by our fishermen of the freedom of the inshore fisheries as secured to them by the Treaty of Washington, whose violent interruption gave occasion to this discussion between the two Governments of the true measure of this Treaty right, will, it is believed, with the record of the proceedings of the Halifax Commission and the correspondence and protest which preceded and attended our payment of the Award, furnish complete materials upon which the judgment of Congress can be formed and its action determined in the juncture of this fishery contention now demanding its serious consideration.

The very grave occurrence at Fortune Bay in January, 1878, was brought by me to the attention of the British Government in March of that year with the view of obtaining redress for our fishermen for the gross violence and serious loss they suffered in their expulsion from this inshore fishery which they were prosecuting under the Treaty of Washington. The reply of the British Government did not reach me until September 4th of that year. It disclosed possible grounds for the rejection of our claims which put upon our rights in the inshore fisheries such limitations of subserviency to British provincial or Imperial legislation as seemed to me wholly inadmissible. These grounds were that our fishermen were pursuing their industry on Sunday contrary to a law of Newfoundland passed subsequent to the Treaty of Washington; that they were using seines to take herring contrary to a law of Newfoundland proscribing that method of fishing for the six months of the year between October and April; that they were using such seines in a manner prohibited at any season of the year by a Statute which precluded catching herrings by means of seines "except by way of shooting and forthwith hauling the same."

In communicating the Report of the evidence which was intended to show the time and manner at and in which our fishermen were pursuing their right, as a justification for their interruption in it, Lord Salisbury observed: "You will perceive that the Report in question appears to demonstrate conclusively that the United States fishermen on this occasion had committed three distinct breaches of the law." To this intimation, even, that the freedom of the fishery, accorded by an Imperial Treaty, either had been subtracted by past, or could be curtailed by future, provincial legislation, I lost no time in opposing an explicit and unconditional rejection of such an interpretation of the Treaty. In a despatch to Mr. Welsh on the 28th of September, I communicated to the British Government the views of this Government, as follows:—

* * * * *

In this observation of Lord Salisbury this Government cannot fail to see a necessary implication that Her Majesty's Government conceives that in the prosecution of the right of fishing accorded to the United States by Article 18 of the Treaty our fishermen are subject to the local Regulations which govern the coast population of Newfoundland in their prosecution of their fishing industry, whatever those Regulations may be, and whether enacted before or since the Treaty of Washington.

The three particulars in which our fisherman are supposed to be constrained by actual legislation of the province cover in principle, every degree of regulation of our fishing industry within the three-mile line which can well be conceived. But they are, in themselves, so important and so serious a limitation of the rights secured by the Treaty as practically to exclude our fishermen from any profitable pursuit of the right, which, I need not add, is equivalent to annulling or canceling by the Provincial Government the privilege accorded by the Treaty with the British Government.

If our fishing fleet is subject to the Sunday laws of Newfoundland, made for the coast population; if it is excluded from the fishing grounds for half the year, from October to April; if our "seines and other contrivances" for catching fish are subject to the Regulations of the Legislature of Newfoundland, it is not easy to see what firm or valuable measure for the privilege of Article 18, as conceded to the United States, this Government can promise to its citizens under the guarantee of the Treaty.

It would not, under any circumstances, be admissible for one Government to subject the persons, the property, and the interests of its fishermen to the unregulated regulation of another Government upon the suggestion that such authority will not be oppressively or capriciously exercised, nor would any Government accept as an adequate guarantee of the proper exercise of such authority over its citizens by a foreign Government, that, presumptively, regulations would be uniform in their operation upon the subjects of both Governments in a similar case. If there are to be regulations of a common enjoyment they must be authenticated by a common or joint authority.

But most manifestly the subject of the regulation of the enjoyment of the shore fishery by the resident provincial population, and of the inshore fishery by our fleet of fishing cruisers, does not tolerate the control of so divergent and competing interests by the domestic legislation of the provinces. Protecting and nursing the domestic interest at the expense of the foreign interest, on the ordinary motives of human conduct, necessarily shape and animate the local legislation. The evidence before the Halifax Commission makes it obvious that to exclude our fishermen from catching bait, and thus compel them to go without bait, or buy bait at the will and price of the provincial fishermen, is the interest of the local fishermen, and will be the guide and motive of such domestic legislation as is now brought to the notice of this Government.

You will, therefore, say to Lord Salisbury that this Government cannot but express its entire dissent from the view of the subject that his Lordship's note seems to indicate. This Government conceives that the fishery rights of the United States, conceded by the Treaty of Washington, are to be exercised wholly free from the restraints and regulations of the Statutes of Newfoundland, now set up as authority over our fishermen, and from any other regulations of fishing now in force or that may hereafter be enacted by that Government.

It may be said that a just participation in this common fishery by the two parties entitled thereto may, in the common interest of preserving the fishery and preventing conflicts between the fishermen, require regulation by some competent authority. This may be conceded. But should such occasion present itself to the common appreciation of the two Governments, it need not be said that such competent authority can only be found in a joint Convention that shall receive the approval of Her Majesty's Government and our own.

282 Until this arrangement shall be consummated, this Government must regard the pretension that the legislation of Newfoundland can regulate our fishermen's enjoyment of the Treaty right as striking at the Treaty itself.

It asserts an authority on one side, and a submission on the other, which has not been proposed to us by Her Majesty's Government and has not been accepted by this Government. I cannot doubt that Lord Salisbury will agree that the insertion of any such element in the Treaty of Washington would never have been accepted by this Government, if it could reasonably be thought possible that it could have been proposed by Her Majesty's Government. The insertion

of any such proposition by construction now is equally at variance with the views of this Government.

The representations made to this Government by the interests of our citizens affected, leave no room to doubt that this assertion of authority is as serious and extensive in practical relations as it is in principle. The rude application made to the twenty vessels in Fortune Bay of this asserted authority, in January last, drove them from the profitable prosecution of their projected cruises. By the same reason the entire inshore fishery is held by us upon the same tenure of dependence upon the Parliament of the Dominion or the Legislatures of the several provinces.

* * * * *

In the opinion of this Government, it is essential that we should at once invite the attention of Lord Salisbury to the question of provincial control over the fishermen of the United States in their prosecution of the privilege secured to them by the Treaty. So grave a question in its bearing upon the obligations of this Government under the Treaty, makes it necessary that the President should ask from Her Majesty's Government a frank avowal or disavowal of the paramount authority of provincial legislation to regulate the enjoyment by our people of the inshore fishery, which seems to be intimated, if not asserted, in Lord Salisbury's note.

Before a receipt of a reply from Her Majesty's Government, it would be premature to consider what should be the course of this Government should this limitation upon the Treaty privileges of the United States be insisted upon by the British Government as their construction of the Treaty.

In answer to this unequivocal presentation both of the freedom of the fishery as this Government interpreted the concession of the Treaty and of the absolute suppression of this Treaty right as a matter of practical value to our fishermen by this actual provincial legislation, Lord Salisbury replied with less distinctness, no doubt, but yet in a sense which I could not but regard as disclaiming any right to qualify the Treaty by municipal legislation previous or subsequent to its date. After intimating a dissent from the doctrine, if I had intended to assert it, "that no British authority has any right to pass any kind of law binding Americans who are fishing in British waters," Lord Salisbury says:

On the other hand Her Majesty's Government will readily admit, what is indeed self-evident, that British sovereignty as regards these matters is limited in its scope by the engagements of the Treaty of Washington which cannot be modified or affected by any municipal legislation. I cannot anticipate that with regard to these principles any difference will be found to exist between the views of the two Governments. If, however, it be admitted that the Newfoundland legislators have the right of binding Americans who fish within their waters, by any laws which do not contravene existing Treaties, it must further be conceded that the duty of determining the existence of any such contravention must be undertaken by the Governments, and cannot be remitted to the discretion of each individual fisherman, for such a discretion if exercised on one side, can hardly be refused on the other.

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Her Majesty's Government prefer the view that the law enacted by the Legislature of the country, whatever it may be, ought to be obeyed by natives and foreigners alike who are sojourning within the territorial limits of its jurisdiction, but that if a law has been inadvertently passed which is in any degree or respect at variance with rights conferred on a foreign Power by Treaty, the correction of the mistake as committed, at the earliest period after its existence shall have been ascertained and recognized, is a matter of international obligation.

This despatch was received by me in November, and on the 23d of the same month the payment of the Award of the Halifax Commission was made at the date provided in the Treaty. The further consideration of the Fortune Bay claims seemed to require only the

verification of the facts on the part of our claimants, so far as they were drawn in question by or were at variance with the report made to the British Government by its officers, and the communication to that Government of the results as finally insisted upon by us as the basis and measure of our claims. The correspondence called for by Congress, and now submitted, shows the entire rejection of the claims on the grounds set forth in Lord Salisbury's despatch of the 6th of April last.

Before considering the main proposition of the British Government by which a direct and flat denial of the freedom of the inshore fisheries as claimed by this Government is interposed, I need to bring to attention two subordinate pretensions of Lord Salisbury's despatch intended to fortify his main proposition.

It appeared that in the management of one, at least, of the seines at Fortune Bay, our fishermen had used the strand for a temporary service in the process of inclosing the school of herring within the seine. This incident in the operation, in the original correspondence as in the transaction itself, a mere subordinate feature of the process of seining complained of, is now made prominent in the despatch of Lord Salisbury. There being no allegation that this use of the strand violates any provincial regulation of the fisheries, the point is made

283 in terms, excludes our fishermen from this incidental use of the strand in the process of taking fish by seines. A true interpretation of the Treaty concession gives no support to this pretension. The concession of fishing is "to take fish of every kind, except shell-fish, on the *sea-coasts and shores*, and in the bays, harbours, and creeks of the provinces, &c., without being restricted to any distance from the shore." Besides this concession of *fishing*, which manifestly covers the use of the strand in the process of *taking* fish, a further permission to land upon the coasts and shores is conceded to our fishermen for the independent purpose of using the land for "drying their nets and curing their fish." The contention seems to be that, because specific permission to use the land for purposes not included in the process of "taking fish," is given in terms, therefore the use of the strand in the process of "taking fish" is excluded, though, in the nature of the process of taking fish, the temporary use of the strand in managing the seines is a part of inshore fishing. This faulty reasoning is not helped at all by the proviso of the Treaty that our fishermen, in using their right on shore, shall "not interfere with the rights of private property, or with British fishermen, in the peaceable use of any part of the said coasts in their occupancy for the same purpose." If this proviso does not include the use of the strand in taking fish, it does not qualify the fishing concession. If it does include that use of the strand, then it construes such use as within the fishing concession and qualifies it by the observance of private property on shore, and non-interference with British fishermen using the strand in their fishing.

Lord Salisbury's reference to the *argument* of Mr. Foster before the Halifax Commission on the independent subject of the commercial privileges for which the British case demanded compensation in the awards, (and which were rejected by the Commission as not within the purview of the Treaty), for the doctrines of this Government in regard to the use of the strand as an incident of the inshore fishery

concession, needs no serious comment here. If the "Case" of either Government could fairly be referred to as maintaining propositions to which it should be held in this contention, the special arguments *pro* and *con* of counsel cannot usefully be resorted to for this purpose. In this interlocutory argument on the commercial question of British Counsel, in answering Mr. Foster, maintained the opposite construction of the Treaty. Neither view had any important relation to the subject then under discussion.

The second topic of Lord Salisbury's despatch, from which aid is sought for his main proposition, is the presentation of Mr. Marcy's Circular to the Collectors of Customs, while the reciprocity Treaty was in force, for promulgation among our fishermen, the whole text of which Lord Salisbury incorporates in his note.

In the full copy of this Circular, which is appended (No. 5) to the Babson and Foster Report, the fishery regulations of the provinces to which it relates are recited, and a reference to these is sufficient to displace any inference that this Government has assented to any curtailment, past or previous, by provincial legislation of the freedom of the inshore fishery as conceded to our fishermen by the terms of the Reciprocity Treaty or the Treaty of Washington. One of these regulations relates to the demarcation of "gurry grounds," and the other to the reservation of spawning grounds, during the spawning season, from invasion. "Gurry," or the offal of fish, was supposed to infect the waters, and the regulation was not of the right of taking fish, but of poisoning them. The care of the spawning beds in spawning season, in like manner, was a regulation of the breeding of fish, not a regulation of modes of American fishing. Both these regulations met the approval of this Government, and were required by Mr. Marcy to be respected by our fishermen, for this reason and in the sense of being within the reasonable province of local civil jurisdiction, and not encroaching upon the province of freedom of the fishery as imparted by the Reciprocity Treaty. But the right of this Government to inspect all such laws and pass upon them as falling one side or the other of the line thus firmly drawn is explicitly stated by Mr. Marcy. He says:

Should they be so framed or executed as to make any discrimination in favour of British fishermen, or to impair the rights secured to American fishermen by that Treaty, those injuriously affected by them will appeal to this Government for redress.

Accordingly, the fishermen are directed to make complaint, upon the case arising, either in respect to any law or its executions, "in order that the matter may be arranged by the two Governments."

The position of this Government as laid down in my despatch of September 28, 1878, is, therefore, unembarrassed by any attitude in this contention heretofore taken in any diplomatic discussion of parallel Treaty engagements. Any particular interpretation of the Treaty as to the right to use the strand in fishing with seines ceases to be of significance in the issue now joined with the British Government, because the provincial laws in question prohibit the use of the seines at all, and the main proposition of the British Government subjects our Treaty rights to such legislation. So, too, the scope of this main proposition can be neither obscured nor confused by the irrelevant consideration of the local jurisdiction within three miles of the shore, over persons or property, of the running of civil or

criminal process, of health or police regulations, of territorial sovereignty in the abstract. The issue between the two Governments is as to what regulations of the freedom the fishery, in the very matter of the time and manner of taking fish, remain a part of British sovereignty over the fishery under the colour of sovereignty over the place, when exclusive sovereignty over the fishery has been parted with by Great Britain, and a participation in such fishery has been acquired by the United States, in the terms and on the considerations of the Treaty of Washington.

Upon this issue the position of this Government was notified to the British Government in September, 1878, as follows:

This Government conceives that the fishery rights of the United States, conceded by the Treaty of Washington, are to be exercised wholly free from
 284 the restraints and regulations of the Statutes of Newfoundland, now set up as authority over our fishermen, and from any other regulations of fishing now in force or that may hereafter be enacted by that Government.

Upon this issue the position of the British Government is now notified to us by the despatch of Lord Salisbury of April 3, ultimo, as follows. Referring to these Statutes of Newfoundland, Lord Salisbury says:

These regulations, which were in force at the date of the Treaty of Washington, were not abolished, but confirmed by the subsequent Statutes, and are binding under the Treaty upon the citizens of the United States in common with British subjects. The United States fishermen, in landing for the purpose of fishing at Tickle Beach, in using a seine at a prohibited time, and in barring herrings with seines from the shore, exceeded their Treaty privileges and were engaged in unlawful acts.

Lord Salisbury further states that Her Majesty's Government "have always admitted the incompetence of the Colonial or the Imperial Legislature to limit by subsequent legislation, the advantages secured by Treaty to the subjects of another Power."

There are but two grounds upon which the subordination of the United States' freedom of the inshore fisheries to Imperial or provincial legislation, curtailing or burdening that freedom ever has been, or in the nature of the case can be, placed.

The first is that of reserved general sovereignty within the three-mile limit, under cover of which it is pretended there lurked in the concession of the freedom of this fishery to the United States in common with Great Britain, the power of one party in the privilege of this common fishery to regulate the enjoyment of it by the other. The statement of this proposition confutes it. The United States would have acquired nothing of right if the concession was constantly subject to the will of Great Britain for its exercise and enjoyment. Accordingly Lord Salisbury disclaims this pretension as ever having been held by the British Government as a reserved power, capable of exercise by any regulations subsequent to the date of the Treaty of Washington. But, manifestly, antecedent regulations, as having force subsequent to the Treaty, cannot be sustained upon the ground of sovereignty over the Treaty concession by any better reason than new legislation of that quality and effect. If the Treaty predominates over subsequent provincial legislation, encroaching upon the Treaty concession by stronger reason, it supplants previous provincial legislation, subversive or restrictive, of the Treaty concession. If such previous legislation persists after

the Treaty comes into operation, it must be because the Treaty, in terms or by just interpretation, accepts this previous legislation as a part of itself. But this is the predominance of the Treaty and not of the legislation, which thenceforth owes its vigour to the stipulations of the Treaty by which the United States adopts and confirms the provincial legislation in force at its date. This is, in substance, the British contention, and, in the failure of the doctrine of reserved sovereignty, is the only alternative basis of the present proposition of the British Government.

The subject thus brought into dispute at this late date in the progress of the fishery negotiations between the two countries is simply what the fishery in provincial waters, which the British Government had at its disposal, and which we acquired at its hands as a matter of property and beneficial enjoyment, really was.

That the British proprietorship in, and dominion over, this inshore fishery was perfect, absolute, and without incumbrance or limitations, and that this was the subject concerning which the negotiations were occupied, and by and to which the Treaty equivalents were to be measured and applied, was certainly never doubted by the negotiators of this Treaty on the part of the United States or of Great Britain. Whatever this fishery was in its natural extent and value, in its geographical area and its multitude and variety of fish-products, that was the subject of which Great Britain possessed the *jus disponendi* and that the subject of which the United States proposed to acquire an undivided share. The proportion of this fishery which Great Britain was to part with, and the United States was to appropriate, does not affect the question of what the entire property was and was understood to be. Whatever the United States would have acquired had Great Britain parted with the whole fishery, the subject partitioned between them was this entirety, no matter what the shares in which it was to be enjoyed might be. It is equally clear that the negotiators on both sides assumed that Great Britain was dealing with this subject as sole owner, and that it had impaired neither its title nor its possession by any previous grant or incumbrance. Whatever right and enjoyment, then, by proprietorship and dominion Great Britain in its political sovereignty could impart to "the subjects of Her Britannic Majesty," that right and enjoyment Great Britain could impart "to the inhabitants of the United States."

This being the subject of the grant and this the title and possession of the grantor, what is the Treaty description of the estate, right, and privilege granted to the United States for the enjoyment of its citizens? The text of the Fishery Articles of the Treaty of Washington shows that there was no limitation whatever upon the grant, except that the estate, right, and privilege granted were to endure but for a term of years, and were to be enjoyed by the United States, not exclusively, but in common with Great Britain. There was, to be sure, a restriction imposed upon both countries which excluded both equally from extending the enjoyment of either's share of the common fishery beyond the "inhabitants of the United States" on the one side, and "Her Britannic Majesty's subjects" on the other, thus disabling either Government from impairing the share of the other by introducing foreign fishermen into the common fishery. But this feature in the grant has no significance in the measure of

the concession as now disputed by Great Britain and contended for by the United States.

285 The British contention imputes to the phrase of the Treaty, "in common with the subjects of Her Britannic Majesty," not only its manifest effect of excluding any possible conclusion that the privilege conceded to the United States was exclusive, but the further effect of measuring the subject of the grant, that is the fishery itself, as it was then, at the very date of the Treaty, regulated by the various laws of the maritime provinces.

For this interpolation there seems no justification either in reason or in the history of the negotiation. There is not the least evidence that it was present to the mind of either of the High Contracting Parties to the Treaty that the subject of the fishery to be partitioned between them was any less than such as it was in its natural dimensions and quality, and such as it was, as a subject of human control, at the unlimited disposal of British sovereignty. What these provincial laws were no one inquired and no one disclosed. That the fishery our sea-going fishermen were to share in was a fishery regulated by and for the local population, fishing from the shore, no one conceived. That the title of Great Britain should be examined, a warranty against adverse title and possession or against incumbrances exacted, would have seemed both foolish and offensive to the High Joint Commission which negotiated this Treaty. To the apprehension of all, the map and the statistics of the catch showed what the fishery was in extent and value, and the dominion of Great Britain over the subject measured the security of the right which we were to acquire.

The proposition of Lord Salisbury reduces the grant of the fishery from the dimensions of the fishery as Great Britain had power to convey it, and by its more natural description would convey it, to the fishery as it had been trimmed and curtailed by local legislation and was to be regulated by local administration. He reduces our enjoyment from a freedom of the fishery such as the plenary political power of Great Britain could impart to its subjects, and could share with the United States to be enjoyed by their inhabitants, to the use of the fishing methods and seasons of the provincial coast population as their faculties and occasions had arranged them. And this interpretation of the subject of the grant by which one party parted with, and the other acquired, nothing of value, turns upon the phrase of the Treaty which defines the estate conveyed as not exclusive, but to be held in common.

Fortunately the closing transaction between the two Governments by which the fishery concession to the United States was to be measured and valued, and compensation on our part therefor to be adjusted according to the measure and value of the provincial fishery, not in the abstract, but as opened to our fishermen, furnished an opportunity to take the estimate both of the British and provincial Governments of the extent and comprehension of the subject of the grant. This transaction antedates the present disputation, and brings the two Governments together in a computation before the Halifax Commission of the nature, extent, and benefit of the inshore provincial fishery.

The considerations for the British concession were threefold: First, an equivalent fishery concession on our own coasts; second, exemption

of provincial fish products from duties, or the concession of our free market; third. such supplemental money payment as the nature, extent, and value of the British fishery concession, in the judgment of the Halifax Commission, would warrant or require. It would be enough to say that the present pretensions of the British Government in reduction of the grant were not presented in depreciation of the price we were to pay, nor was any subjection of the natural fishery to political or municipal disparagement advanced by us in reduction of the money value with which we were to be charged. But the British and provincial Governments are precluded from the present pretensions, not by silence alone as to these latent limitations and incumbrances upon the grant when its price was being adjusted by the Halifax Award. The "Case" of the British Government presents, in the most open and unequivocal terms, the measure of the grant in the sense both of benefit to the United States and of injury to the provincial fishermen. The conduct of the contention throughout maintained the freedom of the fishery to the methods and occasions of our fishing enterprise and skill, and insisted upon the *right accorded* (which might exhaust and destroy the fisheries so as to depreciate their benefit to the coast population even beyond the Treaty period), and not its actual exercise by our fishermen as the standard of estimate by which our money payment was to be fixed.

In "the Case of Her Majesty's Government," submitted to the Halifax Commission, the following language is used to illustrate and enforce the advantage in the extent and method of fishing, secured by the Treaty of 1871 over the restrictions of the Convention of 1818:

The Convention of 1818 entitled United States citizens to fish on the shores of the Magdalen Islands, but denied them the privilege of landing there. *Without such permission the practical use of the inshore fisheries was impossible.* Although such permission has tacitly existed, as a matter of sufferance, it might at any moment have been withdrawn, and the operations of the United States fishermen in that locality would thus have been rendered ineffectual. The value of these inshore fisheries is great; mackerel, herring, halibut, capelin, and launce abound and are caught inside of the principal bays and harbours, where they resort to spawn. Between three hundred and four hundred United States fishing-vessels yearly frequent the waters of this group, and take large quantities of fish, both for curing and bait. A single seine has been known to take at one haul enough of herrings to fill three thousand barrels. Seining mackerel is similarly productive. During the spring and summer fishery of the year 1875, when the mackerel were closer inshore than usual, *the comparative failure of the American fishermen was owing to their being unprepared with suitable hauling-nets and small boats, their vessels being unable to approach close enough to the beaches.*

In the case of the remaining portions of the seaboard of Canada, the terms of the Convention of 1818 debarred United States citizens from landing at any part for the pursuit of operations connected with fishing. *This privilege is essential to the successful prosecution of both the inshore and deep-sea fisheries.* By it they would be enabled to prepare their fish in a superior manner, in a salubrious climate, as well as more expeditiously, and they would be relieved of a serious embarrassment as regards the disposition of fish offals, by curing on shore the fish which otherwise would have been dressed on board their vessels and the refuse thrown overboard.

All the advantages above detailed have been secured for a period of twelve years to United States fishermen. Without them, fishing operations on many parts of the coast would be not only unremunerative but impossible; and they may therefore be fairly claimed as an important item in the valuation of the liberties granted to the United States under Article 18 of the Treaty of Washington.—*Halifax Com.*, volume 1, page 93.

And again:

4. Formation of fishing establishments.

The privilege of establishing permanent fishing stations on the shores of Canadian bays, creeks, and harbours, akin to that of landing to dry and cure fish, is of material advantage to United States citizens.

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There are further advantages derivable from permanent establishments ashore, such as the accumulation of stock and *fresh fish preserved in snow or ice, and others kept in frozen and fresh state by artificial freezing.*—*Ib.*, 94-95.

In that portion of the same "Case" which specially regards the character of the Newfoundland fishery and points out with elaborate precision the rights of United States fishermen on the shores of that island and the compensation demanded therefor, the British Government says:

I. The entire freedom of the Inshore Fisheries.

Newfoundland, from that part of its coast now thrown open to United States fishermen, yearly extracts, at the lowest estimate, five million dollars' worth of fish and fish-oil; and when the value of fish used for bait and local consumption for food and agricultural purposes, of which there are no returns, is taken into account, the total may be fairly stated at \$6,000,000 annually.

It may possibly be contended on the part of the United States that their fishermen have not in the past availed themselves of the Newfoundland inshore fisheries, with but few exceptions, and that they would and do resort to the coasts of that island only for the purpose of procuring bait for the bank fishery. This may up to the present time, to some extent, be true as regards codfish, but not as regards herring, turbot, and halibut. *It is not at all probable that, possessing as they now do the right to take herring and capelin for themselves on all parts of the Newfoundland coasts, they will continue to purchase as heretofore, and they will thus prevent the local fishermen, especially those of Fortune Bay, from engaging in a very lucrative employment which formerly occupied them during a portion of the winter season for the supply of the United States market.*

The words of the Treaty of Washington, in dealing with the question of compensation, makes no allusion to *what use* the United States may or do make of the privileges granted them, but simply state that, inasmuch as it is asserted by Her Majesty's Government that the privileges accorded to the citizens of the United States under Article 18 are of greater value than those accorded by Articles 19 and 21 to the subjects of Her Britannic Majesty, and this is not admitted by the United States, it is further agreed that a Commission shall be appointed, having regard to the privileges accorded by the United States to Her Britannic Majesty's subjects in Articles Nos. 19 and 21, the amount of any compensation to be paid by the Government of the United States to that of Her Majesty in return for the privileges accorded to the United States under Article 18.

It is asserted, on the part of Her Majesty's Government, that the actual use which may be made of this privilege at the present moment is not so much in question as the actual value of it to those who may, if they will, use it. It is possible, and even probable, that United States fishermen may at any moment avail themselves of the privilege of fishing in Newfoundland inshore waters to a much larger extent than they do at present; but even if they should not do so, it would not relieve them from the obligation of making the just payment for a right which they have acquired subject to the condition of making that payment. The case may be not inaptly illustrated by the somewhat analogous one of a tenancy of shooting or fishing privileges; it is not because the tenant fails to exercise the rights which he has acquired by virtue of his lease that the proprietor should be debarred from the recovery of his rent.

There is a marked contrast, to the advantage of the United States citizens, between the privilege of access to fisheries the most valuable and productive in the world, and the barren right accorded to the inhabitants of Newfoundland of fishing in the exhausted and preoccupied waters of the United States north of the thirty-ninth parallel of north latitude, in which there is no field for lucrative operations even if British subjects desired to resort to them; and

there are strong grounds for believing that year by year, as United States fishermen resort in greater numbers to the coasts of Newfoundland for the purpose of procuring bait and supplies, they will become more intimately acquainted with the resources of the inshore fisheries and their unlimited capacity for extension and development. As a matter of fact, United States vessels have, since the Washington Treaty came into operation, been successfully engaged in these fisheries; and it is but reasonable to anticipate that, as the advantages to be derived from them become more widely known, larger numbers of United States fishermen will engage in them.

A participation by fishermen of the United States in the freedom of these waters must, notwithstanding their wonderfully reproductive capacity, 287 tell materially on the local catch, and, while affording to the United States fishermen a profitable employment, must seriously interfere with local success. The extra amount of bait also which is required for the supply of the United States demand for the bank fishery must have the effect of diminishing the supply of cod for the inshores, as it is well known that the presence of that fish is caused by the attraction offered by a large quantity of bait fishes, and as this quantity diminishes the cod will resort in fewer numbers to the coast. The effect of this diminution may not in all probability be apparent for some years to come, and while United States fishermen will have the liberty of enjoying the fisheries for several years in their present teeming and remunerative state, the effects of overfishing may, after their right to participate in them has lapsed, become seriously prejudicial to the interests of the local fishermen. (*Ib.*, pp. 103, 104.)

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It is impossible to offer more convincing testimony as to the value to United States fishermen of securing the right to use the coast of Newfoundland as a basis of operations for the bank fisheries than is contained in the declaration of one who has been for six years so occupied, sailing from the ports of Salem and Gloucester, in Massachusetts, and who declares that it is of the greatest importance to United States fishermen to procure from Newfoundland the bait necessary for those fisheries, and that such benefits can hardly be overestimated; that there will be, during the season of 1876, upward of two hundred United States vessels in Fortune Bay for bait, and that there will be upward of three hundred vessels from the United States engaged in the Grand Bank fishery; that owing to the great advantage of being able to run into Newfoundland for bait of different kinds, they are enabled to make four trips during the season; that the capelin, which may be considered as a bait peculiar to Newfoundland, is the best which can be used for this fishery, and that a vessel would probably be enabled to make two trips during the capelin season, which extends over a period of about six weeks. The same experienced deponent is of opinion that the bank fisheries are capable of immense expansion and development, and that the privilege of getting bait on the coast of Newfoundland is indispensable for the accomplishment of this object.

As an instance of the demand for bait supplies derived from the Newfoundland inshore fisheries, it may be useful to state that the average amount of this article consumed by the French fishermen, who only prosecute the bank fisheries during a period of about six months of the year, is from \$120,000 to \$160,000 annually. *The herring, capelin, and squid amply meet these requirements and are supplied by the people of Fortune and Placentia Bays, the produce of the Islands of Saint Pierre and Miquelon being insufficient to meet the demand.*

It is evident from the above considerations that not only are the United States fishermen almost entirely dependent on the bait supply from Newfoundland, now open to them for the successful prosecution of the bank fisheries, but also that they are enabled, through the privileges conceded to them by the Treaty of Washington, to largely increase the number of their trips, and thus considerably augment the profits of the enterprise. This substantial advantage is secured at the risk, as before mentioned, of hereafter depleting the bait supplies of the Newfoundland inshores, and it is but just that a substantial equivalent should be paid by those who profit thereby.

We are therefore warranted in submitting to the Commissioners that not only should the present actual advantages derived on this head by United States fishermen be taken into consideration, but also the probable effect of the concessions made in their favour. The inevitable consequence of these concessions will be to attract a larger amount of United States capital and enterprise following the profits already made in this direction, and the effect

will be to inflict an injury on the local fishermen, both by the increased demand on their sources of supply and by competition with them in their trade with foreign markets.—*Ib.*, 105-6.

CONCLUSION.

It has thus been shown that under the Treaty of Washington there has been conceded to the United States—

First. The privilege of *an equal participation* in a fishery vast in area, teeming with fish continuously increasing in productiveness, and now yielding to operatives, very limited in number when considered with reference to the field of labour, the large annual return of upward of \$6,000,000, of which 20 per cent. may be estimated as net profit, or \$1,200,000.

It is believed that the claim on the part of Newfoundland in respect to this portion of the privileges acquired by United States citizens under the Treaty of Washington will be confined to the most moderate dimensions when estimated at one-tenth of this amount, namely, \$120,000 per annum, or, for the twelve years of the operation of the Treaty, a total sum of \$1,440,000.—*Ib.*, 107-8.

To this "Case" the United States Government filed an answer, and the British Government filed a reply to the answer in which it repeated its contention:

The words "*for no other purposes whatever*" are studiously omitted by the framers of the last-named Treaty, and *the privilege in common with the subjects of Her Britannic Majesty, to take fish and to land for fishing purposes, clearly includes the liberty to purchase bait and supplies, tranship cargoes, &c., for which Her Majesty's Government contend it has a right to claim compensation.*

It is clear that these privileges were not enjoyed under the Convention of 1818, and it is equally evident that they are enjoyed under the Treaty of Washington.—*Ib.*, 173.

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288 As regards the herring fishery on the coast of Newfoundland, it is availed of to a considerable extent by the United States fishermen, and evidence will be adduced of large exportations by them in American vessels, particularly from Fortune Bay and the neighbourhood, both to European and their own markets.

The presence of United States fishermen upon the coast of Newfoundland, so far from being an advantage, as is assumed in the Answer, operates most prejudicially to Newfoundland fishermen. Bait is not thrown overboard to attract the fish, as asserted, but the United States bank-fishing vessels, visiting the coast in such large numbers as they do, for the purpose of obtaining bait, sweep the coves, creeks, and inlets, thereby diminishing the supply of bait for local catch, and scaring it from the grounds where it would otherwise be an attraction to the cod. *Ib.*, 186.

It forms no part of my purpose in this Report to adduce in argument or proof the manifold supports to the view now presented which the record of the diplomatic history of the fishery negotiations between the two countries or the documents and proceedings of the Halifax Commission contain. It is very apparent throughout them both that the obliteration of the sea-line of demarcation between the rights of our fishermen and those of British fishermen we regarded of principal value as removing the sources of irritation between them and possible occasions of controversy and estrangement between the two nations. In my despatch to Mr. Welsh of September 27, 1878, I laid before the British Government this disposition on our part as furnishing the leading purpose in the framing of the Fishery Articles of the Treaty of Washington. I then said that, "politically and in the interest of good neighbourhood this Government did regard, and at all times would regard, the restoration of the relations between the two countries in the common enjoyment of those fisheries

to the ancient footing of the Treaty of 1783, as most grateful in sentiment and as a most valuable guarantee against any renewal of strife." In the British "Case" before the Halifax Commission Her Majesty's Government definitely insisted upon this assured position of our public relations in this regard as an element of consideration in the Award they asked from the Commission. Her Majesty's Government drew the attention of the Commissioners "to the great importance attaching to the beneficial consequences to the United States of honourably acquiring for their fishermen full freedom to pursue their adventurous calling without incurring constant risks and exposing themselves and their fellow-countrymen to the inevitable reproach of wilfully trespassing on the rightful domain of friendly neighbours. Paramount, however, to this consideration is the avoidance of irritating disputes, calculated to disquiet the public mind of a spirited and enterprising people, and liable always to become a cause of mutual anxiety and embarrassment. It was repeatedly stated by the American members of the Joint High Commission at Washington, in discussing proposals regarding the Canadian fisheries, "that the United States desired to secure their enjoyment, not for their commercial or intrinsic value, but for the purpose of removing a source of irritation."

The experience of our Fortune Bay fishermen in their first attempt, in the sixth year of the running of the Treaty, to exercise on the coast of Newfoundland the "full freedom to pursue their adventurous calling," which Her Majesty's Government said had been honourably acquired for them by their own Government, is exhibited in the papers now submitted, as is also the treatment of their grievance and this Government's presentation of it accorded by Her Majesty's Government.

The British Government claimed before the Halifax Commission the sum of \$120,000 per annum during the twelve years of the Treaty period, or the gross sum of \$1,440,000 for the advantage to the United States of the fishing privilege proper on the Newfoundland coast alone, conceded by the Treaty, over and above the counter concessions of our inshore fishery and the remission of duty on their fish products.

The Halifax Award of \$5,500,000 for the Dominion of Canada and Newfoundland together has been divided between them by the British Government, and the sum of \$1,000,000 has been received by Newfoundland as its share of the money payment made by the United States under the Treaty. It will be observed that under the British view of the exposure of our fishermen at Fortune Bay to the penalties of infractions of the provincial laws, while they were enjoying in their own opinion and that of this Government the full freedom of the fishery accorded by the Treaty, there is no pretense that the violence offered them, and the wanton destruction of their fishing property, and spoliation of their draught of fishes, find any warrant in the supremacy of violated law under colour of which the British Government has refused them any indemnity. In this attitude of the British Government, as taken in the correspondence, the violent expulsion of our fishermen from their fishery on the 6th of January, 1878, by the coast fishermen of Newfoundland seems to be justified, if not espoused. This position, too, of that Government necessarily carries a warning that any future attempt by our fishermen to exercise their Treaty privileges, except in conformity to the local

fishing regulations, will be resisted by the authority of the British Government as well as exposed to the violence of the coast fishermen. Under this unhappy and unexpected failure of accord between the two Governments as to the measure of the inshore fishing privilege secured to our fishermen by the Treaty of Washington, as developed in this correspondence, it becomes the imperative duty of this Government to consider what measures should be taken to maintain the rights of our people under the Treaty, as we understand them, and to obtain redress for their expulsion from the enjoyment of their rights.

So far as this diminution of these privileges calls for a reconsideration of the Treaty equivalents already parted with by this Government and received by Great Britain, as suitable to the failure of the privileges thus purchased and paid for, by this denial of their exercise so as to be valuable or desirable to our people, that subject necessarily must be remitted to diplomatic correspondence.

The only continuing consideration the United States is paying for the Treaty period, for the expected enjoyment of the Treaty concession, is the remission of our customs duties upon the fish products of the provincial share in these fisheries. I respectfully advise that it be recommended to Congress to re-enforce the duties upon fish and fish oil, the products of the provincial fisheries, as they existed before the Treaty of Washington came into operation, to so continue until the two Governments shall be in accord as to the interpretation and execution of the Fishery Articles of the Treaty of Washington, and in the adjustment of the grievance of our fishermen from the infraction of their rights under that Treaty.

This measure will give to our fishermen, while excluded from the enjoyment of the inshore fisheries under the continued enforcement of the British interpretation of the Treaty, a restoration of the domestic market for the products of their own fishing industry, as it stood before its freedom was thrown open to the provincial fishermen in exchange for the free fishery opened to our fishermen.

I respectfully advise, also, submitting to the consideration of Congress the propriety of authorizing the examination and auditing of the claims of our fishermen for injuries suffered by the infraction or denial of their Treaty privileges, with the view of some ultimate provision by Convention with Great Britain or by this Government for their indemnity.

W. M. EVARTS.

No. 173.—1880, October 27: *Letter from Earl Granville (British Foreign Secretary) to Mr. Lowell (United States Minister at London).*

FOREIGN OFFICE, October 27, 1880.

SIR, Her Majesty's Government have carefully considered the correspondence which has taken place between their predecessors and the Government of the United States respecting the disturbance which occurred at Fortune Bay on the 6th January, 1878, and they have approached this subject with the most earnest desire to arrive at an amicable solution of the differences which have unfortunately arisen between the two Governments on the construction of the provi-

sions of the Treaties which regulate the rights of United States' fishermen on the coast of Newfoundland.

In the first place, I desire that there should be no possibility of misconception as to the views entertained by Her Majesty's Government respecting the conduct of the Newfoundland fishermen in violently interfering with the United States' fishermen, and destroying or damaging some of their nets. Her Majesty's Government have no hesitation in admitting that this proceeding was quite indefensible, and is much to be regretted. No sense of injury to their rights, however well founded, could, under the circumstances, justify the British fishermen in taking the law into their own hands, and committing acts of violence; but I will revert by and by to this feature in the case, and will now proceed to the important question raised in this controversy, whether, under the Treaty of Washington, the United States' fishermen are bound to observe the fishery regulations of Newfoundland in common with British subjects.

Without entering into any lengthy discussion on this point, I feel bound to state that, in the opinion of Her Majesty's Government, the clause in the Treaty of Washington which provides that the citizens of the United States shall be entitled, "in common with British subjects," to fish in Newfoundland waters within the limits of British sovereignty, means that the American and the British fishermen shall fish in these waters upon terms of equality; and not that there shall be an exemption of American fishermen from any reasonable regulations to which British fishermen are subject.

Her Majesty's Government entirely concur in Mr. Marcy's Circular of the 28th March, 1856. The principle therein laid down appears to them perfectly sound, and as applicable to the fishery provisions of the Treaty of Washington as to those of the Treaty which Mr. Marcy had in view. They cannot, therefore, admit the accuracy of the opinion expressed in Mr. Evarts' letter to Mr. Welsh of the 28th September, 1878, "that the fishery rights of the United States conceded by the Treaty of Washington are to be exercised wholly free from the restraints and regulations of the Statutes of Newfoundland," if by that opinion anything inconsistent with Mr. Marcy's principle is really intended. Her Majesty's Government, however, fully admit that, if any such local Statutes could be shown to be inconsistent with the express stipulations, or even with the spirit of the Treaty, they would not be within the category of those reasonable regulations by which American (in common with British) fishermen ought to be bound; and they observe, on the other hand, with much satisfaction, that Mr. Evarts, at the close of his letter to Mr. Welsh of the 1st August, 1879, after expressing regret at "the conflict of interests which the exercise of the Treaty privileges enjoyed by the United States appears to have developed," expressed himself as follows:—

290 There is no intention on the part of this [the United States'] Government that these privileges should be abused, and no desire that their full and free enjoyment should harm the colonial fishermen.

While the differing interests and methods of the shore fishery and the vessel fishery make it impossible that the regulation of the one should be entirely given to the other, yet if the mutual obligations of the Treaty of 1871 are to be maintained, the United States Government would gladly cooperate with the Government of Her Britannic Majesty in any effort to make those regulations

a matter of reciprocal convenience and right, a means of preserving the fisheries at their highest point of production, and of conciliating a community of interest by a just proportion of advantages and profits.

Her Majesty's Government do not interpret these expressions in any sense derogatory to the sovereign authority of Great Britain in the territorial waters of Newfoundland, by which only regulations having the force of law within those waters can be made. So regarding the proposal, they are pleased not only to recognize in it an indication that the desire of Her Majesty's Government to arrive at a friendly and speedy settlement of this question is fully reciprocated by the Government of the United States, but also to discern in it the basis of a practical settlement of the difficulty; and I have the honour to request that you will inform Mr. Evarts that Her Majesty's Government, with a view to avoiding further discussion and future misunderstandings, are quite willing to confer with the Government of the United States respecting the establishment of regulations under which the subjects of both parties to the Treaty of Washington shall have the full and equal enjoyment of any fishery which under that Treaty is to be used in common. The duty of enacting and enforcing such regulations, when agreed upon, would, of course, rest with the Power having the sovereignty of the shore and waters in each case.

As regards the claim of the United States fishermen to compensation for the injuries and losses which they are alleged to have sustained in consequence of the violent obstruction which they encountered from British fishermen at Fortune Bay on the occasion referred to, I have to state that Her Majesty's Government are quite willing that they should be indemnified for any injuries and losses which upon a joint inquiry may be found to have been sustained by them, and in respect of which they are reasonably entitled to compensation; but on this point I have to observe that a claim is put forward by them for the loss of fish which had been caught, or which, but for the interference of the British fishermen, might have been caught by means of strand fishing, a mode of fishing to which, under the Treaty of Washington, they were not entitled to resort.

The prosecution by them of the strand fishery being clearly in excess of their Treaty privileges, Her Majesty's Government cannot doubt that, on further consideration, the United States Government will not be disposed to support a claim in respect of the loss of the fish which they had caught, or might have caught, by that process.

I am, &c.

(Signed) GRANVILLE.

No. 174.—1881, February 4: Letter from Mr. Evarts to Mr. Lowell.

No. 110

DEPARTMENT OF STATE,
Washington, February 4, 1881.

JAMES RUSSELL LOWELL, Esqre.

&c. &c. &c.

SIR: The communication from Her Britannic Majesty's Secretary of State for Foreign Affairs, Lord Granville, of October 27, 1880, respecting the disturbance which occurred at Fortune Bay on the

6th of January, 1878, was duly received in your despatch No. 81 of October 28, 1880.

As the separation of the questions raised by that occurrence and the method of their solution were general suggestions on the part of Her Britannic Majesty's Government, I had naturally supposed that this despatch would have been followed by such definite propositions as this Government could either accept or decline—the more so as I had (on June 12th, 1880), in reply to your telegraphic Report of a conversation with Lord Granville, authorized you to say that “the President will be quite ready to entertain any considerations which may be presented to the Secretary of State to relieve the question of the fisheries from its present difficulties.”

If however, as circumstances would seem to indicate, I am to consider this communication as a preliminary inquiry from Lord Granville for the purpose of learning whether such suggestion would be so favourably received by this Government as to justify the opening of direct negotiations, it becomes my duty to put you in possession of the impressions which this inquiry has made upon the Government of the United States.

As I understand the purport of Lord Granville's communication, Her Britannic Majesty's Government desires to arrange the compensation due the United States fishermen for the disturbances at Fortune Bay, without the formal consideration or decision of any questions of Treaty construction which the facts of that disturbance might seem to raise, resting the right of compensation solely upon the unlawful violence exercised by British subjects in Newfoundland.

291 The facts in this case are not complicated and the calculations are simple. The United States Government does not see in its present condition or character sufficient grounds to require any very elaborate method of decision such as a Commission or the necessity for any protracted inquiry. If Her Britannic Majesty's Government will propose the submission of the computation of damages to the summary award of the Secretary of State of the United States and Her Britannic Majesty's Representative at Washington (this function to be exercised either directly or by such delegation as may seem to them judicious), the Government of the United States will accept the proposition and close this controversy on the basis of that award.

But in signifying to Her Britannic Majesty's Government the willingness of the United States to accede to such a proposition, you will carefully guard against any admission of the correctness of those views of our Treaty rights which are expressed either explicitly or by implication in Lord Granville's communication of October the 29th, 1880.

The views of this Government upon the proper construction of the rights of fishery guaranteed by the Treaty of Washington, have been fully expressed in my former despatches, and no reasons have been furnished to induce a change of opinion. The delay in the settlement of the Fortune Bay case has been already too long protracted. It has provoked a not unnatural feeling of irritation among the fishermen of the United States at what they conceive to be a persistent denial of their Treaty rights, while it is to be feared that it has encouraged among the provincial fishermen the idea that their forci-

ble resistance to the exercise of these rights is not without justification in their local law and the construction which Her Britannic Majesty's Government is supposed to have placed upon the provisions of the Treaty.

It is now three years since twenty-two vessels belonging to the United States and engaged in what by them and their Government was considered a lawful industry were forcibly driven from Fortune Bay under circumstances of great provocation and at very serious pecuniary loss. And this occurred at the very time when, under the award of the Halifax Commission, the Government of the United States were about paying to Her Britannic Majesty's Government a very large amount for the privilege of the exercise of this industry by these fishermen. In March of the same year, 1878, this very grave occurrence of January was brought to the attention of the British Government, in the confident hope that compensation would be promptly made for the losses caused by what the United States Government was willing to believe was a local misconstruction of the Treaty or a temporary and, from ignorance, perhaps an excusable popular excitement.

It is unnecessary to do more than recall to your attention the long and unsatisfactory discussion which followed the presentation of this claim, and especially the fact that in its progress the Government of the United States was compelled to express with emphatic distinctness the impossibility of accepting the subordination of its Treaty rights to the provisions of local legislation, which was apparently put forward by Her Majesty's Government as a sufficient ground for the rejection of the claim. And it was not until April, 1880 (a delay of two years, during which the importance of an early settlement was urged upon Her Majesty's Government), that, after what this Government understood and accepted at least as a satisfactory modification of the assumption, we were informed by Lord Salisbury that "Her Majesty's Government are of opinion that under the circumstances of the case as at present within their knowledge, the claim advanced by the United States fishermen for compensation on account of the losses stated to have been sustained by them on the occasion in question, is one which should not be entertained."

This decision of Her Majesty's Government terminated any further discussion, and the Government of the United States found itself compelled to protect the interests of its citizens by such methods as might commend themselves to its judgment. In addition to the Halifax Award which we had paid for the privileges and rights, the exercise of which is now denied our citizens, we were also continuously paying, in the shape of a remission of duties, some \$300,000 per annum for this abortive right. Thus forced into position of antagonism which it profoundly regretted, the Government of the United States was about to take such action as would at least suspend this annual payment, until the two Governments were in accord upon the construction of the Treaty, when Her Majesty's Government, through the United States Minister in London, suggested, June 9, 1880, that the consideration of the subject be resumed between the two Governments, and that in such consideration, the two questions of the interpretation of the Treaty and the attack upon the American fishermen be separated. To that suggestion I replied, June 12,

1880, communicating my great gratification at the friendly disposition of the British Cabinet, and saying that, "the President would be quite ready to entertain any consideration which may be presented to the Secretary of State to relieve the question of the fisheries from its present difficulties."

On October 27, 1880, Lord Granville addressed you the communication which is the subject of this despatch. I regret to find in this communication a disposition to restrict a liberal compensation for an acknowledged wrong by limitations of the fishing rights accorded by the Treaty to which this Government cannot consent. The use of the strand, not as a basis of independent fishing, but as auxiliary to the use of the seine in these waters where seine-fishing is the only possible mode of taking herring, has been maintained by this Government in my former despatches, and would seem to be justified by the explicit declaration of Her Majesty's Government in the "case" submitted by them to the Halifax Commission, in which, referring to the use of the shores, it is affirmed "without such permission the practical use of the inshore fisheries was impossible." But as

292 Lord Granville distinctly refers the propriety and justice of these limitations to further negotiations I will not now discuss them, reserving what I deem it right to say for a future despatch in reference to the second of his Lordship's suggestions.

I have recalled to your attention the history of the Fortune Bay outrage, in order that you may express to Her Britannic Majesty's Government the great disappointment which this long delay in its settlement has occasioned. The circumstances under which it occurred were such as to induce this Government to anticipate prompt satisfaction, and it is impossible not to feel that the course which the British Government has thought fit to pursue has seriously affected public opinion as to the worth of the Treaty which it was hoped by both countries had promoted an amicable solution of long-standing difficulties.

The United States Government cannot feel that justice has been done its citizens in the protracted discussion which this occurrence has provoked, and while perfectly willing to endeavour in concert with Her Britannic Majesty's Government to find some practical and friendly solution of the differences of construction as to the Treaty provisions which their application seems to have developed, this Government cannot consent that, pending such discussion, its citizens shall be exposed to the indignity and loss which have been imposed upon them by these and like occurrences.

You will intimate courteously but firmly to Lord Granville that in accepting what we understand to be the proposition of Her Majesty's Government it is understood as carrying the idea that the settlement suggested will be put in course of immediate execution, and that the determination of the amount of compensation will not be formally confined by any limitation arising from any construction of the Treaty which may be matter of difference between the two Governments.

So useful to the great interests involved do I regard the prompt settlement of this incident in our fishery relations, that I would be glad to hear by telegraph that Lord Granville concurs in the simple form of award which I have proposed.

In imparting to the British Government these views, you may in your discretion read this despatch to Lord Granville and, if he desires it, leave him a copy.

I am, sir, your obedient servant

(Signed)

WM. M. EVARTS.

No. 175.—1881, *February 26: Letter from Earl Granville to the Lords Commissioners of the Treasury.*

FOREIGN OFFICE, *February 26, 1881.*

MY LORDS, Your Lordships are aware that a correspondence has taken place with the Government of the United States with regard to certain claims of American fishermen on account of the interruption of their fishing on the coasts of Newfoundland, amounting to about 120,000 dollars, including interest.

The Government of the United States suggested that these claims should be referred for assessment to the United States' Secretary of State and Her Majesty's Minister at Washington, or to delegates named by them, but it appeared to Her Majesty's Government that it was, for many reasons, desirable to avoid so dilatory a process of investigation, and I was accordingly authorized by the Cabinet to offer a sum of 15,000*l* or 75,000 dollars, in full settlement of the claims.

The United States' Minister has informed me to-day that this offer is accepted, and I have stated to him in reply that Her Majesty's Government are ready to hold this sum of 15,000*l* at the disposal of the Government of the United States on receiving his assurance that it is accepted in full of all claims arising out of any interruption of American fishermen on the coasts of Newfoundland and its dependencies up to the present time, and without prejudice to any question of the rights of either Government under the Treaty of Washington.

I have now therefore to request that your Lordships will be good enough to give the necessary directions for this amount to be held in readiness.

I have forwarded a copy of this letter to Her Majesty's Secretary of State for the Colonies, with whom it will rest to make application to the Governor of Newfoundland for the ultimate refund of this payment.

I am, &c.,

(Signed)

GRANVILLE.

No. 176.—1881, *March 2: Letter from Mr. Lowell to Earl Granville.*

LEGATION OF THE UNITED STATES,

London, March 2nd, 1881.

MY LORD, I have the honour to acquaint your Lordship that, having inquired of Mr. Evarts by telegraph of the nature of the assurance that I might give your Lordship upon the receipt of
293 the proposed indemnity in the Newfoundland fishery transactions, I received from him an answer by cable late last evening to the following effect:

The assurance I may give is this: that the sum paid is accepted in full of all claims arising out of any interruption of American

fishermen on the coasts of Newfoundland and its dependencies up to this time presented to either Government and without prejudice to any question of the rights of either Government under the Treaty of Washington.

I am also permitted to say to your Lordship in giving this assurance, that as a matter of fact no other claims than those embraced in the Fortune Bay list and those named in Mr. Evarts' despatch Number one hundred and nine, which I have shown to your Lordship, are within the knowledge of my Government for presentation or for its own consideration.

I have already communicated to your Lordship orally the substance of this cable message, at the interview which I had the honour of having with you this morning. I understood your Lordship to say in answer to this communication that Her Majesty's Government adhered to the terms they had finally offered: that is to say: that the sum of fifteen thousand pounds should be considered as received in full of all demands arising out of the interruptions of American fishermen on the coasts of Newfoundland up to date: otherwise that you would prefer to fall back upon the plan of a reference already suggested.

I sent a telegram to Mr. Evarts this morning informing him of your views.

I have the honour to me with the highest consideration my Lord

Your most obedient humble servant,

J. R. LOWELL.

The Right Honourable EARL GRANVILLE

&c &c &c

No. 177.—1882, July 15: *Despatch from Earl Granville to Mr. West*
(United States' Minister at London).

(No. 212.)

FOREIGN OFFICE, July 15, 1882.

SIR: I have to acknowledge the receipt of your despatch No. 207 of the 9th May last, transmitting a Memorandum drawn up by the State Department of the United States' Government upon certain Acts of the Legislature of Newfoundland for the regulation of the fisheries in the waters of the Colony.

This Memorandum was communicated to you by Mr. Frelinghuysen in answer to the request of Her Majesty's Government to be favoured with any suggestions which the United States' Government might be prepared to offer with a view to the friendly consideration by the two Governments of such amendments of the Fishery Regulations as might be reasonably called for in the interests of both countries.

Her Majesty's Government regret to find that the Memorandum contains no suggestion of any kind tending to that object, but that it reopens a discussion on the construction of the Treaty of Washington which it was hoped had been exhausted in the previous correspondence.

The Memorandum cites the following extract from a despatch written by Mr. Evarts in 1878, as representing the views of the United States' Government:—

This Government conceives that the fishery rights of the United States conceded by the Treaty of Washington are to be exercised wholly free from the

restraints and regulations of the Statutes of Newfoundland, now set up as authority over our fishermen, and from every other regulation now in force, or that may hereafter be enacted by that Government.

Her Majesty's Government, however, have never accepted that construction of the Treaty, and on this point I have nothing to add to the views expressed in the note which I had the honour to address to Mr. Lowell on the 27th October, 1880.

In that note I used the following language:—

Without entering into any lengthy discussion on this point, I feel bound to state that, in the opinion of Her Majesty's Government, the clause in the Treaty of Washington which provides that the citizens of the United States shall be entitled, "in common with British subjects," to fish in Newfoundland waters within the limits of British sovereignty means that the American and the British fishermen shall fish in these water upon terms of equality, and not that there shall be an exemption of American fishermen from any reasonable regulations to which British fishermen are subject.

Her Majesty's Government entirely concur in Mr. Marcy's Circular of the 28th March, 1856. The principle therein laid down appears to them perfectly sound, and as applicable to the fishery provisions of the Treaty of Washington as to those of the Treaty which Mr. Marcy had in view; they cannot, therefore, admit the accuracy of the opinion expressed in Mr. Evarts' letter to Mr. Welsh of the 28th September, 1878, "that the fishery rights of the United States conceded by the Treaty of Washington are to be exercised wholly free
294 from the restraints and regulations of the Statutes of Newfoundland," if by that opinion anything inconsistent with Mr. Marcy's principle is really intended. Her Majesty's Government, however, fully admit that, if any such local Statutes could be shown to be inconsistent with the express stipulations, or even with the spirit of the Treaty, they would not be within the category of those reasonable regulations by which American (in common with British) fishermen ought to be bound; and they observe, on the other hand, with much satisfaction, that Mr. Evarts, at the close of his letter to Mr. Welsh of the 1st August, 1879, after expressing regret at "the conflict of interests which the exercise of the Treaty privileges enjoyed by the United States appears to have developed," expressed himself as follows:—

"There is no intention on the part of this [the United States'] Government that these privileges should be abused, and no desire that their full and free enjoyment should harm the colonial fishermen.

"While the differing interests and methods of the shore fishery and the vessel fishery make it impossible that the regulation of the one should be entirely given to the other, yet if the mutual obligations of the Treaty of 1871 are to be maintained, the United States' Government would gladly co-operate with the Government of Her Britannic Majesty in any effort to make those regulations a matter of reciprocal convenience and right, a means of preserving the fisheries at their highest point of production, and of conciliating a community of interest by a just proportion of advantages and profits."

I expressed the satisfaction with which Her Majesty's Government not only recognized in Mr. Evarts' proposal above referred to an indication that their desire to arrive at a friendly and speedy settlement of the controversy was fully reciprocated by the Government of the United States, but also discerned in it the basis of a practical solution of the difficulty; and I assured Mr. Lowell of the readiness of Her Majesty's Government to confer with the Government of the United States respecting the establishment of Regulations under which the subjects of both parties to the Treaty of Washington should have the full and equal enjoyment of any fishery which, under the Treaty, is to be used in common.

The Memorandum of the United States' Government, after reviewing certain provisions of the Newfoundland Acts, complains of partiality in their enforcement by the magistrates and other officials of the Colony (a complaint which Her Majesty's Government can not admit to be well-founded, and in support of which no facts are

adduced), and concludes with a suggestion that if the Legislature of Newfoundland can not dispense with those provisions altogether, it should pass an Act expressly declaring that they shall have no application to the citizens of the United States.

I can only renew the expression of the regret and disappointment which is felt by Her Majesty's Government at the apparent disinclination on the part of the Government of the United States to carry out Mr. Evarts' proposal; and I have to instruct you to read this despatch to Mr. Frelinghuysen, and to leave a copy of it with him should he desire it, conveying to him at the same time the hope of Her Majesty's Government that, upon further consideration, the Government of the United States will agree to let the disputed question of Treaty rights remain in abeyance, and will unite with Her Majesty's Government in carrying out the revision of the Fishery Regulations in the spirit and with the object indicated by Mr. Evarts.

I am, &c.

(Signed)

GRANVILLE.

No. 178.—1883, March 3: *Termination of the Treaty of Washington.*

JOINT RESOLUTION providing for the termination of Articles numbered eighteen to twenty-five, inclusive, and Article numbered thirty of the Treaty between the United States of America and Her Britannic Majesty, concluded at Washington, May eighth, eighteen hundred and seventy-one.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled: That in the judgment of Congress the provisions of Articles numbered eighteen to twenty-five, inclusive, and of Article thirty of the Treaty between the United States and Her Britannic Majesty, for an amicable settlement of all causes of difference between the two countries, concluded at Washington on the eighth day of May, anno Domini eighteen hundred and seventy-one, ought to be terminated at the earliest possible time, and be no longer in force: and to this end the President be, and he hereby is, directed to give notice to the Government of Her Britannic Majesty that the provisions of each and every of the articles aforesaid, will terminate and be of no force on the expiration of two years next after the time of giving such notice.

Sec. 2. That the President be, and he hereby is, directed to give and communicate to the Government of Her Britannic Majesty such notice of such termination on the first day of July, anno Domini eighteen hundred and eighty-three or as soon thereafter as may be.

295 Sec. 3. That on and after the expiration of the two years' time required by said Treaty, each and every of said articles shall be deemed and held to have expired and be of no force and effect, and that every Department of the Government of the United States shall execute the laws of the United States (in the premises) in the same manner and to the same effect as if said articles had never been in force; and the Act of Congress approved 1st March, anno Domini eighteen hundred and seventy-three, intitled: "An Act to carry into effect the provisions of the treaty between the United States and Great Britain, signed in the City of Washington the eighth day of May, eighteen hundred and seventy-one, relating to the fisheries," so far as it relates to the articles of said treaty so to be terminated, shall be and stand repealed and be of no force on and after the time of the expiration of the said two years.

Approved 3rd March, 1883.

No. 179.—1885: *Notice of Agreement (concluded 22nd June, 1885) between Her Britannic Majesty and the United States respecting the Fisheries.*

AGREEMENT BETWEEN THE UNITED STATES AND GREAT BRITAIN RESPECTING THE FISHERIES. CONCLUDED 22ND JUNE, 1885.

NOTICE.

By direction of the President, the undersigned Secretary of State hereby makes known to all whom it may concern, that a temporary diplomatic agreement has been entered into between the Government of the United States and the Government of Her Britannic Majesty in relation to the fishing privileges which were granted by the fishery clauses of the treaty between the United States and Great Britain, of 8th May, 1871, whereby the privilege of fishing, which would otherwise have terminated with the treaty clauses on the 1st of July proximo, may continue to be enjoyed by the citizens and subjects of the two countries engaged in fishing operations throughout the season of 1885.

This agreement proceeds from the mutual good will of the two Governments, and has and has been reached solely to avoid all misunderstanding and difficulties which might otherwise arise from the abrupt termination of the fishing of 1885, in the midst of the season.

The immunity which is accorded by this agreement to the vessels belonging to the citizens of the United States engaged in fishing in the British American waters, will likewise be extended to British vessels and subjects engaged in fishing in the waters of the United States.

The Joint Resolution of Congress, of 3rd March, 1883, providing for the termination of the Fishery Articles of the Treaty of 8th May, 1871, having repealed in terms, the Act of 1st March, 1873, for the execution of the Fishery Articles, and that repeal being express and absolute from the date of the termination of the said Fishery Articles; under due notification given and proclaimed by the President of the United States, to wit, 1st of July, 1885, the present temporary agreement in no way affects the question of statutory enactment or exemption from Customs duties, as to which the abrogation of the Fishery articles remains complete.

As part of this agreement, the President *will bring the whole question of the fisheries before Congress at its next session* in December, and recommend the appointment of a Joint Commission by the Governments of the United States and Great Britain to consider the matter, in the interest of maintaining good neighborhood and friendly intercourse between the two countries, thus affording a prospect of negotiation for the development and extension of trade between the United States and British North America.

Copies of the memoranda and exchanged notes on which this temporary agreement rests are appended. Reference is also made to the President's Proclamation of 31st January, 1885, terminating the Fishery Articles of the Treaty of Washington.

By direction of the President,

(Sd.)

T. F. BAYARD,
Secretary of State.

No. 180.—1885, *December: Extract from President's Annual Message to United States Congress.*

* * * * *

The marked good-will between the United States and Great Britain has been maintained during the past year.

The termination of the fishery clauses of the Treaty of Washington, in pursuance of the Joint Resolution of 3rd March, 1883, must have resulted in the abrupt cessation on the 1st of July of this year, in the midst of their ventures, of the operations of the citizens of the United States engaged in fishing in British American waters but for a diplomatic understanding reached with Her Majesty's Government in June last, whereby assurance was obtained that no interruption of those operations should take place during the current fishing season.

In the interest of good neighbourhood and of the commercial intercourse of adjacent communities, the question of the North American fisheries is one of much importance.

Following out the intimation given by me when the extensory arrangement above described was negotiated, I recommend that the Congress provide for the appointment of a Commission in which the Governments of the United States and Great Britain shall be respectively represented, charged with the consideration and settlement, upon a just, equitable and honourable basis, of the entire question of the fishing rights of the two Governments and their respective citizens on the coasts of the United States and British North America. The fishing interests being intimately related to other general questions dependant upon contiguity and intercourse, consideration thereof, in all their equities, might also properly come within the purview of such a commission, and the fullest latitude of expression on both sides should be permitted.

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No. 181.—1886, *April 14: Extract from Report of United States' Committee on Foreign Relations.*

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In the opinion of the Senate the appointment of a Commission, in which the Governments of the United States and Great Britain shall be represented, charged with the consideration and settlement of the fishing rights of the two Governments, on the coasts of the United States and British North America, ought not to be provided for by Congress.

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No. 182.—1886, *March 5: Warning issued by the Canadian Minister of Marine and Fisheries.*

WARNING—TO ALL WHOM IT MAY CONCERN.

The Government of the United States having by notice terminated Articles 18 to 25, both inclusive, and Article 30, known as the Fishery Articles of the Washington Treaty, attention is called to the following provision of the Convention between the United States and Great Britain, signed at London, on the 20th October, 1818:—

Article 1st. Whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof, to take, dry and cure fish, on certain coasts, bays, harbors and creeks of his Britannic Majesty's Dominions in America, it is agreed between the High Contracting Parties, that the inhabitants of the said United States shall have, forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on

that part of the Southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbors and creeks, from Mount Joly, on the Southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company; and that the American fishermen shall also have liberty, forever, to dry and cure fish in any of the unsettled bays, harbors and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose, with the inhabitants, proprietors, or possessors of the ground.

And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish, on or within three marine miles, of any of the coasts, bays, creeks or harbors of His Britannic Majesty's Dominions in America, not included within the above mentioned limits; provided, however, that the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any manner whatever abusing the privileges hereby reserved to them.

297 Attention is also called to the following provisions of the Act of the Parliament of Canada, Cap. 61, of the Acts of 1868, intituled: "An Act respecting fishing by foreign vessels."

2nd. Any commissioned officer of Her Majesty's Navy, serving on board of any vessel of Her Majesty's Navy, cruising and being in the waters of Canada for purpose of affording protection to Her Majesty's Subjects engaged in the Fisheries, or any commissioned officer of Her Majesty's Navy, Fishery Officer, or Stipendiary Magistrate on board of any vessel belonging to or in the service of the Government of Canada and employed in the service of protecting the fisheries or any officer of the Customs of Canada, Sheriff, Magistrate or other person duly commissioned for that purpose, may go on board of any ship, vessel or boat, within any harbor in Canada, or hovering (in British waters) within three marine miles of any of the coasts, bays, creeks or harbors in Canada, and stay on board so long as she may remain within such place or distance.

3rd. If such ship, vessel or boat be bound elsewhere, and shall continue within such harbour, or so hovering for twenty-four hours after the master shall have been required to depart, any one of such officers or persons as are above mentioned may bring such ship, vessel or boat into port and search her cargo, and may also examine the master upon oath touching the cargo and voyage; and if the master or person in command shall not truly answer the questions put to him in such examination, he shall forfeit four hundred dollars; and if such ship, vessel or boat be foreign, or not navigated according to the laws of the United Kingdom or of Canada, and have been found fishing, or preparing to fish, or to have been fishing (in British waters) within three marine miles of any of the coasts, bays, creeks or harbors of Canada, not included within the above mentioned limits, without a license, or after the expiration of the period named in the last license granted to such ship, vessel or boat, under the first section of this Act, such ship, vessel or boat, and the tackle, rigging, apparel, furniture, stores and cargo thereof shall be forfeited.

4th. All goods, ships, vessels and boats, and the tackle, rigging, apparel, furniture, stores and cargo liable to forfeiture under this Act, may be seized and secured by any officers or persons mentioned in the second section of this Act; and every person opposing any officer or person in the execution of his duty under this Act, or aiding or abetting any other person in any opposition, shall forfeit eight hundred dollars, and shall be guilty of a misdemeanour, and upon conviction be liable to imprisonment for a term not exceeding two years.

Therefore be it known, that by virtue of the Treaty Provisions and Act of Parliament, above recited, all foreign vessels, or boats, are forbidden from fishing or taking fish by any means whatever within

three marine miles of any of the coasts, bays, creeks and harbors in Canada, or to enter such bays, harbors and creeks, except for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever; of all of which you will take notice and govern yourself accordingly.

(Sd.) GEORGE E. FOSTER,
Minister of Marine and Fisheries.

DEPARTMENT OF FISHERIES,
Ottawa, 5th March, 1886.

No. 183.—1886, March 29: *Letter from Sir L. S. S. West Minister at Washington to the Governor General of Canada.*

[No. 30.]

WASHINGTON, 29th March, 1886.

MY LORD,—I have the honour to inform your Excellency that the American Consul-General at Halifax is reported to have argued that there is nothing in the Treaty of 1818 to prevent Americans having caught fish in deep water and cured them from landing them in a marketable condition at any Canadian port and transshipping them in bond to the United States, either by rail or vessel, and that moreover a refusal to permit the transportation would be a violation to [of] the general bonding arrangement between the two countries.

I have, &c.

(Sd.) L. S. SACKVILLE WEST.

His Excellency The GOVERNOR-GENERAL.

298 No. 184.—1886, April 6: *Report of a Committee of the Privy Council for Canada, approved by His Excellency the Governor-General in Council.*

The Committee of the Privy Council have had under consideration a despatch, dated the 29th March, 1886, from Her Majesty's Minister at Washington, informing your Excellency that the United States' Consul General at Halifax was reported to have argued that there is nothing in the Convention of 1818 to prevent Americans, having caught fish in deep water and cured them, from landing them in a marketable condition at any Canadian port and transshipping them in bond to the United States either by rail or vessel, and that any refusal to permit such transshipment would be a violation of the general bonding arrangement between the two countries.

The Sub-Committee to whom the despatch in question was referred report that if the contention of the United States' Consul at Halifax is made in relation to American fishing-vessels, it is inconsistent with the Convention of 1818.

That they are of opinion, from the language of that Convention—"Provided, however, that the American fishermen shall be permitted to enter such bays or harbors for the purposes of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water and for no other purpose whatever"—that, under the terms

of the Convention, United States' fishermen may properly be precluded from entering any harbor of the Dominion for the purpose of transshipping cargoes, and that it is not material to the question that such fishermen may have been engaged in fishing outside of the "3-mile limit" exclusively, or that the fish which they may desire to have transhipped have been taken outside of such limit.

That to deny the right of transshipment would not be a violation of the general bonding arrangement between the two countries.

That no bonding arrangement has been made which, to any extent, limits the operation of the Convention of 1818, and, inasmuch as the right to have access to the ports of what is now the Dominion of Canada for all other purposes than those named, is explicitly renounced by the Convention, it cannot with propriety be contended that the enforcement of the stipulation above cited is contrary to the general provisions upon which intercourse is conducted between the two countries.

Such exclusion could not, of course, be enforced against United States' vessels not engaged in fishing.

The Sub-Committee in stating this opinion are not unmindful of the fact that the responsibility of determining what is the true interpretation of a Treaty or Convention made by Her Majesty must remain with Her Majesty's Government, but in view of the necessity of protecting to the fullest extent the inshore fisheries of the Dominion according to the strict terms of the Convention of 1818, and in view of the failure of the United States' Government to accede to any arrangements for the mutual use of the inshore [inshore] fisheries, the Sub-Committee recommend that the claim which is reported to have been set up by the United States' Consul-General at Halifax be resisted.

The Committee concur in the foregoing report and recommendation, and they respectfully submit the same for your Excellency's approval.

(Sd.) JOHN J. MCGEE,
Clerk, Privy Council for Canada.

No. 185.—1886, May 7: *Circular issued by the Canadian Customs Department.*

CIRCULAR No. 371.

CUSTOMS DEPARTMENT,
Ottawa, 7th May, 1886.

SIR,—The Government of the United States having by notice terminated Articles 18 to 25, both inclusive, and Article 30, known as the Fishery Articles of the Washington Treaty, attention is called to the following provision of the Convention between the United States and Great Britain, signed at London, on the 20th October, 1818:—

Article 1st. Whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof, to take, dry and cure fish, on certain coasts, bays, harbors and creeks, of His Britannic Majesty's Dominion, in America, it is agreed between the High Contracting Parties, that

the inhabitants of the said United States shall have, forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind

on that part of the southern coast of Newfoundland which extends from 299 Cape Ray to the Rameau Island, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbors and creeks, from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company; and that the American fishermen shall also have liberty, forever, to dry and cure fish in any of the unsettled bays, harbors and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose, with the inhabitants, proprietors, or possessors of the ground.

And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish, on or within three marine miles, of any of the coasts, bays, creeks or harbors of His Britannic Majesty's dominions in America, not included within the above mentioned limits; provided, however, that the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any manner whatever abusing the privileges hereby reserved to them.

Attention is also called to the following provisions of the Act of the Parliament of Canada, cap. 61, of the Acts of 1868, intituled: "An Act respecting fishing by foreign vessels."

2nd. Any commissioned officer of Her Majesty's Navy, serving on board of any vessel of Her Majesty's Navy, cruising and being in the waters of Canada for the purpose of affording protection to Her Majesty's subjects engaged in the fisheries, or any commissioned officer of Her Majesty's Navy, Fishery Officer, or Stipendiary Magistrate on board of any vessel belonging to or in the service of the Government of Canada and employed in the service of protecting the fisheries or any officer of the Customs of Canada, Sheriff, Magistrate or other person duly commissioned for that purpose, may go on board of any ship, vessel or boat, within any harbor in Canada, or hovering (in British waters) within three marine miles of any of the coasts, bays, creeks or harbors in Canada, and stay on board so long as she may remain within such place or distance.

3rd. If such ship, vessel or boat be bound elsewhere, and shall continue within such harbor, or so hovering for twenty-four hours after the Master shall have been required to depart, any one of such officers or persons as are above mentioned may bring such ship, vessel or boat into port and search her cargo, and may also examine the Master upon oath touching the cargo and voyage; and if the Master or person in command shall not truly answer the questions put to him in such examination, he shall forfeit four hundred dollars; and if such ship, vessel or boat be foreign, or not navigated according to the laws of the United Kingdom or of Canada, and have been found fishing, or preparing to fish, or to have been fishing (in British waters) within three marine miles of any of the coasts, bays, creeks or harbors of Canada, not included within the above mentioned limits, without a license, or after the expiration of the period named in the last license granted to such ship, vessel or boat under the first section of this Act, such ship, vessel or boat, and the tackle, rigging, apparel, furniture, stores and cargo thereof shall be forfeited.

4th. All goods, ships, vessels and boats, and the tackle, rigging, apparel, furniture, stores and cargo liable to forfeiture under this Act, may be seized and secured by any officers or persons mentioned in the second section of this Act; and every person opposing any officer or person in the execution of his duty under this Act, or aiding or abetting any other person in any opposition, shall forfeit eight hundred dollars, and shall be guilty of a misdemeanor, and upon conviction be liable to imprisonment for a term not exceeding two years.

Having reference to the above, you are requested to furnish any foreign fishing vessels, boats or fishermen found within three marine

miles of the shore, within your district, for other purposes than those of shelter and of repairing damages, of purchasing wood and of obtaining water, with a printed copy of the warning enclosed herewith. If such vessel or boat is found fishing, preparing to fish, or violating the provisions of the Convention of 1818, by shipping men or supplies or trading, or if hovering within the three-mile limit, does not depart within twenty-four hours after receiving such warning, you will place an officer on board of such vessel, and at once telegraph the facts to the Fisheries Department at Ottawa, and await instructions.

(Sd.) J. JOHNSON,
Commissioner of Customs.

No. 186.—1886, May 10: *Letter from Mr. Bayard (United States Secretary of State) to Sir L. S. S. West.*

DEPARTMENT OF STATE,
Washington, 10th May, 1886.

SIR,—On the 6th instant, I received from the Consul General of the United States, at Halifax, a statement of the seizure of an
300 American schooner, the “Joseph Story,” of Gloucester, Massachusetts, by the authorities at Baddeck, Cape Breton, and her discharge after a detention of twenty-four hours.

On Saturday, the 8th instant, I received a telegram from the same official, announcing the seizure of the American schooner “David J. Adams,” of Gloucester, Massachusetts, in the Annapolis Basin, Nova Scotia, and that the vessel had been placed in the custody of an officer of the Canadian steamer “Lansdowne,” and sent to St. John, New Brunswick, for trial.

As both of these seizures took place in closely land-locked harbours, no invasion of the territorial waters of the British provinces, with the view of fishing there, could well be imagined. And yet the arrests appear to have been based upon the act or intent of fishing within waters as to which, under the provisions of the Treaty of 1818, between Great Britain and the United States of America, the liberty of the inhabitants of the United States to fish has been renounced.

It would be superfluous for me to dwell upon the desire which, I am sure, controls those respectively charged with the administration of the Governments of Great Britain and the United States to prevent occurrences tending to create exasperation and unneighborly feeling, or collision between the inhabitants of the two countries; but animated with this sentiment the time seems opportune for me to submit some views for your consideration, which I confidently hope will lead to such administration of the laws regulating the commercial interests and the mercantile marine of the two countries as may promote good feeling and mutual advantage, and prevent hostility to commerce under the guise of protection to inshore fisheries.

The Treaty of 1818 is between two nations, the United States of America and Great Britain, who, as the Contracting Parties, can alone apply authoritative interpretation thereto, or enforce its provisions by appropriate legislation.

The discussion prior to the conclusion of the Treaty of Washington, in 1871, was productive of a substantial agreement between the two countries as to the existence and limit of the three marine miles, within the line of which, upon the regions defined in the Treaty of 1818, it should not be lawful for American fishermen to take, dry or cure fish. There is no hesitancy upon the part of the Government of the United States to proclaim such inhibition and warn their citizens against the infraction of the Treaty in that regard, so that such in-shore fishing cannot lawfully be enjoyed by an American vessel being within three marine miles of the land.

But since the date of the Treaty of 1818, a series of laws and regulations importantly affecting the trade between the North American provinces of Great Britain and the United States have been, respectively, adopted by the two countries, and have led to amicable and mutually beneficial relations between their respective inhabitants.

This independent, and yet concurrent, action by the two Governments, has effected a gradual extension, from time to time, of the provisions of Article 1 of the Convention of 3rd July, 1815, providing for reciprocal liberty of commerce between the United States and the territories of Great Britain in Europe, so as gradually to include the colonial possessions of Great Britain in North America and the West Indies, within the results of that Treaty.

President Jackson's Proclamation of 5th October, 1830, created a reciprocal commercial intercourse, on terms of perfect equality of flag between this country and the British American dependencies, by repealing the Navigation Acts of 18th April, 1818, 15th May, 1820, and 1st March, 1823, and admitting British vessels and their cargoes "to an entry in the ports of the United States, from the islands, provinces and colonies of Great Britain, on or near the American continent, and north or east of the United States." These commercial privileges have since received a large extension, in the interests of propinquity, and, in some cases, favours have been granted by the United States without equivalent concession. Of the latter class, is the exemption granted by the Shipping Act of 26th June, 1884, amounting to one-half of the regular tonnage dues on all vessels from the British North American and West Indian possessions entering ports of the United States. Of the reciprocal class are the arrangements for transit of goods and the remission by proclamation, as to certain British ports and places, of the remainder of the tonnage tax, on evidence of equal treatment being shown to our vessels.

On the other side, British and colonial legislation, as notably in the case of the Imperial Shipping and Navigation Act of 26th June, 1849, has contributed its share toward building up an intimate intercourse and beneficial traffic between the two countries, founded on mutual interest and convenience. These arrangements, so far as the United States are concerned, depend upon municipal statute and upon the discretionary powers of the Executive thereunder.

The seizure of the vessels I have mentioned, and certain published warnings purporting to have been issued by the colonial authorities, would appear to have been made under a supposed delegation of jurisdiction by the Imperial Government of Great Britain, and to be intended to include authority to interpret and enforce the provisions of the Treaty of 1818, to which, as I have remarked, the United

States and Great Britain are the Contracting Parties, who can alone deal responsibly with questions arising thereunder.

The effect of this colonial legislation and executive interpretation, if executed according to the letter, would be not only to expand the restrictions and renunciations of the Treaty of 1818, which related solely to inshore fishing within the 3-mile limit, so as to affect the deep sea fisheries, the right to which remained unquestioned and unimpaired for the enjoyment of the citizens of the United States, but further to diminish and practically destroy the privileges expressly secured to American fishing vessels to visit those inshore waters for the objects of shelter, repair of damages and purchasing wood and obtaining water.

Since 1818 certain important changes have taken place in fishing in the regions in question, which have materially modified the conditions under which the business of inshore fishing is conducted and which must have great weight in any present administration of the treaty.

301 Drying and curing fish, for which a use of the adjacent shores was at one time requisite, is now no longer followed, and modern invention of processes of artificial freezing, and the employment of vessels of a larger size, permit the catch and direct transportation of fish to the markets of the United States without recourse to the shores contiguous to the fishing grounds.

The mode of taking fish inshore has also been wholly changed, and from the highest authority on such subjects I learn that bait is no longer needed for such fishing, that purse-seines have been substituted for the other methods of taking mackerel, and that by their employment these fish are now readily caught in deeper waters entirely exterior to the 3-mile line.

As it is admitted that the deep-sea fishing was not under consideration in the negotiation of the Treaty of 1818, nor was affected thereby, and as the use of bait for inshore fishing has passed wholly into disuse, the reasons which may have formerly existed for refusing to permit American fishermen to catch or procure bait within the line of a marine league from the shore, lest they should also use it in the same inhibited waters for the purpose of catching other fish, no longer exist.

For it will, I believe, be conceded as a fact that bait is no longer needed to catch herring or mackerel, which are the objects of inshore fishing, but is used, and only used, in deep-sea fishing, and, therefore, to prevent the purchase of bait or any other supply needed in deep-sea fishing, under colour of executing the provisions of the Treaty of 1818, would be to expand that Convention to objects wholly beyond its purview, scope and intent, and give to it an effect never contemplated by either party, accompanied by results unjust and injurious to the citizens of the United States. As, therefore, there is no longer any inducement for American fishermen to dry and cure fish on the interdicted coasts of the Canadian provinces, and as bait is no longer used or needed by them (for the prosecution of inshore fishing) in order to take fish in the inshore waters to which the Treaty of 1818 alone relates, I ask you to consider the results of excluding American vessels duly possessed of permits from their own Government to touch and trade at Canadian ports, as well as to engage in deep-sea fishing

from exercising freely the same customary and reasonable rights and privileges of trade in the ports of the British Colonies as are freely allowed to British vessels in all the ports of the United States under the laws and regulations to which I have adverted.

Among these customary rights and privileges may be enumerated the purchase of ship supplies of every nature, making repairs, the shipment of crews in whole or part, and the purchase of ice and bait for use in deep-sea fishing.

Concurrently, these usual rational and convenient privileges are freely extended to and are fully enjoyed by the Canadian merchant marine of all occupations, including fishermen, in the ports of the United States.

The question therefore arises whether such a construction is admissible as would convert the Treaty of 1818, from being an instrumentality for the protection of the inshore fisheries along the described parts of the British American coast, into a pretext or means of obstructing the business of deep-sea fishing by citizens of the United States, and of interrupting and destroying the commercial intercourse that, since the Treaty of 1818 and independent of any treaty whatever, has grown up and now exists under the concurrent and friendly laws and mercantile regulations of the respective countries?

I may recall to your attention the fact that a proposition to exclude the vessels of the United States engaged in fishing from carrying also merchandise was made by the British negotiators of the Treaty of 1818, but being resisted by the American negotiators, was abandoned. This fact would seem clearly to indicate that the business of fishing did not then and does not now disqualify a vessel from also trading in the regular ports of entry.

I have been led to offer these considerations by the recent seizures of American vessels to which I have adverted and by indications of a local spirit of interpretation in the provinces affecting friendly intercourse, which is, I firmly believe, not warranted by the terms of the stipulations on which it professes to rest. It is not my purpose to prejudge the facts of the cases, nor have I any desire to shield any American vessel from the consequences of violation of international obligation. The views I have advanced may prove not to be applicable in every feature to those particular cases, and I should be glad if no case whatever were to arise calling in question the good understanding of the two countries in this regard in order to be free from the grave apprehensions which, otherwise, I am unable to dismiss.

It would be most unfortunate and, I cannot refrain from saying, most unworthy if the two nations who contracted the Treaty of 1818 should permit any questions of mutual right and duty under that Convention to become obscured by partizan advocacy or distorted by the heat of local interests. It cannot but be the common aim to conduct all discussion in this regard with dignity and in a self-respecting spirit, that will show itself intent upon securing equal justice rather than unequal advantage. Comity, courtesy, and justice cannot, I am sure, fail to be the ruling motives and objects of discussion.

I shall be most happy to come to a distinct and friendly understanding with you, as the representative of Her Britannic Majesty's Government, which will result in such a definition of the rights of

American fishing vessels under the Treaty of 1818, as shall effectually prevent any encroachment by them upon the territorial waters of the British provinces, for the purpose of fishing within those waters, or trespassing in any way upon the littoral or marine rights of the inhabitants, and at the same time prevent that Convention from being improperly expanded into an instrument of discord, by affecting interests and accomplishing results wholly outside of and contrary to its object and intent, by allowing it to become an agency to interfere with, and perhaps destroy, those reciprocal commercial privileges and facilities between neighbouring communities which contribute so importantly to their peace and happiness.

It is obviously essential that the administration of the laws
302 regulating the Canadian inshore fishing should not be conducted in a punitive and hostile spirit, which can only tend to induce acts of a retaliatory nature.

Everything will be done by the United States to cause their citizens, engaged in fishing, to conform to the obligations of the Treaty, and prevent an infraction of the fishing laws of the British provinces; but it is equally necessary that ordinary commercial intercourse should not be interrupted by harsh measures and unfriendly administration.

I have the honour, therefore, to invite a frank expression of your views upon the subject, believing that, should any differences of opinion or disagreement as to facts exist, they will be found to be so minimized that an accord can be established for the full protection of the inshore fishing of the British provinces, without obstructing the open sea fishing operations of the citizens of the United States, or disturbing the trade Regulations now subsisting between the countries.

I have, &c.,

(Sd.)

T. F. BAYARD.

No. 187.—1886, May 19: *Letter from Marquis of Lansdowne, Governor-General of Canada, to Earl Granville.*

[No. 161.]

OTTAWA, 19th May, 1886.

MY LORD,—I have the honour to inform you that the American Fishing schooner "Ella M. Doughty" was seized at St. Ann's, Nova Scotia, by Sub-Collector McAulay, who is reported by the Collector of Customs at Baddeck, Mr. L. G. Campbell, to have proof that the Captain bought bait at St. Ann's without reporting to the Customs' authorities.

Mr. Campbell further telegraphs that the Captain acknowledged the facts and showed the bait bought, but claimed that he held a permit or license, signed by the Collector of Customs at Portland, Maine, to touch and trade at any foreign port.

The "Ella M. Doughty" has been held for not reporting, and an enquiry is now proceeding in order to ascertain whether there has or has not been an infraction of the Fishery Law of the Dominion.

I have, &c.

(Sd.)

LANDSDOWNE.

The Right Hon. Earl GRANVILLE, K. G.,

&c., &c., &c.

No. 188.—1886, May 20: *Despatch from Mr. T. F. Bayard, United States Secretary of State, to Sir L. S. S. West.*

DEPARTMENT OF STATE,
Washington, 20th May, 1886.

SIR,—Although without reply to the note I had the honour to address to you on the 10th instant in relation to the Canadian fisheries, and the interpretation of the Treaty of 1818, between the United States and Great Britain as to the rights and duties of the American citizens engaged in maritime trade and intercourse with the provinces of British North America, in view of the unrestrained, and as it appears to me unwarranted, irregular and severe action of the Canadian officials toward American vessels in those waters. Yet I feel it to be my duty to bring impressively to your attention information more recently received by me from the United States Consul General at Halifax, Nova Scotia, in relation to the seizure and continued detention of the American schooner "David J. Adams" already referred to in my previous note, and the apparent disposition of the local officials to use the most extreme and technical reasons for interference with vessels not engaged in or intended for inshore fishing on that coast.

The report received by me yesterday evening alleges such action in relation to the vessel mentioned as renders it difficult to imagine it to be that orderly proceeding and "due process of law," so well known and customarily experienced in Great Britain and the United States, and which dignifies the two Governments, and gives to private rights of property and the liberty of the individual their essential safeguards.

By the information thus derived it would appear that after four several and distinct visitations by boats' crews from the "Lansdowne" in Annapolis Basin, Nova Scotia, the "David J. Adams" was summarily taken into custody by the Canadian steamer "Lansdowne" and carried out of the Province of Nova Scotia across the Bay of Fundy and into the port of St. John, New Brunswick, and, without explanation or hearing, on the following Monday, 10th May, taken back again by an armed crew to Digby in Nova Scotia. That in Digby the paper alleged to be the legal precept for the capture and detention of the vessel was nailed to her mast in such manner as to prevent its contents being read, and the request of the captain of the "David J. Adams" and of the U. S. Consul General to be allowed to detach the writ from the mast for the purpose of learning its contents was positively refused by the Provincial officials in charge. Nor was the U. S. Consul General able to learn from the commander of the "Lansdowne" the nature of the complaint against the vessel, and his respectful application to that effect was fruitless.

In so extraordinary, confused and irresponsible a condition of affairs, it is not possible to ascertain with that accuracy which is needful in matters of such grave importance the precise grounds for this harsh and peremptory arrest and detention of a vessel the property of citizens of a nation with whom relations of peace and amity were supposed to exist.

From the best information, however, which the U. S. Consul General was enabled to obtain after application to the prosecuting offi-

cials, he reports that the "David J. Adams" was seized, and is now held:—

- 1st. For alleged violation of the Treaty of 1818;
- 2nd. For alleged violation of the Act 59 George III;
- 3rd. For alleged violation of the Colonial Act of Nova Scotia of 1818; and
- 4th. For alleged violation of the Act of 1870, and also of 1883—both Canadian statutes.

Of these allegations there is but one which at present I press upon your consideration, and that is the alleged infraction of the Treaty of 1818.

I beg to recall to your attention the correspondence and action of those respectively charged with the administration and government of Great Britain and the United States in the year 1870, when the same international questions were under consideration, and the status of law was not essentially different from what it is at present.

This correspondence discloses the intention of the Canadian authorities of that day to prevent encroachment upon their inshore fishing grounds, and their preparations, in the way of a marine police force, very much as we now witness.

The statutes of Great Britain and of her Canadian provinces, which are now supposed to be invoked as authority for the action against the schooner "David J. Adams," were then reported as the basis of their proceedings.

In his note of 26th May 1870 Mr. (afterwards Sir Edward) Thornton, the British Minister at this capital, conveyed to Mr. Fish, then Secretary of State, copies of the Orders of the Royal Admiralty to the Admiral Wellesley, in command of the naval forces "employed in maintaining order at the fisheries in the neighbourhood of the coasts of Canada."

All of these orders directed the protection of Canadian fishermen, and cordial co-operation and concert with the United States force sent on the same service, with respect to American fishermen in those waters. Great caution in the arrest of American vessels charged with violation of the Canadian fishing laws was scrupulously enjoined upon the British authorities, and the extreme importance of the commanding officers of ships selected to protect the fisheries exercising the utmost discretion in paying especial attention to Lord Granville's observation, that no vessel should be seized unless it were evident and could be clearly proved that the offence of fishing had been committed and the vessel captured within three miles of land.

This caution was still more explicitly announced when Mr. Thornton, on the 11th of June, 1870, wrote to Mr. Fish:—

You are, however, quite right in not doubting that Admiral Wellesley, on the receipt of the latter instructions addressed to him on the 5th ultimo, will have modified the directions to the officers under his command, so that they may be in conformity with the views of the Admiralty.

In confirmation of this, I have since received a letter from Vice-Admiral Wellesley, dated the 30th ultimo, informing me that he had received instructions to the effect that officers of Her Majesty's ships employed in the protection of the fisheries should not seize any vessel, unless it were evident and could be clearly proved that the offence of fishing had been committed, and the vessel itself captured within three miles of land.

This understanding between the two Governments wisely and efficiently guarded against the manifest danger of entrusting the execu-

tion of powers so important and involving so high and delicate a discretion to any but wise and responsible officials, whose prudence and care should be commensurate with the magnitude and national importance of the interest involved, and I should fail in my duty if I did not endeavour to impress you with my sense of the absolute and instant necessity that now exists for a restriction of the seizure of American vessels charged with violations of the treaty of 1818, to the conditions announced by Sir E. Thornton to this Government, in June, 1870.

The charges of violating the Local Laws and Commercial Regulations of the Ports of the British provinces (to which I am desirous that due and full observance should be paid by the citizens of the United States) I do not consider in this note, and I will only take this occasion to ask you to give me full information of the official action of the Canadian Authorities in this regard, and what Laws and Regulations having the force of Law, in relation to the protection of their inshore fisheries and preventing encroachments thereon, are now held by them to be in force.

But I trust you will join with me in realizing the urgent and essential importance of restricting all arrests of American fishing vessels for supposed or alleged violations of the Convention of 1818, within the limitations and conditions laid down by the Authorities of Great Britain in 1870; to wit, that no vessel shall be seized
304 unless it is evident and can be clearly proved that the offence of fishing has been committed and the vessel itself captured within three miles of land.

In regard to the necessity for the instant imposition of such restrictions upon the arrest of vessels, you will, I believe, agree with me, and I will therefore ask you to procure such steps to be taken as shall cause such orders to be forthwith put in force under the authority of Her Majesty's Government.

I have, &c.,

(Sd.) T. F. BAYARD.

No. 189.—1886, May 20: Letter from Mr. Bayard to Sir L. S. S. West.

DEPARTMENT OF STATE,
Washington, 20th May, 1886.

MY DEAR MR. WEST,—Since writing you my last note of to-day's date, my attention has been called to a statement that the American schooner "Jennie and Julia," of Eastport Maine, having cleared from that port for Digby, N. S., made due entry at the latter port, and upon attempting to purchase a lot of herring for smoking, was warned that the vessel would be seized if herring were purchased for any purpose whatever, whereupon the vessel left without taking in cargo.

If as it is to be inferred from the fact of the regular clearance and entry, the "Jennie and Julia" was documented for a trading voyage, the reported action of the Digby collector should be looked into very sharply.

It would certainly not help an amicable adjustment of the present difficulties, if the provincial authorities were to initiate a policy of

commercial non-intercourse by refusing to permit exportation of fish in American bottoms.

The report is attracting much attention, and I have telegraphed to our Consular Agent at Digby for a statement of the facts.

I should be glad to receive from you any information you may have in relation to the collector's action.

Very truly, yours,

(Sd.)

T. F. BAYARD.

To the Honorable SIR LIONEL S. S. WEST,
&c., &c., &c.

No. 190.—1886, May 24: *Letter from the Earl of Rosebery (British Foreign Secretary) to Sir L. S. S. West.*

(No. 20. Treaty.)

FOREIGN OFFICE, 24th May, 1886.

SIR,—The American Minister called on me to-day, and said that he had received a telegram from Mr. Bayard late on Saturday night instructing him to ask me if the seizure of American fishing vessels in Canadian waters could not be discontinued, and the vessels already captured restored, of course, without prejudice, and on an undertaking to surrender them if required.

Mr. Phelps went on to argue the construction of the Treaty of 1818, and said that though, at a first glance, its provisions might seem to justify the Canadian authorities in the course which they had taken, a general view of its whole scope contradicted that assumption, which, in any case, was inconsistent with the cordial relations existing between the two countries. In reply, I reminded Mr. Phelps that that Treaty was concluded at a time when, after a war and a period of great bitterness, the relations between Great Britain and the United States were not so cordial as they are now.

As regarded the construction of the Treaty, I could not presume to argue with so eminent a lawyer as himself; I could not, however, refrain from expressing the opinion that the plain English of the clause seemed to me entirely to support the Canadian view. Nor was it the fault of the Canadians that they had been compelled to resort to the enforcement of the Treaty. I admitted, indeed, that the responsibility did not lie on the American Government. But the Senate had refused to sanction any negotiation on the matter, and had therefore thrown back the Canadians on the provisions of the Treaty of 1818. As regarded the seizure of the vessels which Mr. Phelps had described as having transgressed unwittingly, I could only say but little, as I had received no intelligence beyond what was stated in the newspapers. If, however, they had erred unwittingly it was not our fault, for we had issued a formal warning to American fishermen that they would not be permitted, under the Treaty of 1818, to do certain things, and we had requested Mr. Bayard to issue a similar notice. He, however, had declined to do so. I could

305 not, therefore, think that the American vessels had erred unwittingly, more especially, as, if I was rightly informed by the newspapers, there were suspicious and furtive circumstances connected with the case of the "David J. Adams," at any rate, which

tended to prove that the captain was aware that he was acting illegally.

As to the substantial proposition of Mr. Bayard, I begged Mr. Phelps to return the following answer: No one, as he was aware, could be more anxious than I was to maintain the most cordial relations between the two countries. He well knew that I would go more than half way to meet Mr. Bayard in this matter, but it would be difficult to ask the Canadians to suspend their legal action if we had nothing to offer them in the way of a *quid pro quo*. What I would suggest would be this, that he should telegraph at once to Washington to tell Mr. Bayard that I would do my best to induce the Colonial authorities to suspend their action if some assurance could be given me of an immediate readiness to negotiate on the question. Mr. Phelps promised to do this.

I am, &c.,

(Signed)

ROSEBERRY.

No. 191.—1886, May: *Report of the Canadian Minister of Justice.*

The undersigned having had under consideration the communication from Mr. Bayard, Secretary of State, dated at Washington the 10th May instant, and addressed to Her Majesty's Minister at Washington, in reference to the seizure of the fishing vessel "David J. Adams" submits the following observations in relation thereto.

Mr. Bayard suggests that "the Treaty of 1818 was between two nations, the United States of America and Great Britain, who, as the contracting parties, can alone apply authoritative interpretation thereto and enforce its provisions by appropriate legislation."

As it may be inferred from this statement that the right of the Parliament of Canada to make enactments for the protection of the fisheries of the Dominion, and the power of the Canadian officers to protect those fisheries are questioned, it may be well to state, at the outset, the grounds upon which it is conceived by the undersigned that the jurisdiction in question is clear beyond a doubt.

(1.) In the first place the undersigned would ask it to be remembered that the extent of the jurisdiction of the Parliament of Canada is not limited (nor was that of the provinces before the union) by the sea-coast, but extends to three marine miles from the shore, as to all matters over which any legislative authority can in any country be exercised within that space. The legislation which has been adopted on this subject by the Parliament of Canada (and previously to confederation by the provinces) does not extend beyond that limit. It may be assumed that in the absence of any Treaty stipulation to the contrary this right is so well recognised and established by both British and American law, that the grounds on which it is supported need not be stated here at large. The undersigned will merely add, therefore, to this statement of the position, that so far from the right being limited by the Convention of 1818 that Convention expressly recognises the right.

After renouncing the liberty "to take, cure, or dry fish on or within three marine miles of any of the coasts, bays, &c., there is a stipulation that while American fishing vessels shall be admitted to enter such bays, &c., for the purposes of shelter, and of repairing damages

therein, of purchasing wood and of obtaining water," "they shall be under such restrictions as may be necessary to prevent their taking, curing, or drying fish therein, or in any other manner whatever abusing the privileges reserved to them."

(2.) "Appropriate legislation" on this subject was, in the first instance, adopted by the Parliament of the United Kingdom. The Imperial statute, 59 George III., chap. 38, was enacted in the year following the Convention, in order to give that Convention force and effect. That statute declared that except for the purposes before specified it should

not be lawful for any person or persons, not being a natural born subject of His Majesty, in any foreign ship, vessel, or boat, nor for any person in any ship, vessel, or boat other than such as shall be navigated according to the laws of the United Kingdom of Great Britain and Ireland, to fish for, or to take, dry, or cure any fish of any kind whatever, within three marine miles of any coasts, bays, creeks, or harbours whatever in any part of His Majesty's dominions in America, not included within the limits specified and described in the first Article of the said Convention, and that if such foreign ship, vessel, or boat, or any persons on board thereof, shall be found fishing, or to have been fishing, or preparing to fish within such distance of such coasts, bays, creeks, or harbours within such distance of His Majesty's dominions in America, out of the said limits as aforesaid, all such ships, vessels, and boats, together with their cargoes, and all guns, ammunition, tackle, apparel, furniture, and stores, shall be forfeited, and shall and may be seized, taken, sued for, prosecuted, recovered, and condemned by such, and the like ways, means and methods, and in the same courts, as ships, vessels, or boats may be forfeited, seized, prosecuted, and condemned for any offence against any laws relating to the Revenue of Customs, or the laws of trade and navigation, under any Act or Acts of the

Parliament of Great Britain, or of the United Kingdom of Great Britain 306 and Ireland; provided that nothing contained in this Act shall apply or be construed to apply to the ships or subjects of any Prince, Power, or State in amity with His Majesty, who are entitled by treaty with His Majesty to any privilege of taking, drying, or curing fish on the coasts, bays, creeks, or harbours, or within the limits in this Act described; provided always that it shall and may be lawful for any fisherman of the said United States to enter into any such bays or harbours of His Britannic Majesty's dominions in America as are last-mentioned, for the purpose of shelter and repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever; subject nevertheless to such restrictions as may be necessary to prevent such fishermen of the said United States from taking, drying, or curing fish in the said bays or harbours, or in any other manner whatever abusing the said privileges by the said Treaty and this Act reserved to them, and as shall for that purpose be imposed by any order or orders to be from time to time made by His Majesty in Council, under the authority of this Act, and by any regulations which shall be issued by the governor or person exercising the office of governor in any such parts of His Majesty's dominions in America, under or in pursuance of any such Order in Council as aforesaid.

And that if any person or persons upon requisition made by the Governor of Newfoundland, or the person exercising the office of governor, or by any governor in person exercising the office of governor in any other part of His Majesty's dominions in America as aforesaid or by any officer or officers acting under such governor or person, exercising the office of governor in the execution of any orders or instructions from His Majesty in Council, shall refuse to depart from such bays or harbours, or if any person or persons shall refuse or neglect to conform to any regulations or directions which shall be made or given for the execution of any of the purposes of this Act; every such person so refusing or otherwise offending against this Act shall forfeit the sum of two hundred pounds, to be recovered in the Superior Court of Judicature of the Island of Newfoundland or in the Superior Court of Judicature of the Colony or Settlement within or near to which such offence shall be committed, or by bill, plaint, or information in any of His Majesty's Courts of Record at Westminster; one moiety of such penalty to belong to His Majesty, his heirs and successors, and the other moiety to such person or persons as shall sue or prosecute for the same.

The Acts passed by the provinces now forming Canada and also by the Parliament of Canada are to the same effect, and may be said to be merely declaratory of the law as established by the Imperial statute.

(3.) The authority of the Parliaments of the provinces, and, after confederation, the authority of the Parliament of Canada, to make enactments to enforce the provisions of the convention, and likewise the authority of Canadian Officers to enforce those Acts, rests on well known constitutional principles. Those Parliaments existed, and the Parliament of Canada now exists, by the authority of the Parliament of Great Britain, which is one of the "nations" referred to by Mr. Bayard as the "contracting parties." The Colonial statutes have received the sanction of the British Sovereign, who, and not the nation, is actually the party with whom the United States made the convention.

The officers who are engaged in enforcing the Acts of Canada, or the Laws of the Empire, are Her Majesty's officers, although their authority may have been conveyed through the medium of Her Majesty's Governor-General.

The jurisdiction thus exercised cannot therefore be properly described in the language used by Mr. Bayard as a "supposed," and therefore questionable, "delegation of jurisdiction by the Imperial Government of Great Britain."

Her Majesty governs in Canada as well as in Great Britain; the officers in Canada are Her Majesty's officers, and the Statutes of Canada are Her Majesty's Statutes passed on the advice of Her Parliament sitting in Canada.

It is, therefore, an error to conceive that, because Great Britain and the United States were, in the first instance, the contracting parties to the Treaty of 1818, no question arising under that Treaty can be "responsibly dealt with," either by the Parliament or by the authorities of the Dominion of Canada.

The undersigned has further to observe, with regard to this contention of Mr. Bayard, that in the proceedings which have recently been taken for the protection of the Fisheries, no attempt has been made to put any special or novel interpretation on the Treaty of 1818. The seizures of the fishing vessels have been made in order to enforce the explicit provisions of that Treaty, the clear and long established provisions of the Imperial Statute, and of the Statutes of Canada.

The proceedings which have been taken to carry out the law of the Empire in this regard, are the same as those which have been taken, from time to time, during the period in which the Convention has been in force, and the seizures of vessels have been made under process of the Imperial Court of Vice-Admiralty established in one of the provinces of Canada.

Mr. Bayard's statement that "the discussion prior to the conclusion of the Treaty of Washington in 1871 was productive of a substantial agreement between the two countries as to the existence and limit of the three marine miles within the line of which, upon the regions defined in the Treaty of 1818, it should not be lawful for American fishermen to take, cure, or dry fish," does not appear to the undersigned to have any important bearing on the subject under consideration.

The correspondence preceding the Washington Treaty (1871) shows that while the United States insisted that the limit of the three marine miles should follow the sinuosities of the coast, the representatives of Great Britain distinctly claimed that the limit should be three marine miles from the coast line, or from a line drawn across the mouths of bays, harbours, and inlets from headland to headland.

A friendly and conciliatory spirit induced the Government
307 of Great Britain to allow the right in that respect to remain in abeyance, and to refrain from the strict enforcement thereof; but no agreement was come to by which the right to have the line of demarcation drawn from headland to headland was given up on the part of Great Britain, and that right is now insisted upon by the Government of Canada as firmly as it is within the province of a Government subordinate to Imperial authority to do.

Mr. Bayard further observes that since the Treaty of 1818 "a series of laws and regulations affecting the trade between the North American Provinces and the United States, have been respectively adopted by the two countries, and have led to amicable and mutually beneficial relations between their respective inhabitants," and that "the independent and yet concurrent action of the two Governments has effected a gradual extension from time to time of the provisions of Article I. of the Convention of July 3rd, 1815, providing for reciprocal liberty of commerce between the United States and the territories of Great Britain in Europe, so as gradually to include the Colonial possessions of Great Britain in North America and the West Indies within the limits of that Treaty." In reference to this statement the undersigned has to observe that Mr. Bayard's letter proceeds to state certain instances in which it appears to be contended that the Laws and regulations so adopted have effected the provisions of the Convention, and the undersigned is obliged to assume that the argument is derived only from those instances, as he is unable to find any Law or Regulation which has been in the least degree infringed by the action of the Dominion Authorities in protecting their Fisheries.

He has referred to the Proclamation of President Jackson in 1830, creating "reciprocal commercial intercourse on terms of perfect equality of flag" between the United States and the British American Dependencies, and has suggested that those "commercial privileges have since received a large extension, and that in some cases favours have been granted by the United States without equivalent concession," such as "the exemption granted by the Shipping Act of June 26th, 1884, amounting to one half of the regular tonnage dues on all vessels from British North American and West Indies entering ports of the United States."

He has also mentioned under this head, "the arrangements for the transit of goods, and the remission by proclamation as to certain British Ports and places of the remainder of the tonnage tax on the evidence of equal treatment being shown" to United States Vessels.

The Proclamation of President Jackson in 1830, had no relation to the subject of the fisheries, and merely had the effect of opening United States Ports to British vessels on terms like those which prevailed in British Ports to vessels of the United States.

The undersigned, while insisting that such legislation can in no way afford a reason for treating the Convention of 1818 as in any

way affected, as to its force and operation, desires to call attention to the fact that the object of those "Laws and Regulations" was purely of a commercial character, while the object of the Convention of 1818 was to establish and define the rights of the citizens of the two countries in relation to the fisheries on the British North American Coast. Bearing this reservation in mind, however, it may be conceded that large improvements have been made in aid of commercial intercourse between the two countries, and that legislation in that direction has not been confined to the Government of the United States, as indeed Mr. Bayard has admitted, in referring to the case of the Imperial Shipping and Navigation Act of 1849. For upwards of forty years Canada has continued to evince her desire for a free exchange of the chief products of the two countries. She has repeatedly urged the desirability of the fuller reciprocity of trade which was established during the period in which the Treaty of 1854 was in force. That Treaty was terminated at the instance of the United States, and the Treaty of 1818 resumed its operation. Afterwards, by the negotiations which led up to the Washington Treaty (1871), Canada again manifested her willingness for even fuller reciprocal relations than the representatives of the United States were willing to sanction by that Treaty.

The same readiness on the part of the Dominion of Canada to extend and facilitate commercial intercourse between the two countries was again shown after the Fishery Clauses of the Treaty of Washington had been rescinded by the Government of the United States, when Canada suggested, through Her Majesty's Government, her willingness to have the subjects of fisheries and trade adjusted on a basis that would promote harmony and commercial intercourse.

Upon that occasion, and in order to give ample time for the consideration of her proposals in that regard, and to avoid an interruption in the meantime of friendly relations, she continued to allow the United States fishermen, for six months, all the advantages which the rescinded Fishery Clauses had previously given them; although her people received from the United States none of the corresponding advantages which the Treaty of 1871 had declared to be an equivalent for the benefits secured thereby to the fishermen of the United States.

The laws prevailing in Canada in relation to the registry of shipping, extend still more liberty than those of the United States, while in relation to the reduction of tonnage dues on Canadian vessels it has escaped the attention of Mr. Bayard that Canada imposes no such dues on United States vessels.

The Ports of Canada in inland waters are free to vessels of the United States, and those vessels are admitted to the use of her canals on equal terms with Canadian vessels.

Canada allows free entry to vessels built in the United States and purchased by British citizens, charges no tonnage or light dues on United States shipping, and extends a standing invitation for a large measure of reciprocity in trade.

Whatever relevancy therefore the argument may have to the subject under consideration, the undersigned submits that the concessions which Mr. Bayard refers to as "favours," can hardly be said not to have been met by equivalent concessions on the part of Canada, and inasmuch as the disposition of Canada continues to be

the same as was evinced in the friendly legislation just referred to, it would seem that Mr. Bayard's charge of "showing hostility to commerce under the guise of protection to inshore fisheries," or "interrupting ordinary commercial intercourse by harsh measures and unfriendly administration," is hardly justified.

308 But even if the Convention of 1818 had been a Treaty of Commerce the undersigned suggests that the adoption by either country of domestic laws extending commercial relations could not be held to abrogate the terms of agreement between the two countries. The questions, however, as has already been suggested, which are in controversy between Great Britain and the United States prior to 1818 related, not to shipping and commerce, but to the liberties of United States fishermen in waters adjacent to the British North American provinces. Those questions were definitely settled by the Convention of that year, and although the terms of that Convention have since been twice suspended, first by the Treaty of 1854, and afterwards by the Treaty of 1871, after the lapse of these two latter Treaties, the provisions made in 1818 came again into operation, and were carried out by the Imperial and Colonial Authorities without the slightest doubt being raised as to their being in full force and vigour.

Mr. Bayard's contention that the effect of the legislation which has taken place under the Convention of 1818, and of executive action thereunder would be "to expand the restrictions and renunciations of that Treaty which related solely to inshore fishing within the three-mile limit, so as to affect the deep sea fisheries," and so as "to diminish and practically destroy the privileges expressly secured to American fishing vessels to visit these inshore waters for the objects of shelter, and repair of damages and purchasing wood and obtaining water," appears to the undersigned to be unfounded. The legislation referred to in no way affects those privileges, nor has the Government of Canada taken any action towards their restrictions. In the cases of the recent seizures, which are the immediate subject of Mr. Bayard's letter, the vessels seized had not resorted to Canadian waters for any one of the purposes allowed. They were United States fishing vessels, and, against the plain terms of the Convention of 1818, had entered harbours of Canada for purposes other than those enumerated as lawful. In doing so the "David J. Adams" was not even possessed of a permit "to touch and trade," even if such a document could be supposed to divest her of the character of a fishing vessel. While the Government of Canada has no desire to expand the restrictions of the Convention of 1818, the undersigned believes that the fair inference to be drawn from Mr. Bayard's contention is that the desire of the United States Government is to extend very largely the privileges which their citizens enjoy under its terms. The contention that the changes which may from time to time take place in the habits of the fish taken off our coasts, or in the methods of taking them, should be regarded as justifying a periodical revision of the provisions of the Treaty cannot be acceded to. Such changes may from time to time render the provisions of the compact inconvenient to one party or the other, but the validity of the agreement can hardly be said to depend on the convenience or inconvenience which it imposes from time to time on one or other of the contracting parties. When the opera-

tion of its provisions can be shown to have become manifestly inequitable and unfair, the utmost that goodwill and fair dealing can suggest is that the terms should be reconsidered, and a new compact entered into; but this the Government of the United States does not appear to have considered desirable.

It is not, however, the case that the Convention of 1818 affected only the inshore fisheries of the British Provinces; it was framed with the object of affording a complete and exclusive definition of the rights and liberties which the fishermen of the United States were thenceforward to enjoy in following their vocation, so far as those rights could be affected by facilities for access to the shores or waters of the British Provinces, or for intercourse with their people. It is, therefore, no undue expansion of the scope of that Convention to interpret strictly those of its provisions by which such access is denied, except to vessels requiring it for the purposes specifically described. An undue expansion of the scope of the Convention would, upon the other hand, certainly take place, if under cover of its provisions, or of any agreements relating to general commercial intercourse which may have since been made, permission were accorded to United States fishermen to resort habitually to the harbours of the Dominion, not for the sake of seeking safety for their vessels, or of avoiding risk to human life, but in order to use those harbours as a general base of operations from which to prosecute and organize, with greater advantage to themselves, the industry in which they are engaged. The undersigned, therefore, cannot concur in Mr. Bayard's contention, that "to prevent the purchase of bait, or any other supply needed for deep sea fishing," "would be to expand the Convention to objects wholly beyond the purview, scope, and intent" of the Treaty, and to "give to it an effect never contemplated."

Mr. Bayard suggests that the possession by a fishing vessel of a permit to "touch and trade" should give her a right to enter Canadian ports for other than the purposes named in the Treaty, or, in other words, should give her perfect immunity from the provisions of the Treaty. This would amount to a practical repeal of the Treaty, because it would enable a United States Collector of Customs, by issuing a license, originally only intended for purposes of domestic Customs regulation, to give exemption from the Treaty to every United States fishing vessel. The observation that similar vessels under the British flag have the right to enter the ports of the United States for the purchase of supplies, loses its force when it is remembered that the Treaty of 1818 contained no restrictions on British vessels, and no renunciation of any privileges in regard to them.

Mr. Bayard states that in the proceedings prior to the Treaty of 1818, the British Commissioners proposed that United States fishing vessels should be excluded "from carrying also merchandise," but that this proposition "being resisted by the American negotiators was abandoned," and goes on to say, "This fact would seem clearly to indicate that the business of fishing did not then and does not now disqualify vessels from also trading in the regular 'ports
309 of entry.'" A reference to the proceedings alluded to will

show that the proposition mentioned had reference only to United States vessels visiting those portions of the coast of Labrador and Newfoundland on which the United States fishermen had been granted the right to fish, and to land for drying and curing fish, and

the rejection of the proposal can only, therefore, be used to indicate that the right to carry merchandise exists in relation to those coasts, and is no ground for supposing that the right extends to the regular ports of entry, against the express words of the Treaty.

The proposition of the British negotiators was to append to Article 1 the following words: "It is, therefore, well understood that the liberty of taking, drying, and curing fish, granted in the preceding part of this Article, shall not be construed to extend to any privilege of carrying on trade with any of His Britannic Majesty's subjects residing within the limits hereinbefore assigned for the use of the fishermen of the United States." It was also proposed to limit them to having on board such goods as might "be necessary for the prosecution of the fishery, or the support of the fishermen while engaged therein, or in the prosecution of their voyages to and from the fishing ground."

To this the American negotiators objected on the ground that the search for contraband goods, and the liability to seizure for having them in possession, would expose the fishermen to endless vexation, and in consequence the proposal was abandoned. It is apparent, therefore, that this proviso in no way referred to the bays or harbours outside the limits assigned to the American fishermen, from which bays and harbours, before and after this proposition was discussed, it was agreed that United States fishing vessels were to be excluded for all purposes other than for shelter and repairs and purchasing wood and obtaining water.

But Mr. Bayard's argument that the rejection of a proposition should lead to an interpretation adverse to the tenor of such proposition suggests strong evidence that United States fishing vessels were not intended to have the right to enter Canadian waters for bait, to be used even in the prosecution of the deep sea fisheries. The United States negotiators made the proposition that the words "and bait" be added to the enumeration of objects for which their fishermen might be allowed to enter, and the proposition was rejected. This could only have referred to the deep sea fishing, because the inshore fisheries had already been specifically renounced.

Mr. Bayard on more than one occasion intimates that the interpretation of the Treaty and its enforcement are dictated by local and hostile feelings, and that the main question is being "obscured by partizan advocacy and distorted by the heat of local interests," and that the administration of the laws is being "conducted in a punitive and hostile spirit which can only tend to induce steps of a retaliatory nature," and in conclusion expresses a hope that "ordinary commercial intercourse shall not be interrupted by harsh measures and unfriendly administration."

The undersigned observes that it is not the wish of the Government or the people of Canada to interrupt for a moment the most friendly commercial intercourse. The mercantile vessels and the commerce of the United States have at present exactly the same freedom that they have for years past enjoyed in Canada, and the disposition of the Canadian Government is to extend reciprocal trade with the United States beyond its present limits; nor can it be admitted that the charge of local prejudice or hostile feeling is justified by the calm enforcement, through the courts of the country, of the plain terms of a Treaty between Great Britain and the United States, and

the statutes which have been in operation for nearly seventy years, excepting in intervals during which (until put an end to by the United States Government) special and more liberal provisions existed in relation to the commerce and fisheries of the two countries.

The undersigned has also to call attention to the letter of Mr. Bayard of the 20th instant, likewise addressed to Her Majesty's Minister at Washington, relating also to the seizure of the "David J. Adams" in the Port of Digby, Nova Scotia. That vessel was seized, as has been explained on a previous occasion, by the Commander of the Canadian steamer "Lansdowne," under the following circumstances. She was a United States fishing vessel, and entered the harbour of Digby for purposes other than those for which entry is permitted by the Treaty and by the Imperial and Canadian Statutes. As soon as practicable legal process was obtained from the Vice-Admiralty Court at Halifax, and the vessel was delivered to the officers of that Court. The paper referred to in Mr. Bayard's letter as having been nailed to her mast, was doubtless a copy of the warrant which commanded the marshal, or his deputy, to make the arrest. The undersigned is informed that there was no intention whatever of so adjusting the paper that its contents could not be read; but it is doubtless correct that the officer of the Court in charge declined to allow the document to be removed. Both the United States Consul-General and the Captain of the "David J. Adams" were made acquainted with the reasons for the seizure, and the only ground for the statement, that a respectful application to ascertain the nature of the complaint was fruitless, was that the Commander of the "Lansdowne," after the nature of the complaint had been stated to those concerned and was published, and had become notorious to the people of both countries, declined to give the United States Consul-General a specific and precise statement of the charges upon which the vessel would be proceeded against, but referred him to his superior.

While it is to be regretted that this should seem to be discourteous, the officer of the "Lansdowne" can hardly be said to have been pursuing an "extraordinary" course. The legal proceedings had at that time been commenced in the Court of Vice-Admiralty at Halifax, where the United States Consul-General resides, and the officer at Digby could not state with precision, as he was called on to do, the grounds on which the intervention of the Court had been claimed in the proceedings therein. There was not in this instance

310 the slightest difficulty in the United States Consul-General, and those interested in the vessel, obtaining the fullest information; and no information which could have been given by those to whom they applied was withheld. Apart from the general knowledge of the offences which it was claimed the master had committed, and which was furnished at the time of the seizure, the most technical and precise details were readily obtainable at the Registry of the Court, and from the Solicitor for the Crown, and would have been furnished immediately on application to the authority to whom the Commander of the "Lansdowne" requested the United States Consul-General to apply. No such information could have been obtained from the paper attached to the vessel's mast. Instructions have, however, been given to the Commander of the "Lansdowne" and

other officers of the Marine Police, that in the event of any further seizures, a statement in writing shall be given to the master of the seized vessel of the offences charged, and that a copy thereof shall be sent to the United States Consul-General at Halifax, and to the nearest United States Consular Agent. There can be no objection to the Solicitor for the Crown being instructed likewise to furnish the Consul-General with a copy of the legal process in each case, if it can be supposed that any fuller information will thereby be given.

Mr. Bayard is correct in his statement of the reasons for which the "David J. Adams" was seized and is now held. It is claimed that the vessel violated the Treaty of 1818, and consequently the statutes which exist for the enforcement of that Treaty, and it is also claimed that she violated the Customs Laws of Canada of 1883. The undersigned recommends that copies of these statutes be furnished for the information of Mr. Bayard.

Mr. Bayard has in the same despatch recalled the attention of Her Majesty's Minister to the correspondence and action which took place in the year 1870, when the Fishery question was under consideration, and especially to the instructions of the Royal Admiralty to Vice-Admiral Wellesley, in which that officer was directed to observe great caution in the arrest of American fishermen, and to confine his action to one class of offences against the Treaty. Mr. Bayard, however, appears to have attached unwarranted importance to the correspondence and instructions of 1870, when he refers to them as implying an "understanding between the two Governments." An understanding which should, in his opinion, at other times, and under other circumstances, govern the conduct of the authorities, whether Imperial or Colonial, to whom, under the laws of the Empire, is committed the duty of enforcing the Treaty in question. When, therefore, Mr. Bayard points out the "absolute and instant necessity that now exists for a restriction of the seizure of American vessels charged with violations of the Treaty of 1818," to "the conditions specified under those instructions," it is necessary to recall the fact that in the year 1870 the action of the Imperial Government was probably influenced very largely by the prospect which then existed of an arrangement such as was accomplished in the following year by the Treaty of Washington, and that it may be inferred, in view of the disposition made apparent on both sides to arrive at such an understanding, that the Imperial Authorities, without any surrender of Imperial or Colonial rights, and without acquiescing in any limited construction of the Treaty, instructed their Vice-Admiral in British North America to confine his seizures to the more open and injurious class of offences, which were especially likely to be brought within the cognizance of the Naval Officers of the Imperial service.

The condition of affairs at the present time is entirely different. No circumstances exist which would seem to call for any such restrictive instructions. The Canadian Government, as has been already stated, for six months left its fishing grounds open to American fishermen without any corresponding advantage in return, in order to afford time for the action of Congress in regard to the President's suggestion that a commission should be appointed to consider the subjects involved in the Fishery clauses of the Treaty of Washington. Congress has evinced no desire to carry out that recommendation,

and the undersigned respectfully submits that the adoption of instructions, limiting in any way the enforcement of the laws for the protection of the Fisheries is a step against which it is the duty of the Government of Canada most respectfully to protest.

No. 192.—1886, May 29: *Letter from the Earl of Rosebery (British Foreign Secretary) to Sir L. S. S. West.*

(No. 21A. Treaty)

FOREIGN OFFICE, May 29 1886.

SIR,—The American Minister called on me to-day and read me a telegram from Mr. Bayard, of which I enclose a copy.

He again discussed at some length the provisions of the Treaty of 1818, and said that the newspapers which had reached him from America treated the matter as of little moment, because the British Government were sure not to support the action of the Canadian Administration. He also alluded to a correspondence with Lord Kimberley in 1871, in which Lord Kimberley stated that the Imperial Government was the sole interpreter of the British view of Imperial Treaties, and that they were not able to support the Canadian view of the bait clause. Mr. Phelps finally urged that the action of the Canadian Government should be suspended, which would then conduce to a friendly state of matters, which might enable negotiations to be resumed.

I replied to Mr. Phelps that, as regards the strict interpretation of the Treaty of 1818, I was in the unfortunate position, that there
 311 were not two opinions in this country on the matter, and that the Canadian view was held by all authorities to be legally correct. If we are now under the provisions of the Treaty of 1818 it was by the action, not of Her Majesty's Government, or of the Canadian Government, but by the wish of the United States. I had offered to endeavour to procure the prolongation of the temporary arrangement of last year, in order to allow an opportunity for negotiating, and that had been refused. A Joint Commission had been refused, and, in fact, as any arrangement, either temporary or permanent, had been rejected by the United States, it was not a matter of option but a matter of course that we returned to the existing Treaty. As to Lord Kimberley's view, I had had no explanation from him on that point, and of course I entirely concurred with his opinion that the British Government were the interpreters of the British view of Imperial Treaties. As regarded the wish expressed by Mr. Phelps that the present action should be suspended, when possibly an opportunity might arrive for negotiation, I said that that amounted to an absolute concession of the Canadian position with no return whatever, and I feared that the refusal of the United States to negotiate, for so I could not help interpreting Mr. Bayard's silence in answer to my proposition, would produce a bad effect, and certainly would not assist the Imperial Government in their efforts to deal with this question. In the meantime, however, I begged him simply to assure Mr. Bayard that I had received his communication, and that we were still awaiting the Canadian case and the details of the other seizures, that when we had received these, for which we had tele-

graphed, I hoped to be in a better position for giving an answer. Mr. Phelps also touched on the seizures of these ships, and I said that the legality of that would be decided in a Court of Law, and Mr. Phelps objected that it would be a Dominion Court of Law and not an Imperial Court. I replied that an appeal would lie to the Courts in this country, and Mr. Phelps pointed out that that procedure would be expensive; but I reminded him again that it was not our fault that we had been thrown on the provisions of the Treaty of 1818.

I am, &c.,

(Sd.)

ROSEBERRY.

No. 193.—1886, May 29: *Letter from Mr. Bayard to Sir L. S. S. West.*

DEPARTMENT OF STATE,
Washington, 29th May, 1886.

SIR,—I have just received an official imprint of House of Commons Bill No. 136, now pending in the Canadian Parliament, entitled "An Act further to amend the Act respecting fishing by foreign vessels," and am informed that it has passed the House and is now pending in the Senate.

This Bill proposes the forcible search, seizure and forfeiture of any foreign vessel within any harbour in Canada, or hovering within three marine miles of any of the coasts, bays, creeks or harbours in Canada, where such vessel has entered such waters for any purpose not permitted by the laws of nations, or by Treaty or Convention, or by any law of the United Kingdom or of Canada now in force.

I hasten to draw your attention to the wholly unwarranted proposition of the Canadian authorities, through their local agents, arbitrarily to enforce, according to their own construction, the provisions of any Convention between the United States and Great Britain, and, by the interpolation of language not found in any such Treaty, and by interpretation not claimed or conceded by either party to such Treaty, to invade and destroy the commercial rights and privileges of citizens of the United States under and by virtue of Treaty stipulation with Great Britain and Statutes in that behalf made and provided.

I have also been furnished with a copy of Circular No. 371, purporting to be from the Customs Department at Ottawa, dated 7th May, 1886, and to be signed by J. Johnson, Commissioner of Customs, assuming to execute the provisions of the Treaty between the United States and Great Britain, concluded 20th October, 1818; and printed copies of a "Warning," purported to be issued by George E. Foster, Minister of Marine and Fisheries, dated at Ottawa, 5th March, 1886, of a similar tenor, although capable of unequal results in its execution.

Such proceedings I conceive to be flagrantly violative of the reciprocal commercial privileges to which citizens of the United States are lawfully entitled under Statutes of Great Britain and the well defined and publicly proclaimed authority of both countries, besides being in respect of the existing Conventions between the two countries an assumption of jurisdiction entirely unwarranted, and which is wholly denied by the United States.

In the interest of the maintenance of peaceful and friendly relations, I give you my earliest information on this subject, adding that

I have telegraphed Mr. Phelps, our Minister at London, to make earnest protest to Her Majesty's Government against such arbitrary, unlawful, unwarranted and unfriendly action on the part of the Canadian Government and its officials; and have instructed Mr. Phelps to give notice that the Government of Great Britain will be held liable for all losses and injuries to citizens of the United States and their property caused by the unauthorized and unfriendly action of the Canadian Government to which I have referred.

I have, &c.,

(Sd.)

T. F. BAYARD.

312 No. 194.—1886, May 30: *Translated cipher telegram from the Secretary of State of the United States to the United States Minister at London.*

Call attention of Lord Rosebery immediately to Bill number 136, now pending in the Parliament of Canada assuming to execute treaty of 1818, also circular 371, by Johnson, Commissioner of Customs ordering seizure of vessels for violation of treaty. Both are arbitrary and unwarranted assumptions of power, against which you are instructed earnestly to protest, and state that the United States will hold Government of Gt. Britain responsible for all losses which may be sustained by American citizens in the dispossession of their property growing out of the search, seizure, detention or sale of their vessels lawfully within territorial waters of British Nth. America.

BAYARD.

No. 195.—1886, June 2: *Letter from Mr. Phelps to the Earl of Rosebery (British Foreign Secretary).*

LEGATION OF THE UNITED STATES,
London, 2nd June, 1886.

MY LORD,—Since the conversation I had the honour to hold with your Lordship on the morning of the 29th ultimo, I have received from my Government a copy of the Report of the Consul General of the United States at Halifax, giving full details and depositions relative to the seizure of the "David J. Adams," and the correspondence between the Consul General and the Colonial authorities in reference thereto.

The Report of the Consul General, and the evidence annexed to it, appear fully to sustain the points I submitted to your Lordship in the interview above referred to, touching the seizure of this vessel by the Canadian officials.

I do not understand it to be claimed by the Canadian authorities that the vessel seized had been engaged, or was intending to engage, in fishing within any limit prohibited by the Treaty of 1818. The occupation of the vessel was exclusively deep sea fishing, a business in which it had a perfect right to be employed. The ground upon which the capture was made was that the master of the vessel had purchased of an inhabitant of Nova Scotia, near the port of Digby

in that province, a day or two before, a small quantity of bait to be used in fishing in the deep sea, outside the three-mile limit.

The question presented is whether under the terms of the Treaty, and the construction placed upon them in practice for many years by the British Government, and in view of the existing relations between the United States and Great Britain, that transaction affords a sufficient reason for making such a seizure, and for proceeding under it to the confiscation of the vessel and its contents.

I am not unaware that the Canadian authorities, conscious, apparently, that the affirmative of this proposition could not easily be maintained, deemed it advisable to supplement it with a charge against the vessel of a violation of the Canadian Customs Act of 1883, in not reporting her arrival at Digby to the Customs officer. But this charge is not the one on which the vessel was seized, or which must now be principally relied on for its condemnation, and standing alone could hardly, even if well founded, be the source of any serious controversy. It would be at most, under the circumstances, only an accidental and purely technical breach of a Custom-house Regulations, by which no harm was intended, and from which no harm came, and would, in ordinary cases, be easily condoned by an apology, and perhaps the payment of costs.

But trivial as it is, this charge does not appear to be well founded in point of fact. Digby is a small fishing settlement, and its harbour not defined. The vessel had moved about and anchored in the outer part of the harbour, having no business at or communication with Digby, and no reason for reporting to the officer of Customs.

It appears by the Report of the Consul-General to be conceded by the Customs authorities there, that fishing vessels have for forty years been accustomed to go in and out of the bay at pleasure, and have never been required to send ashore and report when they had no business with the port, and made no landing, and that no seizure had ever before been made or claimed against them for so doing.

Can it be reasonably insisted under these circumstances that by the sudden adoption, without notice, of a new rule, a vessel of a friendly nation should be seized and forfeited for doing what all similar vessels had for so long a period been allowed to do without question?

It is sufficiently evident that the claim of a violation of the Customs Act was an afterthought brought forward to give whatever added strength it might to the principal claim on which the seizure had been made.

Recurring, then, to the only real question in the case, whether the vessel is to be forfeited for purchasing bait of an inhabitant of

313 Nova Scotia to be used in lawful fishing, it may be readily admitted that, if the language of the Treaty of 1818 is to be interpreted literally, rather than according to its spirit and plain intent, a vessel engaged in fishing would be prohibited from entering a Canadian port "for any purpose whatever," except to obtain wood or water, to repair damages, or to seek shelter. Whether it would be liable to the extreme penalty of confiscation for a breach of this prohibition, in a trifling and harmless instance, might be quite another question.

Such a literal construction is best refuted by considering its preposterous consequences. If a vessel enters a port to post a letter, or

send a telegram, or buy a newspaper, to obtain a physician in case of illness, or a surgeon in case of accident, to land or bring off a passenger, or even to lend assistance to the inhabitants in fire, flood, or pestilence, it would, upon this construction, be held to violate the Treaty stipulations maintained between two enlightened, maritime, and most friendly nations, whose ports are freely open to each other in all other places and under all other circumstances. If a vessel is not engaged in fishing, she may enter all ports. But if employed in fishing not denied to be lawful, she is excluded, though on the most innocent errand. She may buy water, but not food or medicine; wood, but not coal. She may repair rigging, but not purchase a new rope, though the inhabitants are desirous to sell it. If she even entered the port (having no other business) to report herself to the Custom House, as the vessel in question is now seized for not doing, she would be equally within the interdiction of the Treaty. If it be said these are extreme instances of violation of the Treaty, not likely to be insisted on, I reply that no one of them is more extreme than the one relied upon in this case.

I am persuaded that your Lordship will, upon reflection, concur with me that an intention so narrow, and in its results so unreasonable and so unfair, is not to be attributed to the High Contracting Parties who entered into this Treaty.

It seems to me clear that the Treaty must be construed in accordance with those ordinary and well-settled rules applicable to all written instruments, which, without such salutary assistance, must constantly fail of their purpose. By these rules the letter often gives way to the intent, or, rather, is only used to ascertain the intent. The whole document will be taken together, and will be considered in connection with the attendant circumstances, the situation of the parties, and the object in view. And thus the literal meaning of an isolated clause is often shown not to be the meaning really understood or intended.

Upon these principles of construction, the meaning of the clause in question does not seem doubtful. It is a Treaty of friendship, and not of hostility. Its object was to define and protect the relative rights of the people of the two countries in these fisheries, not to establish a system of non-intercourse, or the means of mutual and unnecessary annoyance. It should be judged in view of the general rules of international comity, and of maritime intercourse and usage, and its restrictions considered in the light of the purposes they were designed to serve.

Thus regarded, it appears to me clear that the words, "for no other purpose whatever," as employed in the Treaty, mean no other purposes inconsistent with the provisions of the Treaty, or prejudicial to the interests of the provinces or their inhabitants, and were not intended to prevent the entry of American fishing vessels into Canadian ports for innocent and mutually beneficial purposes, or unnecessarily to restrict the free and friendly intercourse customary between all civilized maritime nations, and especially between the United States and Great Britain. Such, I cannot but believe, is the construction that would be placed upon this Treaty by an enlightened Court of Justice.

But even were it conceded that if the Treaty was a private contract instead of an international one, a Court, in dealing with an

action upon it, might find itself hampered by the letter from giving effect to the intent, that would not be decisive of the present case.

The interpretation of Treaties between nations in their intercourse with each other proceeds upon broader and higher considerations. The question is not what is the technical effect of the words, but what is the construction most consonant to the dignity, the just interests, and the friendly relations of the sovereign Powers. I submit to your Lordship that a construction so harsh, so unfriendly, so unnecessary, and so irritating as that set up by the Canadian authorities is not such as Her Majesty's Government has been accustomed either to accord or to submit to. It would find no precedent in the history of British diplomacy, and no provocation in any action or assertion of the Government of the United States.

These views derive great if not conclusive force from the action of the British Parliament on the subject, adopted very soon after the Treaty of 1818 took effect, and continued without change to the present time. An Act of Parliament (59 Geo. III, cap. 38) was passed on the 14th June, 1819, to provide for carrying into effect the provisions of the Treaty. After reciting the terms of the Treaty, it enacts (in substance) that it shall be lawful for His Majesty, by Orders in Council, to make such regulations and to give such directions, orders, and instructions to the Governor of Newfoundland, or to any officer or officers in that station, or to any other persons, "as shall or may be from time to time deemed proper and necessary for the carrying into effect the purposes of said convention with relation to the taking, drying, and curing of fish by inhabitants of the United States of America, in common with British subjects, within the limits set forth in the aforesaid Convention."

It further enacts that any foreign vessel engaged in fishing or preparing to fish within three marine miles of the coast (not authorized to do so by Treaty) shall be seized or forfeited upon prosecution in the proper Court.

It further provides as follows:—

That it shall and may be lawful for any fisherman of the said United States to enter into any such bays or harbours of His Britannic Majesty's dominions in America as are last mentioned, for the purpose of shelter and repairing damages therein, and of purchasing wood and of obtaining water, and for no other purpose whatever; subject, nevertheless, to such restrictions as may be necessary to prevent such fishermen of the said United States from taking, drying, or curing fish in the said bays or harbours, or in any other manner whatever abusing the said privileges by the said Treaty and this Act reserved to them, and as shall for that purpose be imposed by any Order or Orders to be from time to time made by His Majesty in Council under the authority of this Act; and by any regulations which shall be issued by the Governor, or person exercising the office of Governor, in any such parts of His Majesty's dominions in America, under or in pursuance of any such Order in Council as aforesaid.

It further enacts as follows:—

That if any person or persons, upon requisition made by the Governor of Newfoundland, or the person exercising the office of Governor, or by any Governor or person exercising the office of Governor in any other parts of His Majesty's dominions in America, as aforesaid, or by any officer or officers acting under such Governor or person exercising the office of Governor, in the execution of any orders or instructions from His Majesty in Council, shall refuse to depart from such bays or harbours; or if any person or persons shall refuse or neglect to conform to any regulations or directions which shall be made or given for the execution of any of the purposes of this Act; every such person so refusing, or otherwise offending against this Act shall forfeit the sum of £200, to be recovered, &c.

It will be perceived from these extracts, and still more clearly from a perusal of the entire Act, that while reciting the language of the Treaty in respect to the purposes for which American "shermen may enter British ports, it provides no forfeiture or penalty for any such entry, unless accompanied either (1) by fishing, or preparing to fish, within the prohibited limits; or (2) by the infringement of restrictions that may be imposed by Orders in Council to prevent such fishing, or the drying or curing of fish, or the abuse of privileges reserved by the Treaty; or (3) by a refusal to depart from the bays or harbours upon proper requisition.

It thus plainly appears that it was not the intention of Parliament, nor its understanding of the Treaty, that any other entry by an American fishing vessel into a British port should be regarded as an infraction of its provisions, or as affording the basis of proceedings against it.

No other Act of Parliament for the carrying out of this Treaty has ever been passed. It is unnecessary to point out that it is not in the power of the Canadian Parliament to enlarge or alter the provisions of the Act of the Imperial Parliament, or to give to the Treaty either a construction or a legal effect not warranted by that Act.

But until the effort which I am informed is now in progress in the Canadian Parliament for the passage of a new Act on this subject, introduced since the seizures under consideration, I do not understand that any Statute has ever been enacted in that Parliament which attempts to give any different construction or effect to the Treaty from that given by the Act of 59 George III.

The only Provincial Statutes which, in the proceedings against the "David J. Adams," that vessel has thus far been charged with infringing are the Colonial Acts of 1868, 1870, and 1883. It is therefore fair to presume that there are no other Colonial Acts applicable to the case, and I know of none.

The Act of 1868, among other provisions not material to this discussion, provides for a forfeiture of foreign vessels "found fishing, or preparing to fish, or to have been fishing in British waters within three marine miles of the coast;" and also provides a penalty of \$400 against a master of a foreign vessel within the harbour who shall fail to answer questions put in an examination by the authorities. No other Act is, by this Statute, declared to be illegal, and no other penalty or forfeiture is provided for.

The very extraordinary provisions in this Statute for facilitating forfeitures, and embarrassing defence against or appeal from them, not material to the present case, would, on a proper occasion, deserve very serious attention.

The Act of 1870 is an amendment of the Act just referred to, and adds nothing to it affecting the present case.

The Act of 1883 has no application to the case, except upon the point of the omission of the vessel to report to the Customs Officer, already considered.

It results, therefore, that, at the time of the seizure of the "David J. Adams" and other vessels, there was no Act whatever, either of the British or Colonial Parliaments which made the purchase of bait by those vessels illegal or provided for any forfeiture, penalty, or proceedings against them for such transaction. And even if such purchase could be regarded as a violation of that clause of the Treaty

which is relied on, no law existed under which the seizure could be justified. It will not be contended that Custom House Authorities or Colonial Courts can seize and condemn vessels for a breach of the stipulations of a Treaty, when no legislation exists which authorises them to take cognizance of the subject, or invests them with any jurisdiction in the premises. Of this obvious conclusion the Canadian authorities seem to be quite aware. I am informed that since the seizures they have pressed, or are pressing, through the Canadian Parliament in much haste an Act which is designed, for the first time in the history of the legislation under this Treaty, to make the facts upon which the American vessels have been seized illegal, and to authorize proceedings against them therefor.

What the effect of such an Act will be in enlarging the provisions of an existing Treaty between the United States and Great Britain need not be considered here. The question under discussion depends upon the Treaty, and upon such legislation, warranted by the Treaty, as existed when the seizures took place.

315 The practical construction given to the Treaty down to the present time has been in entire accord with the conclusions thus deduced from the Act of Parliament. The British Government has repeatedly refused to allow interference with American fishing vessels, unless for illegal fishing, and has given explicit orders to the contrary.

On the 26th May, 1870, Mr. Thornton, the British Minister at Washington, communicated officially to the Secretary of State of the United States copies of the orders addressed by the British Admiralty to Admiral Wellesley, commanding Her Majesty's naval forces on the North American Station, and of a letter from the Colonial Department to the Foreign Office, in order that the Secretary might "see the nature of the instructions to be given to Her Majesty's and the Canadian officers employed in maintaining order at the fisheries in the neighbourhood of the coasts of Canada." Among the documents thus transmitted is a letter from the Foreign Office to the Secretary of the Admiralty, in which the following language is contained:—

The Canadian Government has recently determined, with the concurrence of Her Majesty's Ministers, to increase the stringency of the existing practice of dispensing with the warnings hitherto given, and seizing at once any vessel detected in violating the law.

In view of this change, and of the questions to which it may give rise, I am directed by Lord Granville to request that you will move their Lordships to instruct the officers of Her Majesty's ships employed in the protection of the fisheries that they are not to seize any vessel unless it is evident, and can be clearly proved, that the offence of fishing has been committed, and the vessel itself captured, within three miles of land.

In the letter from the Lords of the Admiralty to Vice-Admiral Wellesley of the 5th May, 1870, in accordance with the foregoing request, and transmitting the letter above quoted from, there occurs the following language:—

My Lords desire me to remind you of the extreme importance of Commanding Officers of the ships selected to protect the fisheries exercising the utmost discretion in carrying out their instructions, paying special attention to Lord Granville's observation, that no vessel should be seized unless it is evident, and can be clearly proved, that the offence of fishing has been committed, and that the vessel is captured within three miles of land.

Lord Granville, in transmitting to Sir John Young the aforesaid instructions, makes use of the following language:—

Her Majesty's Government do not doubt that your Ministers will agree with them as to the propriety of these instructions, and will give corresponding instructions to the vessels employed by them.

These instructions were again officially stated by the British Minister at Washington, to the Secretary of State of the United States, in a letter dated the 11th June, 1870.

Again, in February, 1871, Lord Kimberley, Colonial Secretary, wrote to the Governor General of Canada as follows:—

The exclusion of American fishermen from resorting to Canadian ports, except for the purpose of shelter, and of repairing damages therein, purchasing wood, and of obtaining water, might be warranted by the letter of the Treaty of 1818, and by the terms of the Imperial Act 59 Geo. III. cap. 38; but Her Majesty's Government feel bound to state that it seems to them an extreme measure, inconsistent with the general policy of the Empire, and they are disposed to concede this point to the United States' Government, under such restrictions as may be necessary to prevent smuggling, and to guard against any substantial invasion of the exclusive rights of fishing which may be reserved to British subjects.

And in a subsequent letter from the same source to the Governor General, the following language is used:—

I think it right, however, to add that the responsibility of determining what is the true construction of a Treaty made by Her Majesty with any foreign Power must remain with Her Majesty's Government, and that the degree to which this country would make itself a party to the strict enforcement of the Treaty rights may depend not only on the literal construction of the Treaty, but on the moderation and reasonableness with which these rights are asserted.

I am not aware that any modification of these instructions, or any different rule from that therein contained, has ever been adopted or sanctioned by Her Majesty's Government.

Judicial authority upon this question is to the same effect. That the purchase of bait by American fishermen in the provincial ports has been a common practice is well known, but in no case, so far as I can ascertain, has a seizure of an American vessel ever been enforced on the ground of the purchase of bait, or of any other supplies. On the hearing before the Halifax Fisheries Commission in 1877-78 this question was discussed, and no case could be produced of any such condemnation. Vessels shown to have been condemned were in all cases adjudged guilty either of fishing, or preparing to fish, within the prohibited limit.

And in the case of the "White Fawn," tried in the Admiralty Court at New Brunswick before Judge Hazen in 1870, I understand it to have been distinctly held that the purchase of bait, unless proved to have been in preparation for illegal fishing, was not a violation of the Treaty nor of any existing Law, and afforded no ground for proceedings against the vessel.

But even were it possible to justify on the part of the Canadian authorities the adoption of a construction of the Treaty entirely different from that which has always heretofore prevailed, and
316 to declare those acts criminal which have hitherto been regarded as innocent, upon obvious grounds of reason and justice, and upon common principles of comity to the United States' Government, previous notice should have been given to it or to the

American fishermen of the new and stringent restrictions it was intended to enforce.

If it was the intention of Her Majesty's Government to recall the instructions which I have shown had been previously and so explicitly given relative to interference with American vessels, surely notice should have been given accordingly.

The United States have just reason to complain, even if these restrictions could be justified by the Treaty, or by the Acts of Parliament passed to carry it into effect, that they should be enforced in so harsh and unfriendly a manner, without notice to the Government of the change of policy, or to the fishermen of the new danger to which they were thus exposed.

In any view, therefore, which it seems to me can be taken of this question, I feel justified in pronouncing the action of the Canadian authorities in seizing and still retaining the "David J. Adams" to be not only unfriendly and discourteous, but altogether unwarrantable.

The seizure was much aggravated by the manner in which it was carried into effect. It appears that four several visitations and searches of the vessel were made by boats from the Canadian steamer "Lansdowne" in Annapolis Basin, Nova Scotia. The "Adams" was finally taken into custody, and carried out of the Province of Nova Scotia across the Bay of Fundy and into the port of St. John, New Brunswick; and, without explanation or warning, on the following Monday, the 10th May, taken back by an armed crew to Digby, in Nova Scotia. That, in Digby, the paper alleged to be the legal precept for the capture and detention of the vessel was nailed to her mast in such manner as to prevent its contents being read, and the request of the Captain of the "David J. Adams," and of the United States' Consul General, to be allowed to detach the writ from the mast, for the purpose of learning its contents, was positively refused by the provincial official in charge. Nor was the United States' Consul General able to learn from the Commander of the "Lansdowne" the nature of the complaint against the vessel, and his respectful application to that effect was fruitless.

From all the circumstances attending this case, and other recent cases like it, it seems to me very apparent that the seizure was not made, for the purpose of enforcing any right or redressing any wrong. As I have before remarked, it is not pretended that the vessel had been engaged in fishing, or was intended to fish, in the prohibited waters, or that it had done, or was intending to do, any other injurious act. It was proceeding upon its regular and lawful business of fishing in the deep sea. It had received no request, and, of course, could have disregarded no request, to depart, and was in fact departing when seized; nor had its master refused to answer any questions put by the authorities.

It had violated no existing law, and had incurred no penalty that any known statute imposed.

It seems to me impossible to escape the conclusion that this and other similar seizures were made by the Canadian authorities for the deliberate purpose of harassing and embarrassing the American fishing vessels in the pursuit of their lawful employment, and the injury which would have been a serious one if committed under a mistake,

is very much aggravated by the motives which appear to have prompted it.

I am instructed by my Government earnestly to protest against these proceedings as wholly unwarranted by the Treaty of 1818, and altogether inconsistent with the friendly relations hitherto existing between the United States and Her Majesty's Government; to request that the "David J. Adams" and the other American fishing vessels now under seizure in Canadian ports be immediately released; and that proper orders may be issued to prevent similar proceedings in the future; and I am also instructed to inform you that the United States will hold Her Majesty's Government responsible for all losses which may be sustained by American citizens in the dispossession of their property growing out of the search, seizure, detention, or sale of their vessels lawfully within the territorial waters of British North America.

The real source of the difficulty that has arisen is well understood. It is to be found in the irritation that has taken place among a portion of the Canadian people on account of the termination, by the United States' Government, of the Treaty of Washington on the 1st July last, whereby fish imported from Canada into the United States, and which, so long as that Treaty remained in force, was admitted free, is now liable to the import duty provided by the General Revenue Laws. And the opinion appears to have gained ground in Canada that the United States may be driven, by harrassing and annoying their fishermen, into the adoption of a new Treaty by which Canadian fish shall be admitted free.

It is not necessary to say that this scheme is likely to prove as mistaken in policy as it is indefensible in principle. In terminating the Treaty of Washington the United States were simply exercising a right expressly reserved to both parties by the Treaty itself, and of the exercise of which by either party neither can complain. They will not be coerced by wanton injury into the making of a new one. Nor would a negotiation that had its origin in mutual irritation be promising of success. The question now is not what fresh Treaty may or might be desirable, but what is the true and just construction, as between the two nations, of the Treaty that already exists.

The Government of the United States, approaching this question in a most friendly spirit, cannot doubt that it will be met by Her Majesty's Government in the same spirit, and feels every confidence that the action of Her Majesty's Government in the premises will be such as to maintain the cordial relations between the two countries that have so long happily prevailed.

I have, &c.,

(Sd.)

E. J. PHELPS.

317 No. 196.—1886, June 2: *Letter from Earl of Rosebery to Sir L. S. S. West.*

(No. 24. Treaty.)

FOREIGN OFFICE, 2nd June, 1886.

SIR,—The American Minister informed me to-day, in the course of conversation, that he was at this moment preparing a statement of the American contention with regard to the recent seizures under

the terms of the Convention of 1818. He entered into a long argument to show that seizure was not provided for by law as a penalty for the infraction of this clause; that what was provided for was a punishment for American vessels fishing within the forbidden limits. He said that his Government could not admit the interpretation which apparently was accepted by the Canadian Government, and he mentioned the fact that in any case the American fishermen had no notice of the action that was going to be taken. As to the latter point, I replied that that was not the fault of Her Majesty's Government. On the 18th March I had telegraphed to you to ask you to request the Secretary of State to issue a Notice such as we were about to issue to Canadian fishermen, and he had declined to do so. Mr. Phelps was not aware of this. I went on to say that the view of the American Government appeared to be this: "You are to accept our interpretation of the Treaty, whether it be yours or not, and in any case we will not negotiate with you." I said that that was not a tenable proposition. Mr. Phelps said that it was quite true that his Government, owing to circumstances of which I was aware, had not been able to negotiate, but as regarded the Treaty, he felt sure that he would be able to convince me that the American interpretation was correct. I said that, as regards the circumstances to which he had alluded, we had only to look to the United States' Government, and could not look beyond it. He would remember that at almost our first interview on my accession to office I had proposed to him to endeavour to procure the continuation of the recent arrangement for a year, although that arrangement was disadvantageous to Canada in that it gave the United States all it wanted and gave Canada nothing in return. We had also pressed on the United States' Government the issue of a joint commission to investigate the matter, and that had also been refused. Further, on the 24th May, I made a proposal, personally indeed, but with all the weight which my official character could give, that Canadian action should be suspended, and negotiations should commence, and to this I had receive no reply. In these circumstances, I could not feel that Her Majesty's Government had been wanting in methods of conciliation, and I begged him to send me his statement of his case as quickly as possible, for in the meantime there was such unanimity among our Legal Advisers as to the interpretation of the Treaty of 1818 that I had nothing to submit to them. As regards the cases themselves, I had as yet no details, nor was I in possession of the Bill or of the Circular to which Mr. Bayard's recent telegram referred.

I am, &c.,

(Sd.)

ROSEBERY.

No. 197.—1886, June 5: *Report of the Canadian Minister of Marine and Fisheries.*

DEPARTMENT OF FISHERIES,
Canada, Ottawa, June 5th, 1886.

With reference to a despatch from the British Minister at Washington, to his Excellency the Governor General, dated 21st May last, and enclosing a letter from Mr. Secretary Bayard, regarding the

refusal of the Collector of Customs at Digby, N. S., to allow the United States schooner "Jennie and Julia" the right of exercising commercial privileges at the said port, the undersigned has the honour to make the following observations:—

It appears the "Jennie and Julia" is a vessel of about 14 tons register, that she was to all intents and purposes a fishing vessel, and at the time of her entry into the port of Digby had fishing gear and apparatus on board, and that the Collector fully satisfied himself of these facts. According to the master's declaration she was there to purchase fresh herring only, and wished to get them direct from the weir fishermen. The Collector acted upon his conviction that she was a fishing vessel and as such debarred by the Treaty of 1818 from entering Canadian ports for purposes of trade. He, therefore, in the exercise of his plain duty, warned her off.

The Treaty of 1818 is explicit in its terms, and by it United States' fishing vessels are allowed to enter Canadian ports for shelter, repairs, wood and water, and "for no other purpose whatever."

The undersigned is of the opinion that it cannot be successfully contended, that a *bona fide* fishing vessel can, simply by declaring her intention of purchasing fresh fish for other than baiting purposes, evade the provisions of the Treaty of 1818 and obtain privileges not contemplated thereby. If that were admitted, the provision of the Treaty which excludes United States' fishing vessels for all purposes but the four above mentioned, would be rendered null and void and the whole United States' fishing fleet be at once lifted out

318 of the category of fishing vessels, and allowed free use of Canadian ports for baiting, obtaining supplies and transshipping cargoes.

It appears to the undersigned that the question as to whether a vessel is a fishing vessel or a legitimate trader or merchant vessel is one of fact, and to be decided by the character of the vessel and the nature of her outfit, and that the class to which she belongs is not to be determined by the simple declaration of her master that he is not at any given time acting in the character of a fisherman.

At the same time, the undersigned begs again to observe that Canada has no desire to interrupt the long-established and legitimate commercial intercourse with the United States, but rather to encourage and maintain it, and that Canadian ports are at present open to the whole merchant navy of the United States on the same liberal conditions as heretofore accorded.

The whole respectfully submitted,

(Sd.) GEO. E. FOSTER,
Minister of Marine and Fisheries.

No. 198.—1886, June 7: Letter from Mr. Bayard (United States Secretary of State) to Sir L. S. S. West (British Minister).

DEPARTMENT OF STATE,
Washington, June 7, 1886.

SIR: I regret exceedingly to communicate that report is to-day made to me, accompanied by affidavit, of the refusal of the Collector of Customs of the port of St. Andrews, New Brunswick, to allow

the Master of the American schooner, Annie M. Jordan, of Gloucester, Mass., to enter the said vessel at that port, although properly documented as a fishing vessel with permission to touch and trade at any foreign port or place during her voyage.

The object of such entry was explained by the Master to be the purchase and exportation of "certain merchandize" (possibly fresh fish for food, or bait for deep-sea fishing).

The vessel was threatened with seizure by the Canadian authorities, and her owners allege that they have sustained damage from this refusal of commercial rights.

I earnestly protest against this unwarranted withholding of lawful commercial privileges from an American vessel and her owners, and for the loss and damage consequent thereon the Government of Great Britain will be held liable.

I have, &c.,

T. F. BAYARD.

No. 199.—1886, June 8: *Letter from the Marquis of Lansdowne (Governor-General of Canada), to Earl Granville.*

QUÉBEC, 8th June, 1886.

MY LORD,—In reference to your Lordship's telegrams of the 3rd and 4th inst., in which you have called the attention of my Government to the Customs circular No. 371 and to the "Warning" enclosed therein, I think it desirable to make the following observations in explanation of the telegraphic replies which I have addressed to your Lordship.

In your telegram of the 4th inst., your Lordship pointed out that the terms of the concluding paragraph of the "Warning" in question had the effect of excluding not only vessels belonging to the United States but all foreign vessels from Canadian bays and harbours, and you observed that this was probably not intentional as nothing in the act recited would justify such an exclusion.

I have ascertained that the "Warning," as originally issued from the Department of Fisheries after reciting the 1st article of the Convention of 1818, and sections 2, 3, and 4 of the Canadian Act of 1868, respecting fishing by foreign vessels, contained the following paragraph:—

Therefore be it known, that by virtue of the Treaty provisions and Act of Parliament above recited, all foreign vessels or boats are forbidden from fishing or taking fish by any means whatever within three marine miles of any of the coasts, bays, creeks and harbours in Canada, or to enter such bays, harbours and creeks except for the purpose of shelter and of repairing damages therein, of purchasing wood and obtaining water, and for no other purposes whatever; of all of which you will take notice and govern yourself accordingly.

The passage quoted would, as your Lordship has pointed out, have affected all foreign vessels, whether belonging to the United States or not. The mistake was however, detected and the "Warning"

issued in a revised form from which the paragraph which I have quoted was omitted and replaced by the words "of all of which you will take notice and govern yourself accordingly."

I enclose herewith copies of the Warning in its original and in its amended form. It is possible that your Lordship or the American

Minister may have seen the Warning before it had been amended in the manner which I have described. The amended form which merely recites Art. I. of the Convention of 1818 and the Canadian Statute of 1868, appears to me to be entirely free from objection. The latter of these statutes is, as your Lordship is aware, substantially the same as the Imperial Act of 1819 (59 Geo. III., cap. 58), although the provisions relating to hovering are taken from another Imperial Statute (9 Geo. III., cap. 35). The law of the United States as to hovering is, I believe, the same as that embodied in this Statute.

The concluding paragraphs of the Circular No. 371 to which, and not to the warning, your Lordship's telegram of the 4th of June may have been intended to refer, are also, I think, open to objection. After reciting the Dominion Act of 1868, which, like the Imperial Statute of 1819, applies to foreign vessels generally, the Circular proceeds to mention specially certain Acts as violations, not of either of the Statutes in question, but of the Convention of 1818, and declares that if "such vessels or boats," that is, any foreign fishing vessels or boats, are found committing those acts they are to be detained. As, however, the Convention has reference to the fishing rights of the United States and not to those of other Foreign Powers, the passages which I have quoted are, I think, certainly open to the criticism not only that they assume that the Acts described are violations of the Convention, but that they seek to apply whatever penalties may be enforced against parties contravening the Convention to vessels to which those provisions are not properly applicable.

This point has been considered by my Government with every desire to revise the Circular in such a manner as to remove all reasonable objections to it upon these or other grounds, and I have much pleasure in informing your Lordship that the Circular will be re-issued with the following concluding paragraphs in lieu of those referred to above:—

Having reference to the above you are requested to furnish any foreign fishing vessels, boats or fishermen found within three marine miles of the shore within your district with a printed copy of the warning enclosed herewith.

If any fishing vessel or boat of the United States is found fishing or to have been fishing or preparing to fish, or if hovering within the three mile limit, does not depart within twenty-four hours after receiving such warning, you will place an officer on board of such vessel and at once telegraph the facts to the Fisheries Department at Ottawa and await instructions.

The effect of these words will be that every foreign fisherman found within the three mile limit will receive a warning which will make him aware of the state of the law, while every fishing vessel belonging to the United States found contravening the existing Canadian Statutes, which, as I have already reminded your Lordship, in these respects follow closely those passed by the Imperial Parliament, will, if not departing within twenty-four hours after receiving such warning, be detained under the conditions described.

I trust that the above explanation will be satisfactory to your Lordship.

I have, &c.,

(Sd.)

LANSDOWNE.

The Right Honourable EARL GRANVILLE, K.G.,
&c., &c., &c.

No. 200.—1886, June 14: *Report of a Committee of the Privy Council for Canada, approved by the Governor-General in Council, with annexed Report of the Minister of Marine and Fisheries.*

The Committee of the Privy Council have had under consideration a Report from the Minister of Marine and Fisheries upon the communications, under date the 10th and 20th May last, from the Hon. Mr. Bayard, Secretary of State of the United States, to Her Majesty's Minister at Washington, in reference to the seizure of the American fishing vessel "David J. Adams."

The Committee concur in the annexed report, and they advise that your Excellency be moved to transmit a copy thereof, if approved, to the Right Hon. the Secretary of State for the Colonies.

All which is respectfully submitted for your Excellency's approval.

(Sd.) JOHN J. MCGEE,
Clerk, Privy Council for Canada.

[*Accompanying Report of the Minister of Marine and Fisheries.*]

320 The undersigned, having had his attention called by your Excellency to a communication from Mr. Bayard, Secretary of State of the United States, dated the 10th May, and addressed to Her Majesty's Minister at Washington, in reference to the seizure of the American fishing vessel "David J. Adams," begs leave to submit the following observations thereon:—

Your Excellency's Government fully appreciates and reciprocates Mr. Bayard's desire that the administration of the laws regulating the commercial interests and the mercantile marine of the two countries might be such as to promote good feeling and mutual advantage. Canada has given many indisputable proofs of an earnest desire to cultivate and extend her commercial relations with the United States, and it may not be without advantage to recapitulate some of those proofs.

For many years before 1854 the maritime provinces of British North America had complained to Her Majesty's Government of the continuous invasion of their inshore fisheries (sometimes accompanied, it was alleged, with violence) by American fishermen and fishing vessels.

Much irritation naturally ensued, and it was felt to be expedient by both Governments to put an end to this unseemly state of things by Treaty, and at the same time to arrange for enlarged trade relations between the United States and the British North American Colonies. The Reciprocity Treaty of 1854 was the result by which not only were our inshore fisheries opened to the Americans, but provision was made for the free interchange of the principal natural products of both countries, including those of the sea.

Peace was preserved on our waters, and the volume of international trade steadily increased during the existence of this Treaty, and until it was terminated in 1866—not by Great Britain, but by the United States.

In the following year Canada (then become a Dominion and united to Nova Scotia and New Brunswick) was thrown back on the Convention of 1818, and obliged to fit out a Marine Police to enforce the laws and defend her rights. Still desiring, however, to cultivate friendly relations with her great neighbour, and not too suddenly to deprive American fishermen of their accustomed fishing grounds and means of livelihood, she readily acquiesced in the proposal of Her Majesty's Government for the temporary issue of annual licenses to fish, on payment of a moderate fee. Your Excellency is aware of the failure of that scheme. A few licenses were issued at first, but the applications for them soon ceased, and the American fishermen persisted in forcing themselves into our waters without leave or license.

Then came the recurrence, in an aggravated form, of all the troubles which had occurred anterior to the Reciprocity Treaty. There were invasions of our waters, personal conflicts between our fishermen and American crews, the destruction of nets, the seizure and condemnation of vessels, and intense consequent irritation on both sides. This was happily put an end to by the Washington Treaty of 1871. In the interval between the termination of the first Treaty and the ratification of that by which it was evidently [eventually] replaced, Canada on several occasions pressed without success, through the British Minister at Washington, for a renewal of the Reciprocity Treaty, or for the negotiation of another on a still wider basis.

When, in 1874, Sir Edward Thornton, then British Minister at Washington, and the late Hon. George Brown, of Toronto, were appointed joint Plenipotentiaries for the purpose of negotiating and concluding a Treaty relating to "Fisheries, Commerce and Navigation," a Provisional Treaty was arranged by them with the United States' Government, but the Senate decided that it was not expedient to ratify it, and the negotiation fell to the ground.

The Treaty of Washington, while it failed to restore the provisions of the Treaty of 1854 for reciprocal free trade (except in fish), at least kept the peace, and there was tranquility along our shores until July, 1885, when it was terminated again by the United States' Government and not by Great Britain.

With a desire to show that she wished to be a good neighbour and in order to prevent loss and disappointment on the part of the United States' fishermen by their sudden exclusion from her waters in the middle of the fishing season, Canada continued to allow them for six months all the advantages which the rescinded Fishery Clauses had previously given them, although her people received from the United States none of the corresponding advantages which the Treaty of 1871 had declared to be an equivalent for the benefits secured thereby to the American fishermen.

The President in return for this courtesy promised to recommend to Congress the appointment of a joint commission by the two Governments of the United Kingdom and the United States to consider the Fishery question, with permission also to consider the whole state of the trade relations between the United States and Canada.

This promise was fulfilled by the President, but the Senate rejected his recommendation and refused to sanction the Commission.

Under these circumstances, Canada, having exhausted every effort to procure an amicable arrangement, has been driven again to fall

back upon the Convention of 1818, the provisions of which she is now enforcing and will enforce in no punitive or hostile spirit, as Mr. Bayard supposes, but solely in protection of her fisheries, and in vindication of the right secured to her by Treaty.

Mr. Bayard suggests that "the Treaty of 1818 was between two nations, the United States of America and Great Britain, who, as the contracting parties, can alone apply authoritative interpretation thereto, and enforce the provisions by appropriate legislation."

As it may be inferred from this statement that the right of the Parliament of Canada to make enactments for the protection
321 of the fisheries of the Dominion, and the power of the Canadian officers to protect those fisheries, are questioned, it may be well to state at the outset the grounds upon which it is conceived by the undersigned that the jurisdiction in question is clear beyond a doubt.

(1.) In the first place the undersigned would ask it to be remembered that the extent of the jurisdiction of the Parliament of Canada is not limited (nor was that of the provinces before the Union) to the sea coast, but extends for three marine miles from the shore as to all matters over which any legislative authority can in any country be exercised within that space. The legislation which has been adopted on this subject by the Parliament of Canada (and previously to Confederation by the Provinces) does not reach beyond that limit. It may be assumed that in the absence of any Treaty stipulation to the contrary this right is so well recognized and established by both British and American law, that the grounds on which it is supported need not be stated here at large. The undersigned will merely add, therefore, to this statement of the position, that so far from the right being limited by the Convention of 1818 that Convention expressly recognizes it.

After renouncing the liberty to "take, cure or dry fish on or within three marine miles of any of the coasts, bays, creeks or harbors of His Majesty's dominions in America," there is a stipulation that while American fishing vessels shall be admitted to enter such bays, &c., "for the purpose of shelter and of repairing damages therein, of purchasing wood and of obtaining water," they shall be under such restrictions as may be necessary to prevent their taking, curing or drying fish therein, or in any other manner whatever abusing the privileges reserved to them.

(2.) "Appropriate legislation" on this subject was, in the first instance, adopted by the Parliament of the United Kingdom. The Imperial Statute 59 George III., chap. 38, was enacted in the year following the Convention in order to give that Convention force and effect. That statute declared that except for the purposes before specified it should "not be lawful for any person or persons, not being a natural born subject of His Majesty, in any foreign ship, vessel or boat, nor for any person in any ship, vessel or boat, other than such as shall be navigated according to the laws of the United Kingdom of Great Britain and Ireland, to fish for, or to take, dry or cure any fish of any kind whatever within three marine miles of any coasts, bays, creeks or harbors whatever in any part of His Majesty's dominions in America, not included within the limits specified and described in the first Article of the said Convention, and that if such foreign ship, vessel or boat or any persons on board thereof, shall be found fishing, or to have been fishing, or preparing to fish within such distance of such coasts, bays, creeks or harbors within such parts of His Majesty's

dominions in America, out of the said limits as aforesaid, all such ships, vessels and boats together with their cargoes and all guns, ammunition, tackle, apparel, furniture and stores, shall be forfeited and shall and may be seized, taken, sued for, prosecuted, recovered and condemned by such and the like ways, means and methods and in the same Courts as ships, vessels or boats may be forfeited, seized, prosecuted and condemned for any offence against any laws relating to the Revenue of Customs or the laws of Trade and Navigation, under any Act or Acts of the Parliament of Great Britain, or of the United Kingdom of Great Britain and Ireland; provided that nothing contained in this Act shall apply, or be construed to apply to the ships, or subjects of any Province, [Prince] Power or State in amity with His Majesty, who are entitled by Treaty with His Majesty to any privilege of taking, drying or curing fish on the coasts, bays, creeks or harbors, or within the limits in this Act described; Provided always, that it shall and may be lawful for any fisherman of the said United States to enter into any such bays or harbors of His Britannic Majesty's Dominions in America as are last mentioned for the purpose of shelter and repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever; subject nevertheless to such restrictions as may be necessary to prevent such fishermen of the said United States from taking, drying or curing fish in the said bays or harbors, or in any other manner whatever abusing the said privileges by the said Treaty and this Act reserved to them, and as shall for that purpose be imposed by any order or orders to be from time to time made by His Majesty in Council under the authority of this Act, and by any regulations which shall be issued by the Governor or person exercising the office of Governor in any such parts of His Majesty's Dominions in America, under or in pursuance of any such order in Council as aforesaid.

"And that if any person or persons, upon requisition made by the Governor of Newfoundland, or the person exercising the office of Governor, or by any Governor in person exercising the office of Governor in any other parts of His Majesty's Dominions in America, as aforesaid, or by any officer or officers acting under such Governor, or person exercising the office of Governor, in the execution of any orders or instructions from His Majesty in Council, shall refuse to depart from such bays or harbors, or if any person or persons shall refuse or neglect to conform to any regulations or directions which shall be made or given for the execution of any of the purposes of this Act, every such person so refusing or otherwise offending against this Act shall forfeit the sum of two hundred pounds, to be recovered in the Superior Court of Judicature of the Island of Newfoundland, or in the Superior Court of Judicature of the colony or settlement within or near to which such offence shall be committed, or by Bill, plaint or information in any of His Majesty's Courts of Record at Westminster, one moiety of such penalty to belong to His Majesty, his heirs and successors, and the other moiety to such person or persons as shall sue or prosecute for the same."

The Acts passed by the provinces now forming Canada, and also by the Parliament of Canada (now noted in the margin)^a are to the

^a Dominion Acts, 31 Vic, Cap. 61. 33 Vic, Cap. 16, now incorporated in revised Statutes of 1886, Cap. 90 Nova Scotia Acts, revised Statutes, 3rd series, C. 94, 29 Vic. (1866) C. 35. New Brunswick Acts, 16 Vic., (1853) C. 69 P. Edward Island Act 6 Vic. (1843) C. 14.

same effect, and may be said to be merely declaratory of the law as established by the Imperial Statute.

322 (3.) The authority of the Legislatures of the Provinces, and after confederation, the authority of the Parliament of Canada, to make enactments to enforce the provisions of the Convention, as well as the authority of Canadian officers to enforce those Acts, rests on well-known constitutional principles.

Those Legislatures existed, and the Parliament of Canada now exists, by the authority of the Parliament of the United Kingdom of Great Britain and Ireland, which is one of the "nations" referred to by Mr. Bayard as the "contracting parties." The Colonial statutes have received the sanction of the British Sovereign, who and not the nation is actually the party with whom the United States made the Convention. The officers who are engaged in enforcing the Acts of Canada or the laws of the Empire are Her Majesty's officers, whether their authority emanates directly from the Queen or from her Representative the Governor-General.

The jurisdiction thus exercised cannot, therefore, be properly described in the language used by Mr. Bayard as a supposed and therefore questionable delegation of jurisdiction by the Imperial Government of Great Britain. Her Majesty governs in Canada as well as in Great Britain; the officers of Canada are Her officers, the statutes of Canada are Her statutes, passed on the advice of Her Parliament sitting in Canada.

It is, therefore, an error to conceive that because the United States and Great Britain were in the first instance the contracting parties to the Treaty of 1818, no questions arising under that Treaty can be "responsibly dealt with" either by the Parliament or by the authorities of the Dominion.

The raising of this objection now is the more remarkable as the Government of the United States has long been aware of the necessity of reference to the Colonial Legislatures in matters affecting their interests. The Treaties of 1854 and 1871 expressly provide that so far as they concerned the fisheries or trade relations of the Provinces, they should be subject to ratification by their several Legislatures, and seizures of American vessels and goods followed by condemnation for breach of the Provincial Customs Laws, have been made for forty years without protest or objection on the part of the United States' Government.

The undersigned with regard to this contention of Mr. Bayard has further to observe that, in the proceedings which have recently been taken for the protection of the fisheries, no attempt has been made to put any special or novel interpretation on the Convention of 1818. The seizures of the fishing vessels have been made in order to enforce the explicit provisions of the Treaty, the clear and long established provisions of the Imperial Statute and of the Statutes of Canada, expressed in almost the same language.

The proceedings which have been taken to carry out the law of the Empire in the present case, are the same as those which have been taken from time to time during the period in which the Convention has been in force, and the seizures of vessels have been made under process of the Imperial Court of Vice-Admiralty established in the Provinces of Canada.

Mr. Bayard further observes that since the Treaty of 1818, "A series of laws and regulations affecting the trade between the North

American Provinces and the United States have been respectively adopted by the two countries, and have led to amicable and mutually beneficial relations between their respective inhabitants," and that "the independent and yet concurrent action of the two Governments has effected a gradual extension from time to time of the provisions of Article 1 of the Convention of July 3, 1815, providing for reciprocal liberty of commerce between the United States and the territories of Great Britain in Europe, so as gradually to include the Colonial possessions of Great Britain in North America and the West Indies within the limits of that Treaty."

The undersigned has not been able to discover in the instances given by Mr. Bayard any evidence that "the Laws and Regulations affecting the trade between the British North American Provinces and the United States," or that "the independent and yet concurrent action of the two Governments" have either extended or restricted the terms of the Convention of 1818, or affected in any way the right to enforce its provisions according to the plain meaning of the Articles of the Treaty. On the contrary a reference to the 18th Article of the Washington Treaty will show that the contracting parties made the Convention the basis of the further privileges granted by the Treaty, and it does not allege that its provisions are in any way extended or affected by subsequent legislation or Acts of Administration.

Mr. Bayard has referred to the Proclamation of President Jackson, in 1830, creating reciprocal commercial intercourse "on terms of perfect equality of flag" between the United States and the British American Dependencies, and has suggested that these "commercial privileges have since received a large extension, and that in some cases favors have been granted by the United States without equivalent concession" such as "the exemption granted by the Shipping Act of June 26, 1884 amounting to one-half of the regular tonnage dues on all vessels from British North America and West Indies entering ports of the United States."

He has also mentioned under this head "the arrangements for the transit of goods, and the remission by Proclamation as to certain British Ports and places, of the remainder of the tonnage tax, on evidence of equal treatment being shown" to United States vessels.

The Proclamation of President Jackson, in 1830, had no relation to the subject of the fisheries, and merely had the effect of opening United States' ports to British vessels on terms similar to those which had already been granted in British Ports to vessels of the United States. The object of these "Laws and Regulations," mentioned by Mr. Bayard, was purely of a commercial character, while the sole purpose of the Convention of 1818 was to establish and define the rights of the citizens of the two countries in relation to the fisheries on the British North American coast.

Bearing this distinction in mind, however, it may be conceded that substantial assistance has been given to the development of
 323 commercial intercourse between the two countries. But legislation in that direction has not been confined to the Government of the United States, as indeed Mr. Bayard has admitted, in referring to the case of the Imperial Shipping and Navigation Act of 1849.

For upwards of forty years, as has already been stated, Canada has continued to evince her desire for a free exchange of the chief products of the two countries. She has repeatedly urged the desirability of the fuller reciprocity of trade, which was established during the period in which the Treaty of 1854 was in force.

The laws of Canada, with regard to the registry of vessels, tonnage dues, and shipping generally, are more liberal than those of the United States. The ports of Canada in inland waters are free to vessels of the United States, which are admitted to the use of her canals on equal terms with Canadian vessels.

Canada allows free registry to ships built in the United States and purchased by British citizens, charges no tonnage or light dues on United States' shipping, and extends a standing invitation for a large measure of reciprocity in trade by her tariff legislation.

Whatever relevancy therefore the argument may have to the subject under consideration, the undersigned submits that the concessions which Mr. Bayard refers to as "favours" granted by the United States can hardly be said not to have been met by equivalent concessions on the part of the Dominion, and inasmuch as the disposition of Canada continues to be the same as was evinced in the friendly legislation just referred to, it would seem that Mr. Bayard's charges of showing "hostility to commerce under the guise of protection to inshore fisheries," or of "interrupting ordinary commercial intercourse by harsh measures and unfriendly administration," is hardly justified.

The questions which were in controversy between Great Britain and the United States prior to 1818, related not to shipping and commerce, but to the claims of United States' Fishermen to fish in waters adjacent to the British North American Provinces.

Those questions were definitely settled by the Convention of that year, and although the terms of that Convention have since been twice suspended, first by the Treaty of 1854, and subsequently by that of 1871, and after the lapse of each of these two Treaties the provisions made in 1818 came again into operation, and were carried out by the Imperial and Colonial Authorities without the slightest doubt being raised as to their being in full force and vigour.

Mr. Bayard's contention that the effect of the legislation which has taken place under the Convention of 1818, and of Executive action thereunder, would be "to expand the restrictions and renunciations of that Treaty, which related solely to inshore fishing, within the three mile limit, so as to affect the deep sea fisheries," and "to diminish and practically destroy the privileges expressly secured to American vessels to visit these inshore waters for the objects of shelter and repair of damages, and purchasing wood and obtaining water," appears to the undersigned to be unfounded. The legislation referred to in no way affects these privileges, nor has the Government of Canada taken any action toward their restriction. In the cases of the recent seizures, which are the immediate subject of Mr. Bayard's letters, the vessel seized had not resorted to Canadian waters for any one of the purposes specified in the Convention of 1818 as lawful. They were United States' fishing vessels, and against the plain terms of the Convention had entered Canadian harbours. In doing so the "David J. Adams" was not even possessed of a permit "to touch and

trade," even if such a document could be supposed to divest her of the character of a fishing vessel.

The undersigned is of opinion that while for the reasons which he has advanced there is no evidence to show that the Government of Canada has sought to expand the scope of the Convention of 1818, or to increase the extent of its restrictions, it would not be difficult to prove that the construction which the United States seek to place on that Convention would have the effect of extending very largely the privileges which their citizens enjoy under its terms. The contention that the changes which may from time to time occur in the habits of the fish taken off our coasts, or in the methods of taking them, should be regarded as justifying a periodical revision of the terms of the treaty, or a new interpretation of its provisions cannot be acceded to. Such changes may from time to time render the conditions of the contract inconvenient to one party or the other, but the validity of the agreement can hardly be said to depend on the convenience or inconvenience which it imposes from time to time on one or other of the contracting parties. When the operation of its provisions can be shown to have become manifestly inequitable, the utmost that goodwill and fair dealing can suggest is that the terms should be re-considered and a new arrangement entered into, but this the Government of the United States does not appear to have considered desirable.

It is not however the case that the Convention of 1818 affected only the inshore fisheries of the British Provinces; it was framed with the object of affording a complete and exclusive definition of the rights and liberties which the fishermen of the United States were thenceforth to enjoy in following their vocation so far as these rights could be affected by facilities for access to the shores or waters of the British Provinces or for intercourse with their people. It is therefore no undue expansion of the scope of that Convention to interpret strictly those of its provisions by which such access is denied, except to vessels requiring it for the purposes specifically described.

Such an undue expansion would, upon the other hand, certainly take place, if, under cover of its provisions, or of any agreements relating to general commercial intercourse which may have since been made, permission were accorded to United States' fishermen to resort habitually to the harbours of the Dominion, not for the sake of seeking safety for their vessels or for avoiding risk to human life, but in order to use these harbours as a general base of operations from which to prosecute and organize with greater advantage to themselves the industry in which they are engaged.

324 It was in order to guard against such an abuse of the provisions of the treaty that amongst them was included the stipulation that not only should the inshore fisheries be reserved to British fishermen but that the United States should renounce the right of their fishermen to enter the bays or harbours, excepting for the four specified purposes, which do not include the purchase of bait or other applicances, whether intended for the deep sea fisheries or not.

The undersigned, therefore, cannot concur in Mr. Bayard's contention that "to prevent the purchase of bait or any other supply needed for deep sea fishing would be to expand the Convention to

objects wholly beyond the purview, scope and intent of the Treaty," and to "give to it an effect never contemplated."

Mr. Bayard suggests that the possession by a fishing vessel of a permit to "touch and trade" should give her a right to enter Canadian ports, for other than the purposes named in the Treaty, or, in other words, should give her perfect immunity from its provisions.

This must amount to a practical repeal of the Treaty, because it would enable a United States' Collector of Customs by issuing a license originally intended for purposes of domestic customs regulation to give exemption from the Treaty to every United States' fishing vessel. The observation that similar vessels under the British flag have the right to enter the ports of the United States for the purchase of supplies, loses its force when it is remembered that the Convention of 1818 contained no restrictions on British vessels, and no renunciation of any privileges in regard to them.

Mr. Bayard states that in the proceedings prior to the Treaty of 1818 the British Commissioners proposed that United States' fishing vessels should be excluded "from carrying also merchandize," but that their proposition "being resisted by the American negotiators, was abandoned"; and goes on to say: "this fact would seem clearly to indicate that the business of fishing did not then, and does not now, disqualify vessels from also trading in the regular ports of entry." A reference to the proceedings alluded to will show that the proposition mentioned related only to United States vessels visiting those portions of the coasts of Labrador and Newfoundland on which the United States' fishermen had been granted the right to fish and to land for drying and curing fish, and the rejection of the proposal can at the utmost be supposed only to indicate that the liberty to carry merchandize might exist without objection in relation to these coasts, and is no ground for supposing that the right extends to the regular ports of entry, against the express words of the Treaty.

The proposition of the British negotiators was to append to Art. 1 the following words: "It is therefore well understood that the liberty of taking, drying and curing fish, granted in the preceding part of this Article, shall not be construed to extend to any privilege of carrying on trade with any of His Britannic Majesty's subjects residing within the limits hereinbefore assigned for the use of the fishermen of the United States."

It was also proposed to limit them to having on board such goods as might "be necessary for the prosecution of the fishery or the support of the fishermen while engaged therein, or in the prosecution of their voyages to and from the fishing grounds."

To this the American negotiators objected on the ground that the search for contraband goods and the liability to seizure for having them in possession would expose the fishermen to endless vexation, and in consequence the proposal was abandoned. It is apparent, therefore, that this proviso in no way referred to the bays or harbours outside of the limits assigned to the American fishermen, from which bays and harbours it was agreed, both before and after this proposition was discussed, that United States' fishing vessels were to be excluded for all purposes except than for shelter and repairs and purchasing wood and obtaining water.

If, however, weight is to be given to Mr. Bayard's argument that the rejection of a proposition advanced by either side during the course of the negotiations, should be held to necessitate an interpretation adverse to the tenor of such proposition, that argument may certainly be held to prove that American fishing vessels were not intended to have the right to enter Canadian waters for bait to be used even in the prosecution of the deep sea fisheries. The United States' negotiators in 1818, made the proposition that the words, "and bait" be added to the emuneration [enumeration] of the objects for which their fishermen might be allowed to enter and the proviso as first submitted had read: "provided, however, that American fishermen shall be permitted to enter such bays and harbours for the purpose only of obtaining shelter, wood, water and bait." The addition of the two last words was, however, resisted by the British Plenipotentiaries and their omission acquiesced in by their American colleagues. It is moreover to be observed that this proposition could only have had reference to the deep sea fishing, because the inshore fisheries had already been specifically renounced by the representatives of the United States.

In addition to this evidence it must be remembered that the United States' Government admitted in the case submitted by them before the Halifax Commission in 1877, that neither the Convention of 1818 nor the Treaty of Washington conferred any right or privilege of trading on American fishermen. The British case claimed compensation for the privilege which had been given since the ratification of the latter treaty to United States' fishing vessels to transfer cargoes, to outfit vessels, buy supplies, obtain ice, engage sailors, procure bait, and traffic generally in British ports and harbours.

This claim was however successfully resisted, and in the United States case it is maintained: that the various incidental and reciprocal advantages of the Treaty, such as the privileges of traffic, purchasing bait and other supplies, are not the subject of compensation, because the Treaty of Washington confers no such rights on the inhabitants of the United States, who now enjoy them merely by sufferance, and who can at any time be deprived of them by the enforcement of existing laws or the re-enactment of former
 325 oppressive statutes. Moreover, the Treaty does not provide for any possible compensation for such privileges.

Now the existing laws referred to in this extract are the various statutes passed by the Imperial and Colonial Legislatures to give effect to the Treaty of 1818, which it is admitted in the said case could at any time have been enforced (even during the existence of the Washington Treaty) if the Canadian Authorities had chosen to do so.

Mr. Bayard on more than one occasion intimates that the interpretation of the Treaty and its enforcement are dictated by local and hostile feelings, and that the main question is being obscured by partizan advocacy and disturbed by the heat of local interests," and in conclusion, expresses a hope that "ordinary commercial intercourse shall not be interrupted by harsh measures and unfriendly administration."

The undersigned desires emphatically to state that it is not the wish of the Government or the people of Canada to interrupt for a

moment the most friendly and free commercial intercourse with the neighbouring Republic.

The mercantile vessels and the commerce of the United States have at present exactly the same freedom that they have for years past enjoyed in Canada, and the disposition of the Canadian Government is to extend reciprocal trade with the United States beyond its present limits, nor can it be admitted that the charge of local prejudice or hostile feeling is justified by the calm enforcement, through the legal tribunals of the country of the plain terms of a Treaty between Great Britain and the United States and of the statutes which have been in operation for nearly seventy years excepting in intervals during which (until put an end to by the United States Government) special and more liberal provisions existed in relation to the commerce and fisheries of the two countries.

The undersigned has further to call attention to the letter of Mr. Bayard of the 20th May, relating also to the seizure of the "David J. Adams" in the Port of Digby, Nova Scotia.

That vessel was seized, as has been explained on a previous occasion, by the commander of the Canadian steamer "Lansdowne," under the following circumstances:—

She was a United States' fishing vessel and entered the harbour of Digby for purposes other than those for which entry is permitted by the Treaty and by the Imperial and Canadian Statutes.

As soon as practicable, legal process was obtained from the Vice-Admiralty Court at Halifax, and the vessel was delivered to the Officer of that Court. The paper referred to in Mr. Bayard's letter as having been nailed to her mast, was doubtless a copy of the warrant which commanded the Marshal or his deputy to make the arrest.

The undersigned is informed there was no intention whatever of so adjusting the paper that its contents could not be read, but it is doubtless correct that the officer of the Court in charge declined to allow the document to be removed. Both the United States' Consul General and the Captain of the "David J. Adams" were made acquainted with the reasons for the seizure, and the only ground for the statement that a respectful application to ascertain the nature of the complaint was fruitless, was that the Commander of the "Lansdowne," after the nature of the complaint had been stated to those concerned, and was published and had become notorious to the people of both countries, declined to give the United States' Consul General a specific and precise statement of the charges upon which the vessel would be proceeded against, but referred him to his superior.

Such conduct on the part of the officer of the "Lansdowne" can hardly be said to have been "extraordinary" under the present circumstances.

The legal proceedings had at that time been commenced in the Court of Vice-Admiralty at Halifax where the United States' Consul General resides, and the officer at Digby could not have stated with precision, as he was called upon to do, the grounds on which the intervention of the Court had been claimed in the proceedings therein.

There was not in this instance the slightest difficulty in the United States' Consul General and those interested in the vessel obtaining the fullest information, and no information which could have been given by those to whom they applied was withheld.

Apart from the general knowledge of the offences which it was claimed the master had committed, and which was furnished at the time of the seizure, the most technical and precise details were readily obtainable at the Registry of the Court and from the solicitors for the Crown, and would have been furnished immediately on application to the authority to whom the Commander of the "Lansdowne" requested the United States' Consul General to apply. No such information could have been obtained from the paper attached to the vessel's mast.

Instructions have, however, been given to the Commander of the "Lansdowne" and other officers of the Marine Police that in the event of any further seizures a statement in writing shall be given to the master of the seized vessel of the offences for which the vessel may be detained, and that a copy thereof shall be sent to the United States' Consul General at Halifax, and to the nearest United States' Consular Agent, and there can be no objection to the Solicitor for the Crown being instructed likewise to furnish the Consul General with a copy of the legal process in such case, if it can be supposed that any fuller information will thereby be given.

Mr. Bayard is correct in his statement of the reasons for which the "David J. Adams" was seized and is now held. It is claimed that that vessel violated the Treaty of 1818, and consequently the statutes which exist for the enforcement of that Treaty, and it is also claimed that she violated the Customs Laws of 1883.

The undersigned recommends that copies of these Statutes be furnished for the information of Mr. Bayard.

326 Mr. Bayard has in the same despatch recalled the attention of Her Majesty's Minister to the correspondence and action which took place in the year 1870, when the Fishery question was under consideration, and especially to the instructions from the Lords of the Admiralty to Vice Admiral Wellesley, in which that officer, was directed to observe great caution in the arrest of American fishermen and to confine his action to one class of offences against the Treaty. Mr. Bayard, however, appears to have attached unwarranted importance to the correspondence and instructions of 1870 when he refers to them as implying an "understanding between the two Governments;" an understanding which should, in his opinion, at other times and under other circumstances, govern the conduct of the authorities, whether Imperial or Colonial, to whom under the laws of the Empire, is committed the duty of enforcing the Treaty in question.

When, therefore, Mr. Bayard points out the "absolute and instant necessity that now exists for a restriction of the seizure of American vessels charged with violations of the Treaty of 1818," to the conditions specified under these instructions it is necessary to recall the fact that in the year 1870 the principal cause of complaint on the part of Canadian fishermen was that the American vessels were trespassing on the inshore fishing grounds and interfering with the catch of mackerel in Canadian waters, the purchase of bait being then a matter of secondary importance.

It is probable that the action of the Imperial Government was influenced very largely by the prospect which then existed of an arrangement such as was accomplished in the following year by the Treaty of Washington, and that it may be inferred, in view of the

disposition made apparent on both sides to arrive at such an understanding, that the Imperial authorities, without any surrender of Imperial or Colonial rights, and without acquiescing in any limited construction of the Treaty, instructed the Vice-Admiral to confine his seizures to the more open and injurious class of offences which were especially likely to be brought within the cognizance of the naval officers of the Imperial service.

The Canadian Government, as has already been stated, for six months left its fishing grounds open to American fishermen, without any corresponding advantage in return, in order to prevent loss to those fishermen and to afford time for the action of Congress on the President's recommendation that a joint Commission should be appointed to consider the whole question relating to the fisheries.

That recommendation has been rejected by Congress. Canadian fish is, by prohibitory duties, excluded from the United States' market. The American fishermen clamour against the removal of these duties, and in order to maintain a monopoly of the trade, continue against all law to force themselves into our waters and harbours and make our shores their base for supplies, especially of bait, which is necessary to the successful prosecution of their business.

They hope by this course to supply the demand for their Home market, and thus to make Canada indirectly the means of injuring her own trade.

It is surely, therefore, not unreasonable that Canada should insist on the rights secured to her by Treaty. She is simply acting on the defensive, and no trouble can arise between the two countries if American fishermen will only recognise the provisions of the Convention of 1818 as obligatory upon them, and, until a new arrangement is made, abstain both from fishing in her waters and from visiting her bays and harbours for any purposes save those specified in the Treaty.

In conclusion the undersigned would express the hope that the discussion which has arisen in this question may lead to renewed negotiations between Great Britain and the United States and may have the result of establishing extended trade relations between the Republic and Canada, and of removing all sources of irritation between the two countries.

(Sd.) GEORGE E. FOSTER,
Minister of Marine and Fisheries.

No. 201.—1886, *June 14*: Letter from Mr. Bayard (*United States Secretary of State*) to Sir L. S. S. West (*British Minister*).

DEPARTMENT OF STATE,
Washington, June 14, 1886.

SIRS The Consul-General of the United States at Halifax communicated to me the information derived by him from the Collector of Customs at that port to the effect that American fishing vessels will not be permitted to land fish at that port of entry for transportation in bond across the province.

I have also to inform you that the masters of the four American fishing vessels of Gloucester, Mass., Martha A. Bradly, Rattler, Eliza

Boynton, and Pioneer, have severally reported to the Consul-General at Halifax that the subcollector of Customs at Canso had warned them to keep outside an imaginary line drawn from a point three miles outside Canso Head to a point three miles outside St. Esprit, on the Cape Breton Coast, a distance of 40 miles. This line
 327 for nearly its entire continuance is distant 12 to 25 miles from the coast. The same masters also report that they were warned against going inside an imaginary line drawn from a point three miles outside North Cape, on Prince Edward Island, to a point three miles outside of East Point, on the same island, a distance of over 100 miles, and that this last-named line was for nearly that entire distance about 30 miles from the shore.

The same authority informed the masters of the vessels referred to that they would not be permitted to enter Bay Chaleur.

Such warnings are, as you must be well aware, wholly unwarranted pretensions of extra-territorial authority and usurpations of jurisdiction by the provincial officials.

It becomes my duty, in bringing this information to your notice, to request that if any such orders for interference with the unquestionable rights of the American fishermen to pursue their business without molestation at any point not within three marine miles of the shore, and within the defined limits as to which renunciation of the liberty to fish was expressed in the Treaty of 1818, may have been issued, the same may at once be revoked as violative of the rights of citizens of the United States under Convention with Great Britain.

I will ask you to bring this subject to the immediate attention of Her Britannic Majesty's Government, to the end that proper remedial orders may be forthwith issued.

It seems most unfortunate and regrettable that questions which have been long since settled between the United States and Great Britain should now be sought to be revived.

I have, &c.,

T. F. BAYARD.

No. 202.—1886, June 30: Letter from Mr. Bayard to Captain Jesse Lewis (from the "New York Herald" of 9th July, 1886).

DEPARTMENT OF STATE,
 Washington, 30th June, 1886.

Captain JESSE LEWIS,
 Owner of the Schooner "David J. Adams,"
 Gloucester, Mass.

SIR,—I have your letter, dated the 26th inst., stating the severe loss to you occasioned by the summary seizure by the Canadian authorities, in Annapolis Basin, Nova Scotia, of your fishing schooner the "David J. Adams," which, as you say, is all the property you possess and constituted your only support.

It is proper that I should inform you that demand was made upon the Government of Great Britain for the release of the vessel, coupled with a notification that that Government would be held answerable for all loss and damage caused by her seizure and detention. Your case commands my sincere sympathy, and ever since it was brought to my knowledge has had the constant consideration of the Depart-

ment, and of the consular officers of the United States in the Dominion of Canada.

Mr. William L. Putnam, of Portland, Me., in conjunction with Mr. George W. Biddle, of Philadelphia, has been engaged by this Government as its legal counsel in respect of its rights and duties which may be brought in question by reason of the seizure of your vessel.

If you will communicate with Mr. Putnam he will no doubt give you all information in his power in relation to the laws under which your property was so seized, and suggest what steps should be taken to protect your private interest in the premises.

Moreover, I suggest that you should carefully secure evidence of all the facts connected with the presence of your vessel in Annapolis Basin, and of the absence of any unlawful act or intention on the part of her master, crew, or owner, as well as proof of the actual loss and injury sustained by you by reason of this harsh and, as I believe, wholly unwarranted action by the Canadian officials—such evidence to be obtained and preserved as the basis of claims for your remuneration.

More than one year ago I sought to protect our citizens engaged in fishing from the results which might attend any possible misunderstanding between the Governments of Great Britain and the United States as to the measure of their mutual rights and privileges in the territorial waters of British North America, after the termination of the fishery articles of the treaty of Washington in June last. It seemed to me then, and seems to me now, very hard that differences of opinion between the two Governments should cause loss to the honest citizens whose line of obedience might be thus rendered vague and uncertain and their property be brought into jeopardy. Influenced by this feeling, I procured a temporary arrangement which secured our fishermen full enjoyment of all the Canadian fisheries, free from molestation during a period which would permit discussion of a just international settlement of the whole fishery question. But other counsels prevailed, and my efforts further to protect the fishermen from such trouble as you now suffer were unavailing.

To secure for them full protection in the enjoyment of all their just rights and privileges is still my earnest intent and object, and for all losses to which they may be unlawfully subjected at the hands of the authorities of foreign Governments I shall seek and expect to obtain full redress. I regret exceedingly the disturbance in the long customary pursuits and the serious loss and inconvenience attendant upon a disputed construction of laws and treaties by two separate Governments, and I trust that I shall soon be enabled to secure such a clear and comprehensive declaration of agreement between those charged with the administration of the two Governments as will define the line of their rights and secure from molestation those American fishermen who, obeying the injunctions of their Government respecting subordination to the laws of foreign Governments, keep within the laws of their own country.

Reparation for all losses unlawfully caused by foreign authority will be made the subject of international presentation and demand.

I am, &c.,

(Sd.)

T. F. BAYARD.

No. 203.—1886, July 7: *Letter from Sir L. S. S. West to the Earl of Rosebery.*

No. 64 Treaty.
Confidential.

WASHINGTON 7. July 1886.

MY LORD; In the absence of instructions from your Lordship on the present phase of the Fisheries question, and in view of the tenour of Mr. Bayard's notes on the detention of American fishing vessels by the Canadian authorities, I have avoided all conversation with him on the subject. These notes are written in order to establish the contention that the operation of the Treaty of 1818 is virtually suspended by the spirit of subsequent commercial legislation on both sides, and that the action taken by the Canadian authorities under it is therefore unjustifiable. It must be borne in mind, however, that the commercial legislation upon which so much stress has been laid by the opponents in the Senate to the appointment of a Commission may be said to have auspiciously culminated in the reciprocity of 1854, which, together with the policy which it inaugurated, was nevertheless denounced by the United States Government, and that all endeavours on the part of the Dominion Government to renew it have failed. The freedom of intercourse, therefore, which, in so far as the fisheries are concerned, may be said to have been repudiated by Congress by the denunciation of the instruments which established it, can scarcely now be claimed as a right, in view of the repeated declarations both in Congress and outside that the fishing interests were content to abide by a Treaty which expressly denies it. It was preferred to return to the Treaty of 1818 sooner than to admit the principle of "free fish and free fishing," for it was argued that, since the fish had left the Canadian shores, American fishing vessels had no reason for resorting to Canadian waters, and the right of free intercourse for inshore fishing operations was therefore no longer of any value. In dealing with the situation thus created by the Senate for the sole purpose of thwarting the policy of the present Administration, two points at once present themselves which are of importance in the event of any proposal being made on either side for negotiation.

1. The probable refusal of the Dominion Government to suspend action under the Treaty of 1818 pending negotiation.

2. The probable refusal of the Senate to sanction any agreement come to between Her Majesty's Government and President Cleveland's present Cabinet. Mr. Bayard is fully aware of the difficult position in which he has been placed, and it is therefore very likely that he is endeavouring to conciliate the Senate in view of possible negotiation by writing notes in the sense of the speeches of the Maine Senators, and in order thus to be enabled to give satisfactory assurances of the disposition of that body to agree to an arrangement which could scarcely be reached without some such understanding, for he is aware that Her Majesty's Government would not be disposed to enter into engagements which the Senate might again refuse to allow the President to carry out. He feels also that Her Majesty's Government can only look to the United States Government and not to the circumstances in which he has been placed, and he is evidently now seeking means of escape from his dilemma. That such is

the case appears from a letter which he has addressed to the owner of the schooner "D. J. Adams," copies of which, as published in the newspapers, I have the honour to enclose, as well as copies of an article from the New York Herald, commenting thereon. The allusion to "the mistake in not having taken his advice" is significant of the difficulty he now finds in securing a clear and comprehensive "declaration" of an agreement.

I have the honour to be with the highest respect, my Lord,

Your Lordship's most obedient humble servant,

L. S. SACKVILLE WEST.

329 No. 204.—1886, July 10: Letter from Mr. Bayard (*United States' Secretary of State*) to Sir L. S. S. West (*British Minister*).

DEPARTMENT OF STATE,
Washington, 10th July, 1886.

S'8.—I have the honour to inform you that I am in receipt of a Report from the Consul General of the United States, at Halifax, accompanied by sworn testimony stating that the "Novelty," a duly registered merchant steam vessel of the United States, has been denied the right to take in steam coal, or purchase ice, or tranship fish in bond to the United States, at Pictou, N. S.

It appears that, having reached that port on the 1st inst., and finding the Customs Office closed on account of a holiday, the master of the "Novelty" telegraphed to the Minister of Marine and Fisheries, at Ottawa, asking if he would be permitted to do any of the three things mentioned above. That he received in reply a telegram reciting with certain inaccurate and extended application, the language of Art. I, of the Treaty of 1818, the limitations upon the significance of which are in pending discussion between the Government of the United States and that of Her Britannic Majesty. That on entering and clearing the "Novelty" on the following day at the Custom House, the collector stated that his instructions were contained in the telegram the master had received; and that, the privilege of coaling being denied, the "Novelty" was compelled to leave Pictou without being allowed to obtain fuel necessary for her lawful voyage on a dangerous coast.

Against this treatment I make instant and formal protest as an unwarranted interpretation and application of the Treaty by the officers of the Dominion of Canada and the Province of Nova Scotia, as an infraction of the laws of commercial and maritime intercourse existing between the two countries, and as a violation of hospitality, and for any loss or injury resulting therefrom the Government of Her Britannic Majesty will be held liable.

I have, &c.,

(Sd.)

T. F. BAYARD.

The Honourable Sir L. S. WEST, K.C.M.G.

&c., &c., &c.

No. 205.—1886, July 10: *Letter from Mr. Bayard United States Secretary of State, to Sir L. S. S. West (British Minister).*

DEPARTMENT OF STATE,
Washington, 10th July, 1866.

SIR,—On the 2nd of June last, I had the honour to inform you that despatches from Eastport, in Maine, had been received, reporting threats by the Customs officials of the Dominion to seize American boats coming into those waters to purchase herring from the Canadian weirs for the purpose of canning the same as sardines, which would be a manifest infraction of the right of purchase and sale of herring caught and sold by Canadians in their own waters in the pursuance of legitimate trade.

To this note I have not had the honour of a reply.

To-day Mr. C. A. Boutwell, M. P., [M. C.] from Maine, informs me that American boats visiting St. Andrews, N. B., for the purpose of there purchasing herring from the Canadian weirs for canning had been driven away by the Dominion cruiser "Middleton."

Such inhibition of usual and legitimate commercial contracts and intercourse is assuredly without warrant of law, and I draw your attention to it in order that the commercial rights of citizens of the United States may not be thus invaded and subjected to unfriendly discrimination.

I am, &c.,

(Sd.) T. F. BAYARD.

The Hon. SIR L. S. WEST, K.C.M.G.

&c., &c., &c.

330 No. 206.—1886, July 16: *Letter from Mr. Bayard (United States Secretary of State) to Hon. C. Hardinge (British Chargé d' Affaires at Washington).*

WASHINGTON, 16th July, 1886.

SIR,—I have just received through the Hon. C. A. Boutelle, M. C., the affidavit of Stephen R. Balkam, alleging his expulsion from the harbour of St. Andrews, N. B., by Captain Kent of the Dominion cruiser "Middleton," and the refusal to permit him to purchase fish, caught and sold by Canadians, for the purpose of canning as sardines.

The action of Captain Kent seems to be a gross violation of ordinary commercial privileges against an American citizen, proposing to transact his customary and lawful trade and not prepared, or intending, in any way to fish or violate any local law, or regulation, or treaty stipulation.

I trust instant instructions to prevent the recurrence of such unfriendly treatment of American citizens may be given to the offending officials at St. Andrew's and reparation be made to Mr. Balkam.

I have, &c.,

(Sd.) T. F. BAYARD.

The Hon. C. HARDINGE,

No. 207.—1886, *July 16: Telegram from Mr. Bayard (United States Secretary of State) to Mr. Phelps (United States Minister at London).*—[*Translation of Cypher Telegram Received at the Legation, July 16, 1886.*]

PHELPS, *Minister, London.*

You will state to Lord Rosebery that realizing fully any embarrassment or delays attendant upon pending changes of British Administration, it is our duty to call upon Imperial Government to put a stop to the unjust, arbitrary and vexatious action of Canadian authorities towards our citizens engaged in open sea fishing and trading but not violating or contemplating violation of any Law or Treaty. Our readiness long since expressed to endeavour to come to a just and fair joint interpretation of Treaty rights and commercial privileges is ill met by persistent and unfriendly action of Canadian authorities which is rapidly producing a most injurious and exasperating effect. I am without reply from British Minister, who is now absent.

BAYARD.

No. 208.—1886, *July 22: Report of the Canadian Minister of Justice.*

To his Excellency the Administrator of the Government in Council.

DEPARTMENT OF JUSTICE,
Ottawa, 22nd July, 1886.

With reference to the despatch of the 24th June last, from the Secretary of State for the Colonies to your Excellency respecting the Fisheries Question, and enclosing copies of letters on the subject from the Foreign Office to the Colonial Office, and of one from Mr. Phelps to the Secretary of State for Foreign Affairs, the undersigned has the honour to report as follows:—

The letter of Mr. Phelps seems designed to present to Earl Rosebery the case of the "David J. Adams," the fishing vessel seized a short time ago near Digby, in the province of Nova Scotia.

Mr. Phelps intimates that he has received from his Government a copy of the report of the Consul General of the United States at Halifax, giving full details and depositions relating to the seizure, and that that report, and the evidence annexed to it, appear fully to sustain the points which he had submitted to Earl Rosebery at an interview which he had had a short time before the date of his letter.

The report of the Consul General and the depositions referred to seem not to have been presented to Earl Roseberry, and their contents can only be inferred from the statements made in Mr. Phelps' letter.

These statements appear to be based on the assertions made by the persons interested in the vessel by way of defence against the
331 complaint under which she was seized, but cannot be regarded as presenting a full or accurate representation of the case. The undersigned submits the facts in regard to this vessel, as they are

alleged by those on whose testimony the Government of Canada can rely to sustain the seizure and detention.

The Offence as to the Treaty and Fishery Laws.

The "David J. Adams" was a United States' fishing vessel, whether, as alleged in her behalf, her occupation was deep sea fishing or not, and whether, as suggested, she had not been engaged, nor was intended to be engaged, in fishing in any limit proscribed by the Treaty of 1818 or not, are questions which do not, in the opinion of the undersigned, affect the validity of the seizure and of the proceedings subsequent thereto, for reasons which will be hereafter stated; but in so far as they may be deemed material to the defence, they are questions of fact which remain to be proved in the Vice-Admiralty Court of Halifax, in which the proceedings for the vessel's condemnation are pending, and in respect of which proof is now being taken, and inasmuch as the trial has not been concluded (much less a decision reached) it is perhaps premature for Mr. Phelps to claim the restoration of the vessel, and to assert a right to damages for her detention, on the assumption of the supposed facts above referred to.

It is alleged in the evidence on behalf of the prosecution that the "David J. Adams," being a United States' fishing vessel, on the morning of the 5th of May, 1886, was in what is called the "Annapolis Basin," which is a harbour on the north-west coast of Nova Scotia. She was several miles within the Basin, and the excuse suggested (that the captain and crew may have been there through a misapprehension as to the locality) by the words of Mr. Phelps' letter, "Digby is a small fishing settlement and its harbour not defined," is unworthy of much consideration.

Digby is not a fishing settlement, although some of the people on the neighbouring shores engage in fishing. It is a town, with a population of about two thousand persons. Its harbour is formed by the Annapolis Basin, which is a large inlet of the Bay of Fundy, and the entrance to it consists of a narrow strait marked by conspicuous headlands which are little more than a mile apart. The entrance is called "Digby Gut" and for all purposes connected with this enquiry, the harbour is one of the best defined in America.

The "David J. Adams" was, on the morning of the 5th day of May, 1886, as has already been stated, several miles within the Gut. She was not there for the purpose of "shelter" or "repairs" nor to "purchase wood" nor "to obtain water." She remained there during the 5th and on the 6th May, 1886, she was lying at anchor about half a mile from the shore, at a locality called "Clements West."

On the morning of the 6th May, 1886, the captain made application to the owners of a fishing weir, near where he was laying for bait, and purchased four and a-half barrels of that article. He also purchased and took on board, about two tons of ice. While waiting at anchor for these purposes the name of the vessel's "hailing place" was kept covered by canvas, and this concealment continued while she afterwards sailed down past Digby.

One of the crew represented to the persons attending the weir that the vessel belonged to the neighbouring province of New Brunswick. The captain told the owner of the weir, when the Treaty was spoken of by the latter, that the vessel was under British register.

The captain said he would wait until the next morning to get more bait from the catch in the weir which was expected that day. At daybreak, however, on the morning of the 7th of May, 1886, the Government steamer "Lansdowne" arrived off Digby, and the "David J. Adams" got under way without waiting to take in the additional supply of bait, and sailed down the Basin towards the Gut.

Before she had passed Digby she was boarded by the first officer of the "Lansdowne" and to him the captain made the following statement: that he had come to that place to see his people, as he had formerly belonged there, that he had no fresh bait on board, and that he was from the "Banks" and bound for Eastport, Maine.

The officer of the "Lansdowne" told him he had no business there, and asked him if he knew the law. His reply was "Yes."

A few hours afterwards, and while the "David J. Adams," was still inside the Gut, the officer of the "Lansdowne," ascertaining that the statements of the captain were untrue, and that bait had been purchased by him within the harbour on the previous day, returned to the "David J. Adams," charged the captain with the offence, and received for his reply the assertion that the charge was false, and that the person who gave the information was a "liar."

The officer looked into the hold of the vessel and found the herring which had been purchased the day before, and which, of course, was perfectly fresh, but the captain declared that this "bait" was ten days old.

The officer of the "Lansdowne" returned to his ship, reported the facts, and went again to the "Adams," accompanied by another officer, who also looked at the bait. Both returned to the "Lansdowne" and then conveyed to the "Adams" the direction that she should come to Digby and anchor near the "Lansdowne." This was, in fact, the seizure.

These are the circumstances by which the seizure was, in the opinion of Mr. Phelps, "much aggravated," and which makes it seem very apparent to him that the seizure "was not made for the purpose of enforcing any right, or redressing any wrong."

The fact that the seizure was preceded by visitations and searches was due to the statements of the master, and the reluctance of the officers of the "Lansdowne" to enforce the law until they had ascertained to a demonstration that the offence had been committed, and that the captain's statements were untrue.

The "David J. Adams," as already stated, was in the harbour upwards of forty-eight hours, and, when seized, was proceeding to sea, without having been reported at any Customs House. Her business was not such as to make it her interest to attract the attention of the Canadian authorities, and it is not difficult, therefore, to conjecture the reason why she was not so reported, or to see that the reason put forward that Digby is but a small fishing settlement and its harbours not defined, is a disingenuous one. In going to the weir to purchase bait, the vessel passed the Customs House at Digby, almost within hailing distance. When at the weir, she was within one or two miles of another Customs House (at Clementsport), and within about fifteen miles of another (at Annapolis). The master

has not asserted that he did not know the law on this subject, as it is established that he knew the law in relation to the restriction on foreign fishing vessels.

The provisions of the Customs Act of Canada on this subject are not essentially different from those of his own country. The captain and crew were ashore during the 5th and 6th of May, 1886. The following provisions of the Customs Act of Canada apply:—

The master of every vessel coming from any port or place out of Canada, or coastwise, and entering any port in Canada, whether laden or in ballast, shall go without delay when such vessels is anchored or moored, to the Custom House for the port or place of entry where he arrives, and there make a report in writing to the Collector or other proper officer, of the arrival and voyage of such vessel, stating her name, country and tonnage, the port of registry, the name of the master, the country of the owners, the number and the names of the passengers, if any, the number of the crew, and whether the vessel is laden or in ballast, and if laden, the marks and numbers of every package and parcel of goods on board, and where the same was laden, and the particulars of any goods stowed loose, and where and to whom consigned, and where any and what goods, if any, have been laden or unladen, or bulk has been broken, during the voyage, what part of the cargo, and the number and names of the passengers which are intended to be landed at that port, and what and whom at any other port in Canada, and what part of the cargo, if any, is intended to be exported in the same vessel, and what surplus stores remain on board, as far as any of such particulars are or can be known to him.—46 V., c. 12, s. 25.

The master shall at the time of making his report, if required by the Officer of Customs, produce to him the bills of lading of the cargo, or true copies thereof, and shall make and subscribe an affidavit referring to his report, and declaring that all the statements made in the report are true, and shall further answer all such questions concerning the vessel and cargo, and the crew and the voyage, as are demanded of him by such officer, and shall, if required, make the substance of any such answer part of his report.—46 V., c. 12, s. 28.

If any goods are unladen from any vessel before such report is made, or if the master fails to make such report, or makes an untrue report, or does not truly answer the questions demanded of him, as provided in the next preceding section, he shall incur a penalty of four hundred dollars, and the vessel may be detained until such penalty is paid.—46 V., c. 12, s. 29.

PROCEEDINGS FOLLOWING THE SEIZURE.

These have been made the subject of a complaint by Mr. Phelps, although the explanations which were given in the previous memorandum of the undersigned (in reference to the letters of Mr. Bayard to Her Majesty's Minister at Washington) and in the report, on the same subject, of the Minister of Marine and Fisheries, laid before his Excellency the Governor General on the 14th June, ultimo, coupled with a disavowal by the Canadian Government of any intention that the proceedings in such cases should be unnecessarily harsh or pursued in a punitive spirit, might have been expected to be sufficient. After the seizure was made, the Commander of the "Lansdowne" took the "David J. Adams" across the Bay of Fundy to Saint John, a distance of about forty miles. He appears to have had the impression that, as his duties would not permit him to remain at Digby, the vessel would not be secure from rescue, which has in several cases occurred after the seizure of fishing vessels. He believed she would be more secure in the harbour of Saint John, and that the legal proceedings, which in due course would follow, could be taken there. He was immediately directed, however, to return with the vessel to Digby, as it seemed more in order, and more in compliance with the

statutes relating to the subject, that she should be detained in the place of seizure, and that the legal proceedings should be taken in the Vice-Admiralty Court of the Province where the offence was committed. It does not seem to be claimed by the United States' authorities that any damage to the vessel, or that any injury or inconvenience to any one concerned was occasioned by this removal to Saint John, and by her return to Digby, occupying as they did but a few hours, and yet this circumstance seems to be relied on as aggravating "the seizure," and as depriving it of the character of a seizure made "to enforce a right or to redress a wrong."

Another ground of complaint is that in Digby "the paper alleged to be the legal precept for the capture and detention of the vessel was nailed to her mast in such a manner as to prevent its contents being read, and the request of the captain and of the United States' Consul General to be allowed to detach the writ from the mast, for the purpose of learning its contents, was positively refused by the provincial official in charge; that the United States' Consul General was not able to learn from the Commander of the 'Lansdowne' the nature of the complaint against the vessel, and that his respectful application to that effect was fruitless."

333 1. As to the position of the paper on the mast. It is not a fact that it was nailed to the vessel's mast "in such a manner as to prevent its contents being read." It was nailed there for the purpose of being read, and could have been read.

2. As to the refusal to allow it to be detached. Such refusal was not intended as a discourtesy, but was legitimate and proper. The paper purported to be, and was, a copy of the writ of summons and warrant which were then in the Registry of the Vice-Admiralty Court at Halifax. It was attached to the mast by the officer of the Court, in accordance with the rules and procedure of that Court. The purposes for which it was so attached did not admit of any consent for its removal.

3. As to the desire of the captain and of the United States' Consul General to ascertain the contents of the paper. The original was in the Registry of the Court, accessible to every person, and the Registry is within eighty yards of the Consul General's Office. All the reasons for the seizure were made known to the captain days before the paper arrived to be placed on the mast, and before the Consul General arrived at Digby. These reasons were not only matters of public notoriety, but had been published in the newspapers of the province, and in hundreds of other newspapers circulating throughout Canada and the United States. The captain and the Consul General did not need, therefore, to take the paper from the mast in order to learn the causes of the seizure and detention.

4. As to the application of the Consul General having been fruitless. The fact has transpired that he had reported the seizure and its causes to his Government before the application was made. It has been already explained in the previous memorandum of the undersigned, and in the report of the Minister of Marine and Fisheries, that the application was for a specific statement of the charges, and that it was made to an officer who had neither the legal acquirements nor the authority to state them in a more specific form than that in which he had already stated them. The Commander of the "Lans-

downe" requested the Consul General to make his request to the Minister of Marine and Fisheries, and if he had done so the specific statement which he desired could have been furnished in an hour.

It is hoped that the explanation already made, and the precautions which have been taken against even the appearance of discourtesy in the future, will, on consideration, be found to be satisfactory.

INCIDENTS OF THE CUSTOMS SEIZURE.

Mr. Phelps presents the following views with respect to the claim that the "David J. Adams" besides violating the treaty and the statutes relating to "fishing by foreign vessels," is liable to be detained for the penalty under the Customs laws.

1. That this claim indicates the consciousness that the vessel could not be forfeited for the offence against the Treaty and Fishery Laws. This supposition is groundless. It is by no means uncommon, in legal proceedings, both in Canada and the United States, for such proceedings to be based on more than one charge, although any one of the charges would, in itself, if sustained, be sufficient for the purpose of the complainant. The success of this litigation, like that of all litigation, must depend not merely on the rights of the parties but on the proof which may be adduced as to a right having been infringed. In this instance it appears, from Mr. Phelps' letter, that the facts which are to be made the subject of proof are widely in dispute, and the Government of Canada could, with propriety, assert both its claims so that both of them should not be lost by any miscarriage of justice in regard to one of them. This was, likewise, the proper course to be taken in view of the fact that an appeal might, at any time, be made to the Government by the owners of the "David J. Adams" for remission of the forfeiture incurred in respect of the fishery laws. The following is a section of the Canadian statute relating to fishing by foreign vessels:—

In cases of seizure under this Act the Governor in Council may direct a stay of proceedings, and in cases of condemnation, may relieve from the penalty, in whole or in part, and on such terms as are deemed right.—31 V., c. 61, s. 19.

It seemed necessary and proper to make at once any claim founded on infraction of the Customs laws, in view of the possible termination of the proceedings by executive interference under this enactment. It would surely not be expected that the Government of Canada should wait until the termination of the proceedings under the Fishery Acts before asserting its claim to the penalty under the Customs Act. The owners of the offending vessel, and all concerned, were entitled to know, as soon as they could be made aware, what the claims of the Government were in relation to the vessel, and they might fairly urge that any which were not disclosed were waived.

2. Mr. Phelps remarks that this charge is "not the one on which the vessel was seized," and "was an afterthought." The vessel was seized by the commander of the "Lansdowne" for a violation of the fishery laws before the Customs authorities had any knowledge that such a vessel had come into the port, or had attempted to leave it, and the commander was not aware at that time whether the "David J. Adams" had made proper entry or not. A few hours afterwards, however, the Collector of Customs at Digby ascertained the facts, and on the facts being made known to the head of his department at

Ottawa, was immediately instructed to take such steps as might be necessary to assert the claim for the penalty which had been incurred. The Collector did so.

3. Mr. Phelps asserts that the charge of breach of the Customs law is not the one "which must now be principally relied on for 334 condemnation." It is true that condemnation does not necessarily follow. The penalty prescribed is a forfeiture of four hundred dollars, on payment of which the owners are entitled to the release of the vessel.

If Mr. Phelps means by the expression just quoted, that the Customs' offence cannot be relied on, in respect to the penalty claimed, and that the vessel cannot be detained until that penalty is paid, it can only be said that in this contention the Canadian Government does not concur. Section 29 of the Customs' Act, before quoted, is explicit on that point.

4. It is also urged that the offence was at most "only an accidental and clearly technical breach of a Customs House regulation, by which no harm was intended and from which no harm came, and would in ordinary cases be easily condoned by an apology, and, perhaps, payment of costs." What has already been said under the heading, "the Offence (as to Custom laws)," presents the contention opposed to the offence being considered as "accidental." The master of the "David J. Adams" showed by his language and conduct that what he did, he did with design and with the knowledge that he was violating the laws of the country. He could not have complied with the Customs law without frustrating the purposes for which he had gone into port.

As to the breach being a "technical" one, it must be remembered that with thousands of miles of coast, indented as the coasts of Canada are, by hundreds of harbours and inlets, it is impossible to enforce the fishery law without a strict enforcement of the Customs laws. This difficulty was not unforeseen by the framers of the Treaty of 1818, who provided that the fishermen should be "under such restrictions as might be necessary to prevent their taking, drying, or curing fish, * * * or in any other manner whatever *abusing the privileges reserved to them.*" No naval force which could be equipped by the Dominion would of itself be sufficient for the enforcement of the fishery laws. Foreign fishing vessels are allowed by the treaty to enter the harbours and inlets of Canada, but they are allowed to do so only for specified purposes. In order to confine them to those purposes it is necessary to insist on the observance of the customs laws, which are enforced by officers all along the coast. A strict enforcement of the customs laws, and one consistent with the Treaty, would require that, even when coming into port for the purposes for which such vessels are allowed to enter our waters, a report should be made at the Customs House, but this has not been insisted on in all cases. When the customs laws are enforced against those who enter for other than legitimate purposes, and who choose to violate both the fishery laws and customs laws, the Government is far within its right, and should not be asked to accept an apology and payment of costs. It may be observed here, as affecting Mr. Phelps' demand for restoration and damages, that the apology and costs have never been tendered, and that Mr. Phelps seems to be of opinion that they are not called for.

5. Mr. Phelps is informed by the Consul General at Halifax that it is "conceded by the Customs authorities there that foreign fishing vessels have for forty years been accustomed to go in and out of the bay at pleasure, and have never been required to send ashore and report when they had no business with the port, and made no landing, and that no seizure had ever before been made, or claim against them for so doing." Nothing of this kind is, or could be conceded by the customs authorities there, or elsewhere in Canada. The bay referred to, the Annapolis Basin, is like all the other harbours of Canada, except that it is unusually well defined and land locked, and furnished with customs houses. Neither there, nor anywhere else, have foreign fishing vessels been accustomed to go in and out at pleasure without reporting. If they had been so permitted the fishery laws could not have been enforced, and there would have been no protection against illicit trading while the Reciprocity Treaty of 1854 and the fishery clauses of the Washington Treaty were in force, the Convention of 1818 being of course suspended, considerable laxity was allowed to United States' fishing vessels,—much greater than the terms of those Treaties entitled them to, but the Consul General is greatly mistaken when he supposes that at other times the Customs laws were not enforced, and that seizures of foreign fishing vessels were not made for omitting to report. Abundant evidence on this point can be had.

In 1839 Mr. Vail, the acting Secretary of State (United States) reported that most of the seizures (which then were considered numerous) were for alleged violations of the customs laws (Papers relating to the Treaty of Washington, vol. 6, p. 283, Washington Edition.) From a letter of the United States' Consul at Charlottetown, dated 19th August, 1870, to the United States' Consul General at Montreal, it appears that it was the practice of the United States' fishermen at that time to make regular entry at the port to which they resorted. The Consul said "Here the fishermen enter and clear, and take out permits to land their mackerel from the Collector, and as their mackerel is a free article in this island, there can be no illicit trade."

In the year 1870, two United States' fishing vessels, the "H. W. Lewis" and the "Granada" were seized on like charges in Canadian waters.

What Mr. Phelps styles "a Custom House regulation" is an Act of the Parliament of Canada, and has for many years been in force in all the provinces of the Dominion. It is one which the Government cannot at all alter or repeal, and which its officers are not at liberty to disregard.

6. It is suggested, though not asserted, in the letter of Mr. Phelps, that the penalty cannot reasonably be insisted on, because a new rule has been suddenly adopted without notice. The rule, as before observed, is not a new one, nor is its enforcement a novelty. As the Government of the United States choose to put an end to the arrangements under which the fishermen of that country were accustomed to frequent Canadian waters with so much freedom, the obligation of giving notice to those fishermen, that their rights were thereafter, by the action of their own Government, to be greatly restricted, and that they must not infringe the laws of Canada, was surely a duty incumbent on the Government of the United States, rather than on that of Canada. This point cannot be better expressed than in the lan-

335 guage reported to have been recently used by Mr. Bayard, the United States' Secretary of State, in his reply to the owners of the "George Cushing," a vessel recently seized on a similar charge. "You are well aware that questions are now pending between this Government and that of Great Britain in relation to the justification of the rights of American fishing vessels in the territorial waters of British North America, and we shall relax no effort to arrive at a satisfactory solution of the difficulty. In the meantime it is the duty and manifest interest of all American citizens, entering Canadian jurisdiction to ascertain and obey the laws and regulations there in force. For all unlawful depredations of property or commercial rights this Government will expect to procure redress and compensation for the innocent sufferers."

INTERPRETATION OF THE TREATY.

Mr. Phelps after commenting in the language already quoted from his letter, on the claim for the Customs penalty, treats, as the only real question in the case, the question whether the vessel is to be forfeited for purchasing bait to be used in lawful fishing. In following his argument on this point, it should be borne in mind, as already stated, that, in so far as the fact of the bait having been intended to be used in lawful fishing is material to the case, that is a fact which is not admitted. It is one in respect of which the burden of proof is on the owners of the vessel, and it is one on which the owners have not yet obtained an adjudication by the tribunal before which the case has gone.

Mr. Phelps admits "that if the language of the Treaty of 1818 is to be interpreted literally, rather than according to its spirit and plain intent, a vessel engaged in fishing would be prohibited from entering a Canadian port for any purpose whatever, except to obtain wood or water, or to repair damages, or to seek shelter."

It is claimed on the part of the Government of Canada that this is not only the language of the Treaty of 1818, but "its spirit and plain intent." To establish this contention, it should be sufficient to point to the clear, unambiguous words of the Treaty. To those clear and unambiguous words Mr. Phelps seeks to attach a hidden meaning, by suggesting that certain "preposterous consequences" might ensue from giving them their ordinary construction. He says that with such a construction a vessel might be forfeited for entering a port "to post a letter, to send a telegram, to buy a newspaper, to obtain a physician in case of illness, or a surgeon in case of accident, to land or bring off a passenger, or even to lend assistance to the inhabitants, &c.

There are probably few treaties or statutes, the literal enforcement of which might not in certain circumstances produce consequences worthy of being described as preposterous.

At most this argument can only suggest that in regard to this Treaty as in regard to every enactment its enforcement should not be insisted on where accidental hardships or "preposterous consequences" are likely to ensue. Equity, and a sense of natural justice, would doubtless lead the Government with which the Treaty was made to abstain from its rigid enforcement for inadvertent offences, although the right so to enforce it might be beyond question. It is

for this reason that inasmuch as the enforcement of this Treaty, to some extent, devolves on the Government of Canada, the Parliament of the Dominion has in one of the sections already quoted of the statute relating to "fishing by foreign vessels" (31 Vic., cap. 61, s. 19) entrusted the executive with power to mitigate the severity of those provisions when an appeal to executive interference can be justified. In relation to every law of a penal character the same power for the same purpose is vested in the executive. Mr. Phelps will find it difficult, however, to discover any authority among the jurists of his own country or of Great Britain, or among the writers on international law, for the position that against the plain words of a treaty or statute, an interpretation is to be sought which will obviate all chances of hardship and render unnecessary the exercise of the executive power before mentioned.

It might fairly be urged against his argument, that the Convention of 1818 is less open to an attempt to change its plain meaning than even a statute would be. The latter is a declaration of its will by the supreme authority of the State, the former was a compact deliberately and solemnly made by two parties, each of whom expressed what he was willing to concede, and by what terms it was willing to be bound. If the purposes for which the United States desired that their fishing vessels should have the right to enter British American waters included other than those expressed, their desire cannot avail them now, nor be a pretext for a special interpretation, after they assented to the words "and for no other purpose whatever." If it was "preposterous" that their fishermen should be precluded from entering provincial waters "to post a letter" or for any other of the purposes which Mr. Phelps mentions, they would probably never have assented to a treaty framed as this was. Having done so, they cannot now urge that their language was "preposterous" and that its effect must be destroyed by resort to "interpretation."

But that which Mr. Phelps calls "literal interpretation" is by no means so preposterous as he suggests, when the purpose and object of the treaty come to be considered. While it was not desired to interfere with ordinary commercial intercourse between the people of the two countries, the deliberate and declared purpose existed on the part of Great Britain, and the willingness existed on the part of the United States to secure, absolutely and free from the possibility of encroachment, the fisheries of the British possessions in America, to the people of those possessions, excepting as to certain localities in respect of which special provisions were made. To effect this it was not merely necessary that there should be a joint declaration of the right which was to be established, but that means should be taken to preserve that right. For this purpose a distinction was necessarily drawn between United States' vessels engaged in commerce and those engaged in fishing. While the former had free access to our coasts, the latter were placed under a strict prohibition.

The purpose was to prevent the fisheries from being poached on, and to preserve them to "the subjects of His Britannic Majesty in North America," not only for the pursuit of fishing within the waters adjacent to the coast (which can under the law of nations be done by any country) but as a basis of supplies for the pursuit of fishing in the deep sea. For this purpose it was necessary to keep

out foreign fishing vessels, excepting in cases of dire necessity, no matter under what pretext they might desire to come in. The fisheries could not be preserved to our people if every one of the United States' fishing vessels that were accustomed to swarm along our coasts could claim the right to enter our harbours, "to post a letter, or send a telegram, or buy a newspaper, to obtain a physician in case of illness, or a surgeon in case of accident, to land or bring off a passenger, or even to lend assistance to the inhabitants in fire, flood or pestilence," or to "buy medicine" or to "purchase a new rope." The slightest acquaintance with the negotiations which led to the Treaty of 1818, and with the state of the Fishery Question preceding it, induces the belief that if the United States' negotiators had suggested these, as purposes for which their vessels should be allowed to enter our waters the proposal would have been rejected as "preposterous," to quote Mr. Phelps' own words. But Mr. Phelps appears to have over-looked an important part of the case, when he suggested that it is a "preposterous" construction of the Treaty which would lead to the purchase of bait being prohibited. So far from such a construction being against "its spirit and plain intent," no other meaning would accord with that spirit and intent. If we adopt one of the methods, contended for by Mr. Phelps, of arriving at the true meaning of the Treaty, namely, having reference to the "attending circumstances," &c., we find that so far from its being considered by the framers of the Treaty that a prohibition of the right to obtain bait would be a "preposterous" and an "extreme instance," a proposition was made by the United States' negotiators that the proviso should read thus: *Provided "however, that American fishermen shall be permitted to enter such bays and harbours, for the purposes only of obtaining shelter, wood, water and bait," and the insertion of the word "bait" was resisted by the British negotiators and struck out. After this how can it be contended that any rule of interpretation would be sound which would give to United States' fishermen the very permission which was sought for on their behalf during the negotiations, successfully resisted by the British representatives and deliberately rejected by the framers of the Convention?*

It is a well known fact that the negotiations preceding the Treaty had reference very largely to the deep sea fisheries, and that the right to purchase bait in the harbours of the British possessions, for the deep sea fishing was one which the United States' fishermen were intentionally excluded from. Referring to the difficulties which subsequently arose from an enforcement of the Treaty, an American author says: "It will be seen that most of those difficulties arose from a change in the character of the fisheries. Cod being caught on the banks were seldom pursued within the three mile limit, and yet it was to cod, and perhaps halibut, that all the early negotiations had reference.

The mackerel fishing had now sprung up in the Gulf of St. Lawrence, and had proved extremely profitable. This was at that time an inshore fishery.-- (Schuyler's American Diplomacy, page 411.)

In further amplification of this argument the undersigned would refer to the views set forth in the memorandum, before mentioned, in the letters of Mr. Bayard, in May last, and to those presented in

the report of the Minister of Marine and Fisheries, approved on the 14th June ultimo.

While believing, however, that Mr. Phelps cannot, by resort to any such matters, successfully establish a different construction for the Treaty from that which its words present, the undersigned submits that Mr. Phelps is mistaken as to the right to resort to any matters outside the Treaty itself to modify its plain words. Mr. Phelps expresses his contention thus: "It seems to me clear that the Treaty may be considered in accordance with those ordinary and well settled rules, applicable to all written instruments, which, without such salutary assistance, must constantly fail of their purpose. By these rules the letter often gives way to the intent, or rather is only used to ascertain the intent, and the whole document will be taken together, and will be considered in connection with the attending circumstances, the situation of the parties and the object in view, and thus the literal meaning of an isolated clause is often shown not to be the meaning really understood or intended." It may be readily admitted that such rules of interpretation exist, but when are they to be applied? Only when "interpretation" is necessary. When the words are plain in their ordinary meaning, the task of interpretation does not begin, Vattel says in reference to the "Interpretation of Treaties":

The first general maxim of interpretation is that, *it is not allowable to interpret what has no need of interpretation*. When the deed is worded in clear and precise terms, when its meaning is evident, and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but an attempt to elude it.

Those cavillers who dispute the sense of a clear and determinate article, are accustomed to seek their frivolous subterfuges in the pretended intentions and views which they attribute to its author. It would be very often dangerous to enter with them into the discussion of those supposed views that are pointed out in the piece itself. The following rule is better calculated to foil such cavillers and will at once cut short all chicanery. *If he who could, and ought to have explained himself clearly and fully, has not done it, it is the worse for him;* he cannot be allowed to introduce subsequent restrictions which he has not expressed. This [is] a maxim of the Roman Law:

Pactionem obscuram iis nocere in quorum fuit potestate legem apertius conscribere. The equity of this rule is glaringly obvious and its necessity is not less evident." (Vattel's "Interpretation of Treaties" Liv. II, cap. 17.)

Sedgewich, the American writer, on the "Construction of Statutes," (and treaties are constructed [construed] by much the same rules as statutes), says, at page 194:

The rule is, as we shall constantly see, cardinal and universal, that if the statute is plain and unambiguous, there is no room for construction or interpretation. The Legislature has spoken, their intention is free from doubt, and their will must be obeyed. "*It may be proper,*" it has been said in Kentucky, in giving a construction to a statute, to look to the effects and consequences, when its provisions are ambiguous, or the legislative intention is doubtful. But when the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislative and not judicial action. So too it is said by the Supreme Court of the United States, where a law

is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.

At the tribunal of arbitration at Geneva, held under the Washington Treaty in 1872, a similar question arose. Counsel for Her Majesty's Government presented a supplemental argument in which the ordinary rules for the interpretation of treaties were invoked. Mr. Evarts, one of the Counsel for the United States, and afterwards Secretary of State, made a supplemental reply, in which the following passage occurs:

At the close of the special argument we find a general presentation of canons for the construction of treaties, and some general observations as to the light, or the controlling reason, under which these rules of the Treaty should be construed. These suggestions may be briefly dismissed. It certainly would be a very great reproach to these nations, which had deliberately fixed upon three propositions, as expressive of the law of nations in their judgment for the purposes of this trial, that a resort to general instructions, for the purpose of interpretation, was necessary. Eleven canons of interpretation drawn from Vattel are presented in order, and then several of them, as the case suits, are applied as valuable in elucidating this or that point of the rules. But the learned Counsel has omitted to bring to your notice the first and most general rule of Vattel, which being once understood, would, as we think, dispense with any consideration of the subordinate canons, which Vattel has introduced, to be used only in case his first general rule does not apply. This first proposition is that *it is not allowable to interpret what has no need of interpretation*. (Washington Treaty Papers, vol. III. pp. 446-7.)

In a letter of Mr. Hamilton Fish to the United States' Minister in England, on the same subject, dated 16th April, 1872, the following view was set forth:—

Further than this it appears to me that the principles of English and American law (and they are substantially the same) regarding the construction of statutes and treaties and of written instruments generally, would preclude the seeking of evidence of interest [intent] outside the instrument itself. It might be a painful trial on which to enter, in seeking the opinions and recollections of parties to bring into conflict the differing expectations of those who were engaged in the negotiation of an instrument. (Washington Treaty Papers, vol. II., page 473.)

But even at this barrier, the difficulty in following Mr. Phelps' argument, by which he seeks to reach the interpretation he desires, does not end after taking a view of the treaty which all authorities thus forbid. He says: "Thus regarded, it appears to me clear that the words 'for no other purpose whatever,' as employed in the treaty, mean 'for no other purpose inconsistent with the provisions of the Treaty.'"

Taken in that sense the words would leave no meaning, for no other purpose would be consistent with the Treaty, excepting those mentioned.

He proceeds, "or prejudicial to the interests of the provinces or their inhabitants." If the United States' authorities are the judges as to what is prejudicial to those interests, the Treaty will have very little value. If the provinces are to be the judges, it is most prejudicial to their interests that United States' fishermen should be permitted to come into their harbours on any pretext, and it is fatal to their fishery interests that those fishermen, with whom they have to compete at such a disadvantage in the markets of the United States, should be allowed to enter for supplies and bait, even for the pursuit

of the deep sea fisheries. Before concluding his remarks on this subject, the undersigned would refer to a passage in the answer on behalf of the United States to the case of Her Majesty's Government, as presented to the Halifax Fisheries Commission in 1877:

The various incidental and reciprocal advantages of the Treaty, such as the privileges of traffic, purchasing bait and other supplies, are not the subject of compensation, because the Treaty of Washington confers no such rights on the inhabitants of the United States, *who now enjoy them merely by sufferance, and who can at any time be deprived of them by the enforcement of existing laws, or the re-enactment of former oppressive Statutes.*

Mr. Phelps has made a lengthy citation from the Imperial Act, 59 Geo. III, cap. 38, for the purpose of establishing:—

1st. That the penalty of forfeiture was not incurred by any entry into British ports, unless accompanied by fishing, or preparing to fish, within the prohibited limits.

2nd. That it was not the intention of Parliament, or its understanding of the Treaty, that any other entry should be regarded as an infraction of the provisions of that Act.

As regards the latter point it seems to be effectually disposed of by the quotation which Mr. Phelps has made. The Act permits fishermen of the United States to enter into the bays or harbours of His Britannic Majesty's Dominions in America for the purposes named in the Treaty, "and for no other purpose whatever," and, after enacting the penalty of forfeiture, in regard to certain offences, provides a penalty of £200 sterling against any person otherwise

offending against the Act. It cannot, therefore, be successfully
338 fully contended that Parliament intended to permit entry into the British American waters for the purchase of bait or for any other than the purposes specified in the Treaty.

As to the first point it is to be observed that the penalty of forfeiture was expressly pronounced as applicable to the offence of fishing or preparing to fish. It may be that forfeiture is incurred by other illegal entry, contrary to the Treaty and contrary to the Statute. It may also be contended that preparing within the prohibited limits to fish in any place is the offence at which the penalty is aimed, or it may be that the preparing within these waters to fish, is evidence of preparing to fish within the prohibited waters under the Imperial Statute, and especially under the Canadian Statute which places the burden of proof on the defendant.

The undersigned does not propose, at this time, to enter into any elaborate argument to show the grounds on which the penalty of forfeiture is available, because that question is one which is more suitable for determination by the Courts, to whose decision it has been referred in the very case under consideration.

The decision in the case of the "David J. Adams" will be soon pronounced, and as the Government of Canada will be bound by the ultimate judgment of competent authority on this question, and cannot be expected to acquiesce in the view of the United States' Government, without such judgment, any argument of the case in diplomatic form would be premature and futile.

In order, however, to show that Mr. Phelps is in error when he assumes that the practical construction hitherto given to the Treaty is in accordance with his views, it is as well to state that in the year 1815 the commander of one of Her Majesty's ships of war seized four

United States' fishing vessels, (see Sabine on Fisheries), and again in 1817 the Imperial Government acted on the view that they had the right to seize foreign vessels encroaching on the fishing grounds. Instructions were issued by Great Britain to seize foreign vessels fishing or at anchor in any of the harbours or creeks in the British North American Possessions, or within their maritime jurisdictions, and send them to Halifax for adjudication. Several vessels were seized and information was fully communicated to the Government of the United States. This, it will be remembered, was not only before the Treaty, but before the Imperial Act above referred to.

The following were the words of the Admiralty Instructions then issued:

On your meeting with any foreign vessel fishing or at anchor in any of the harbours or creeks in His Majesty's North American Provinces, or within our maritime jurisdiction, you will seize and send such vessel so trespassing to Halifax for adjudication, unless it should clearly appear that they have been obliged to put in there in consequence of distress, acquainting me with the cause of such seizure, and every other particular, to enable me to give all information to the Lords Commissioners of the Admiralty.

Under these instructions eleven or twelve American fishing vessels were seized in Nova Scotia on 8th June, 1817, in consequence of their frequenting some of the harbours of that province.

In 1818, the fishing vessels "Nabby" and "Washington" were seized and condemned for entering and harbouring in British American waters.

In 1839 the "Java," "Independence," "Magnolia" and "Hart" were seized and confiscated, the principal charge being that they were within British American waters without legal cause.

In 1840 the "Papineau" and "Mary" were seized and sold for purchasing bait.

In the spring of 1819 a United States' fishing vessel named the "Charles" was seized and condemned in the Vice-Admiralty Court in New Brunswick for having resorted to a harbour of that province after warning and without necessity.

In the year 1871 the United States' fishing vessel "J. H. Nickerson" was seized for having purchased bait within three marine miles of the Nova Scotia shore, and condemned by the judgment of Sir William Young, Chief Justice of Nova Scotia, and Judge of the Court of Vice-Admiralty. The following is a passage from his judgment:

The vessel went in, not to obtain water or men, as the allegation says, but to purchase or procure bait (which as I take it, is a preparing to fish), and it was contended that they had a right to do so, and that no forfeiture accrued on such entering. The answer is, that if a privilege to enter our harbours for bait was to be conceded to American fishermen it ought to have been in the Treaty, and it is too important a matter to have been accidentally overlooked. We know, indeed, from the state papers, that it was not overlooked, that it was suggested and declined. But the Court, as I have already intimated, does not insist upon that as a reason for its judgment. What may be fairly and justly insisted on is, that beyond the four purposes specified in the Treaty—shelter, repairs, water and wood—here is another purpose or claim, not specified, while the Treaty itself declares that no such other purpose or claim shall be received to justify an entry. It appears to me an inevitable conclusion that the "J. H. Nickerson" in entering the Bay of Ingonish for the purpose of procuring bait, while there, became liable to forfeiture and upon the true construction of the Treaty and Acts of Parliament was legally seized. (Vide Halifax Com., Vol. III., pp. 3398, Washington Edition).

In view of these seizures and of this decision it is difficult to understand the following passages in the letter of Mr. Phelps:

The practical construction given to the Treaty, down to the present time, has been in entire accord with the conclusions thus deduced from the Act of Parliament. The British Government has repeatedly refused to allow interference with American fishing vessels, unless for illegal fishing, and has given explicit orders to the contrary.

Judicial authority upon the question is to the same effect. That the purchase of bait by American fishermen in the provincial ports has been a common practice is well known, but in no case, so far as I can ascertain, has a seizure of an American vessel ever been enforced on the ground of the purchase of bait, or of any other supplies. On the hearing before the Halifax Fishery Commission in 1877-78 this question was discussed and no case could be produced of any such condemnation. Vessels shown to have been condemned were in all cases adjudged guilty either of fishing or preparing to fish, within the prohibited limits.

Although Mr. Phelps is under the impression that "in the hearing before the Halifax Fishery Commission in 1877 this question was discussed and no case could be produced of any such condemnation," the fact appears in the records of that Commission, as published by the Government of the United States, that on a discussion which there arose, the instances above mentioned were nearly all cited, and the judgment of Sir William Young in the case of the "J. H. Nickerson" was presented in full, and it now appears among the papers of that Commission (see Vol. III., Documents and Proceedings of Halifax Commission, page 3398, Washington Edition). The decision in the case of the "J. H. Nickerson" was subsequent to that in the case of the "White Fawn" mentioned to the exclusion of all the other cases referred to by Mr. Phelps. Whether that decision should be re-affirmed or not is a question more suitable for judicial determination than for discussion here.

RIGHT OF THE DOMINION PARLIAMENT TO MAKE FISHERY ENACTMENT.

Mr. Phelps deems it unnecessary to point out that it is not in the power of the Canadian Parliament to alter or enlarge the provisions of the Act of the Imperial Parliament, or to give to the Treaty a construction or legal effect not warranted by that Act.

No attempt has ever been made by the Parliament of Canada or by that of any of the Provinces to give a "construction" to the Treaty, but the undersigned submits that the right of the Parliament of Canada, with the Royal Assent given in the manner provided in the constitution, to pass an Act on this subject to give that Treaty effect, or to protect the people of Canada from the infringement of the Treaty provisions, is clear beyond question. An Act of that Parliament duly passed, according to constitutional forms, has as much the force of law in Canada and binds as fully offenders who may come within its jurisdiction, as any Act of the Imperial Parliament.

The efforts made on the part of the Government of the United States to deny and refute the validity of Colonial statutes on this subject have been continued for many years, and in every instance have been set at naught by the Imperial authorities and by the Judicial tribunals.

In May, 1870, this vain contention was completely abandoned. A circular was issued by the Treasury Department at Washington, in which circular the persons to whom it was sent were authorised and

directed to inform all masters of fishing vessels that the authorities of the Dominion of Canada had resolved to terminate the system of granting fishing licenses to foreign vessels.

The circular proceeds to state the terms of the Treaty of 1818, in order that United States' fishermen might be informed of the limitation thereby placed on their privileges. It proceeds further to set out at large the Canadian Act of 1868, relating to fishing by foreign vessels, which has been hereinbefore referred to.

The fishermen of the United States were by that circular expressly warned of the nature of the Canadian Statute which it is now once more pretended is without force, but no intimation was given to those fishermen that these provisions were nugatory, and would be resisted by the United States Government. Lest there should be any misapprehension on that subject, however, on 9th June of the same year, less than a month after that circular, another circular was issued from the same Department, stating again the terms of the Treaty of 1818, and these containing the following paragraph:—

Fishermen of United States are bound to respect the British laws for the regulation and preservation of the fisheries, to the same extent to which they are applicable to British and Canadian fishermen.

The same circular, noticing the change made in the Canadian Fishery Act of 1868, by the amendment of 1870, makes this observation:

It will be observed that the warning formerly given is not required under the amended Act, but that vessels trespassing are liable to seizure without such warning.

THE CANADIAN STATUTE OF 1836.

Mr. Phelps is again under an erroneous impression, with regard to the Statute introduced at the last session of the Dominion Parliament.

He is informed that "since the seizure the Canadian authorities have pressed, or are pressing, through the Canadian Parliament, in much haste, an Act, which is designed, for the first time in the history of the Legislation, under this Treaty, to make the facts upon which the American vessels have been seized illegal, and to authorise proceedings against them therefor."

The following observations are appropriate in relation to this passage of Mr. Phelps' letter:—

1. The Act which he refers to, was not passed with haste. It was passed through the two Houses in the usual manner, and with the observance of all the usual forms. Its passage occupied probably more time than was occupied in the passage through the Congress of the United States, of a measure which possesses much the same character, and which will be referred to hereafter.

340 2. The Act has no bearing on the seizures referred to.

3. It does not make any act illegal which was legal before, but declares what penalty attaches to the offences which were already prohibited.

It may be observed, in reference to the charges of "undue haste" and of "legislating for the first time in the history of the legislation under the Treaty," that before the Statute referred to had become law the United States' Congress passed a Statute containing the following section:—

That whenever any foreign country whose vessels have been placed on the same footing in the ports of United States as American vessels (the coastwise trade excepted) shall deny to any vessels of the United States any of the com-

mercial privileges accorded to national vessels in the harbors, ports, or waters of such foreign country, the President, on receiving satisfactory information of the continuance of such discriminations against any vessels of the United States, is hereby authorised to issue his proclamation, excluding, on and after such time as he may indicate, from the exercise of such commercial privileges in the ports of the United States as are denied to American vessels in the ports of such foreign country, all vessels of such foreign country of a similar character to the vessels of the United States thus discriminated against and suspending such concessions previously granted to the vessels of such country, and on and after the date named in such proclamation for it to take effect, if the master, officer or agent of any vessel of such foreign country excluded by said proclamation from the exercise of any commercial privileges shall do any act prohibited by said proclamation, in the ports, harbors, or waters of the United States for or on account of such vessel, such vessel, and its rigging, tackle, furniture and boats, and all the goods on board shall be liable to seizure and to forfeiture to the United States, and any person opposing any officer in the United States in the enforcement of this Act, or aiding and abetting any other person in such opposition, shall forfeit eight hundred dollars, and shall be guilty of a misdemeanour, and, upon conviction, shall be liable to imprisonment for a term not exceeding two years. Sec: 17 of Act No. 85 of Congress, 1886.

This enactment has all the features of hostility which Mr. Phelps has stigmatised as "unprecedented in the history of legislation under the Treaty."

ENFORCEMENT OF THE ACTS WITHOUT NOTICE.

Mr. Phelps insisted upon what he regards as "obvious grounds of reason and justice," and "upon common principles of comity," that previous notice should have been given of the "new stringent restrictions" it was intended to enforce.

It has already been shown that no new restrictions have been attempted. The case of the "David J. Adams" is proceeding under the Statutes which have been enforced during the whole time when the Treaty had operation.

It is true that for a short time prior to the Treaty of Washington, and when expectations existed of such a Treaty being arrived at, the instructions of 1870, which are cited by Mr. Phelps, were issued by the Imperial authorities. It is likewise true that under these instructions the rights of Her Majesty's subjects in Canada were not insisted on, in their entirety. These instructions were obviously applicable to the particular time at which and the particular circumstances under which they were issued by Her Majesty's Government.

But it is obviously unfair to invoke them now, under wholly different circumstances, as establishing a "practical construction" of the Treaty, or as affording any ground for claiming that the indulgence which they extended should be perpetual.

The fishery clauses of the Treaty of Washington were annulled by a notice from the Government of the United States, and, as has already been urged, it would seem to have been the duty of that Government, rather than of the Government of Canada, to have warned its own people of the consequences which must ensue. This was done in 1870 by the circulars from the Treasury Department at Washington, and might well have been done at this time.

Mr. Phelps has been pleased to stigmatise "the action of the Canadian authority in seizing and still detaining the 'David J. Adams' as not only unfriendly and discourteous, but altogether unwarrantable."

He proceeds to state that that vessel "had violated no existing law," although his letter cites the statute which she had directly and plainly violated, and he states that she "had incurred no penalty that any known statute imposed," while he has quoted at large the words which inflict a penalty for the violation of that statute. He declares, it seems impossible for him to escape the conclusion that "this and similar seizures were made by the Canadian authorities for the deliberate purpose of harassing and embarrassing the American fishing vessels in the pursuit of their lawful employment," and that the injury is "very much aggravated by the motives which appear to have prompted it."

He professes to have found the real source of the difficulty in "the irritation that has taken place among a portion of the Canadian people, on account of the termination by the United States' Government of the Washington Treaty," and in a desire to drive the United States, by "harassing and annoying their fishermen, into the adoption of a new Treaty, by which Canadian fish shall be admitted free," and he declares that "this scheme is likely to prove as mistaken in policy as it is unjustifiable in principle."

He might, perhaps, have more accurately stated the real source of the difficulty had he suggested that the United States' authorities have long endeavoured, and are still endeavouring, to obtain that which, by their solemn Treaty, they deliberately renounced, and to deprive the Canadian people of that which by Treaty the Canadian people lawfully acquired.

341 The people of the British North American Provinces, ever since the year 1818 (with the exception of those periods in which the Reciprocity Treaty and the Fishery Clauses of the Washington Treaty prevailed) have, at enormous expense, and with great difficulty, been protecting their fisheries against encroachments by fishermen of the United States, carried on under every form and pretext, and aided by such denunciations as Mr. Phelps has thought proper to reproduce on this occasion. They value no less now than they formerly did the rights which were secured to them by the Treaty, and they are still indisposed to yield those rights, either to individual aggression or official demands.

The course of the Canadian Government since the rescission of the Fishery Clauses of the Washington Treaty has been such as hardly to merit the aspersions which Mr. Phelps has used. In order to avoid irritation, and to meet a desire which the Government represented by Mr. Phelps professed to entertain for the settlement of all questions which could re-awaken controversy, they conceded, for six months, after the expiration of those clauses, all the benefits which the United States' fishermen had enjoyed under them, although during that interval the Government of the United States enforced against Canadian fishermen the laws which those Fishery Clauses had suspended.

Mr. Bayard, the United States' Secretary of State, has made some recognition of these facts in a letter which he is reported to have written recently to the owners of the "David J. Adams." He says—

More than one year ago I sought to protect our citizens engaged in fishing from results which might attend any possible misunderstanding between the Governments of Great Britain and the United States, as to the measure of their mutual rights and privileges in the territorial waters of British North America.

After the termination of the Fishery Articles of the Treaty of Washington, in June last, it seemed to me then, and seems to me now, very hard that differences of opinion between the two Governments should cause loss to honest citizens, whose line of obedience might be thus rendered vague and uncertain, and their property be brought into jeopardy. Influenced by this feeling, I procured a temporary arrangement, which secured our fishermen full enjoyment of all Canadian fisheries, free from molestation, during a period which would permit discussion of a just international settlement of the whole Fishery Question; but other counsels prevailed, and my efforts further to protect fishermen from such trouble as you now suffer, were unavailing.

"At the end of the interval of six months the United States' authorities concluded to refrain from any attempt to negotiate for larger fishery rights for their people, and they have continued to enforce their Customs laws against the fishermen and people of Canada.

The least they could have been expected to do under these circumstances was to leave to the people of Canada the full and unquestioned enjoyment of the rights secured to them by Treaty.

The Government of Canada has simply insisted upon those rights, and has presented to the legal tribunals its claim to have them enforced.

The insinuations of ulterior motives, the imputations of unfriendly dispositions, and the singularly inaccurate representation of all the leading features of the questions under discussion may, it has been assumed, be passed by with little more comment. They are hardly likely to induce Her Majesty's Government to sacrifice the rights which they have heretofore helped our people to protect, and they are too familiar to awaken indignation or surprise.

The undersigned respectfully recommends that the substance of this memorandum, if approved, be forwarded to the Secretary of State for the Colonies, for the information of Her Majesty's Government.

(Sd.)

JNO. S. D. THOMPSON,
Minister of Justice.

OTTAWA, 22nd July, 1886.

No. 209.—1886, July 23: *Letter from the Earl of Rosebery to Mr. Phelps.*

FOREIGN OFFICE July 23 1886.

SIR, I have the honour to acknowledge the receipt of your note of the 16th instant, enclosing a copy of a telegram from Mr. Bayard, in which he calls upon Her Majesty's Government to put a stop to the action of Canadian authorities towards United States' fishermen, which he characterises as unjust, arbitrary, and vexatious.

Mr. Bayard further states that the readiness of the United States' Government to endeavour to come to a just and fair joint interpretation of Treaty rights and commercial privileges is ill met by persistent and unfriendly action of the Canadian authorities, which is rapidly producing a most injurious and exasperating effect.

I cannot help regretting that the tone of this communication
342 should not have more corresponded with the conciliatory disposition of Her Majesty's Government, for the expressions which I have cited can hardly tend to facilitate a settlement of the difficult questions involved.

I beg, however, to state that the views of the Canadian Government upon the whole matter will very shortly be communicated to the United States' Government in a despatch which I have addressed to Her Majesty's Minister at Washington, in reply to the various communications which he has received from Mr. Bayard. I shall have the honour to place a copy of the despatch in question in your hands.

As regards the disposition expressed by Mr. Bayard to come to a just and fair joint interpretation of Treaty rights, Her Majesty's Government have already displayed their full readiness to negotiate on more than one occasion, and their view of Treaty rights has been explained both in my conversations with yourself and in despatches.

I trust, therefore, that this expression of the wishes of your Government, corresponding as it does so entirely with our own desire, indicates the willingness of the United States to enter as speedily as possible into definite arrangements which may lead to negotiations on a practical basis for the settlement of this question.

I have, &c.,

(Signed) ROSEBERY.

No. 210.—1886, July 23: *Letter from the Earl of Rosebery to Sir L. S. S. West.*

FOREIGN OFFICE, July 23, 1886.

SIR: I have received your dispatch No. 28 (Treaty,) of the 11th May last, inclosing a copy of a note addressed to you by Mr. Bayard, in which, whilst expressly referring to the seizure by the Canadian authorities of the American fishing vessels Joseph Story and David J. Adams, he discusses at length the present position of the North American Fisheries Question.

I have also received a communication upon the same subject from the United States Minister at this Court, dated the 2d June last, which, although advancing arguments of a somewhat different character, is substantially addressed to the consideration of the same question.

I think it therefore desirable to reply to these two communications together in the present despatch, of which I shall hand a copy to Mr. Phelps.

The matter is one involving the gravest interests of Canada; and, upon receipt of the communications above mentioned, I lost no time in requesting the Secretary of State for the Colonies to obtain from the Government of the Dominion an expression of their views thereon. I now inclose a copy of an approved Report of the Canadian Privy Council, in which the case of Canada is so fully set forth that I think it would be desirable, as a preliminary step to the further discussion of the questions involved in this controversy, to communicate a copy of it to Mr. Bayard, as representing the views of the Dominion Government; and I have to request that, in so doing, you will state that Her Majesty's Government will be glad to be favoured with any observations which Mr. Bayard may desire to make thereon.

In regard to those portions of Mr. Phelps's note of the 2d June, in which he calls in question the competence of the Canadian authorities

under existing Statutes, whether Imperial or Colonial, to effect seizures of United States fishing vessels under circumstances such as those which appear to have led to the capture of the *David J. Adams*, I have to observe that Her Majesty's Government do not feel themselves at present in a position to discuss that question, which is now occupying the attention of the Courts of Law in the Dominion, and which may possibly form the subject of an appeal to the Judicial Committee of Her Majesty's Privy Council in England.

It is believed that the Courts in Canada will deliver Judgment in the above cases very shortly; and until the legal proceedings now pending have been brought to a conclusion, Her Majesty's Government do not feel justified in expressing an opinion upon them, either as to the facts or the legality of the action taken by the Colonial authorities.

I do not, therefore, conceive it to be at present necessary to make any specific reply to Mr. Bayard's further notes of the 11th and 12th May and 1st, 2d, and 7th June last. But with regard to his note of the 20th May relative to the seizure of the United States fishing vessel *Jennie and Julia*, I inclose for communication to Mr. Bayard a copy of a Report from the Canadian Minister of Marine and Fisheries, dealing with this case.

I cannot, however, close this dispatch without adding that Her Majesty's Government entirely concur in that passage of the Report of the Canadian Privy Council, in which it is observed that "if the provisions of the Convention of 1818 have become inconvenient to either Contracting Party, the utmost that good-will and fair dealing can suggest is that the terms shall be reconsidered."

It is assuredly from no fault on the part of Her Majesty's Government that the question has now been relegated to the terms of the Convention of 1818. They have not ceased to express their anxiety to commence negotiations, and they are now prepared to enter upon a frank and friendly consideration of the whole question with the most earnest desire to arrive at a settlement consonant alike with the rights and interests of Canada and of the United States.

Where, as in the present case, conflicting interests are brought into antagonism by Treaty stipulations the strict interpretation of which has scarcely been called in question, the matter appears to Her Majesty's Government to be pre-eminently one for friendly negotiation.

I am, &c.

No. 211.—1886, August 9: *Letter from Mr. Bayard to Mr. Hardinge (British Chargé d'Affaires at Washington).*

DEPARTMENT OF STATE,
Washington, 9th August, 1886.

SIR,—I regret that it has become my duty to draw the attention of Her Majesty's Government to the unwarrantable and unfriendly treatment, reported to me this day by the United States' Consul General at Halifax, experienced by the American fishing schooner "*Rattler*," of Gloucester, Mass., on the 3rd instant, upon the occasion of

her being driven by stress of weather to find shelter in the harbour of Shelburne, N. S.

She was deeply laden, and was off the harbour of Shelburne when she sought shelter in a storm, and cast anchor just inside the harbour's entrance.

She was at once boarded by an officer of the Canadian cutter "Terror" who placed two men on board.

When the storm ceased, the "Rattler" weighed anchor to proceed on her way home, when the two men placed on board by the "Terror" discharged their pistols as a signal, and an officer from the "Terror" again boarded the "Rattler" and threatened to seize the vessel unless the captain reported at the Custom House.

The vessel was then detained until the Captain reported at the Custom House, after which she was permitted to sail.

The hospitality which all civilised nations prescribe has thus been violated, and the stipulations of a treaty grossly infringed.

A fishing vessel denied all the usual commercial privileges in a port has been compelled strictly to perform commercial obligations.

In the interests of amity I ask that this conduct may be properly rebuked by the Government of Her Majesty.

I have, etc.

(Sd.)

T. F. BAYARD.

The Honourable CHARLES HARDINGE,
&c., &c., &c.

No. 212.—1886, *August 14: Report of the Canadian Minister of Marine and Fisheries.*

OTTAWA, 14th August, 1886.

, The undersigned has the honor to submit the following, in answer to a despatch from Lord Granville to the Governor General under date 27th July last, enclosing two notes from Mr. Secretary Bayard to the British Minister at Washington, and asking that Her Majesty's Government be furnished with a report upon the cases therein referred to.

In his first communication, dated 10th July, Mr. Bayard says:—

I have the honor to inform you that I am in receipt of a report from the Consul General of the United States at Halifax, accompanied by sworn testimony, stating that the "Novelty," a duly registered merchant steam vessel of the United States, has been denied the right to take in steam coal, or purchase ice, or tranship fish in bond to the United States, at Pictou, Nova Scotia.

It appears, that having reached that port on the 1st instant, and finding the Customs Office closed on account of a holiday, the Master of the "Novelty" telegraphed to the Minister of Marine and Fisheries at Ottawa, asking if he would be permitted to do any of the three things mentioned above; that he received in reply a telegram reciting with certain inaccurate and extended application the language of Article I of the Treaty of 1818, the limitations upon the significance of which are in pending discussion between the Government of the United States and that of Her Britannic Majesty; that on entering and clearing the "Novelty" on the following day at the Customs House, the collector stated that his instructions were contained in the telegram the Master had received, and that the privilege of coaling being denied, the "Novelty" was compelled to leave Pictou without being allowed to obtain fuel necessary for her lawful voyage on a dangerous coast.

344 Against this treatment I make instant and formal protest, as an unwarranted interpretation and application of the Treaty, by the officers of the Dominion of Canada and the Province of Nova Scotia, as an infraction of the laws of commercial and maritime intercourse, existing between the two countries, and as a violation of hospitality, and for any loss or injury resulting therefrom the Government of Her Britannic Majesty will be held liable.

With reference to this, the undersigned begs to observe that Mr. Bayard's statement appears to need modification in several important particulars. In the first place, the "Novelty" was not a vessel regularly trading between certain ports in the United States and Canada, but was a fishing vessel, whose purpose was to carry on the mackerel seining business in the waters of the Gulf of St. Lawrence, around the coast of Prince Edward Island and Nova Scotia; that she had on board a full equipment of seines and fishing apparatus and men; that she was a steam vessel and needed coal, not for purposes of cooking or warming, but to produce motive power for the vessel, and that she wished to pursue her business of fishing in the above-named waters, and to send her fares home over Canadian Territory, to the end that she might the more uninterruptedly and profitably carry on her business of fishing. That she was a fishing vessel and not a merchant vessel, is proved not only by the facts above-mentioned, but also from a telegram over the signature of H. B. Joyce, the Captain of the vessel, a copy of which is appended. In his telegram, Captain Joyce indicates the character of his vessel by using the words "American fishing steamer," and he signs himself "H. B. Joyce, Master fishing steamer, 'Novelty.'"

There seems, no doubt therefore, that the "Novelty" was in character, and in purpose, a fishing vessel, and as such comes under the provision of the Treaty of 1818, which allows United States fishing vessels to enter Canadian ports "for the purpose of shelter and repairing damages therein, and of purchasing wood and of obtaining water, and for no other purpose whatever."

The object of the Captain was to obtain supplies for the prosecution of his fishing, and to tranship his cargoes of fish at a Canadian port, both of which are contrary to the letter and spirit of the Convention of 1818.

To Mr. Bayard's statement, that in reply to Captain Joyce's inquiry of the Minister of Marine and Fisheries, he received in reply a telegram reciting with certain inaccurate and extended application, the language of Art. I of the Treaty of 1818, the undersigned considers it a sufficient answer to adduce the telegrams themselves.

1st. Enquiry by the Captain of the "Novelty":

Hon. George E. Foster, Minister of Marine and Fisheries, Ottawa.

PICOU, N. S., 1st July, 1886.

Will the American fishing steamer now at Pictou be permitted to purchase coal or ice, or to tranship fresh fish, in bond, to the United States' markets? Please answer.

(Sd.) H. B. JOYCE,
Master of Fishing Steamer "Novelty."

2nd. Reply of the Minister of Marine and Fisheries thereto:

To H. B. Joyce, Master American Steamer "Novelty," Pictou, N. S.

OTTAWA, 1st July, 1886.

By terms of Treaty 1818, United States' fishing vessels are permitted to enter Canadian ports for shelter, repairs, wood and water, and for no other purpose whatever. That Treaty is now in force.

(Sd.) GEO. E. FOSTER,
Minister of Marine and Fisheries.

The undersigned fails to observe wherein any "inaccurate or extended application" of the language of the Treaty can be found in the above answer, inasmuch as it consists of a *de facto* citation from the Treaty itself with the added statement for the information of the Captain, that said Treaty was at that time in force. As to the "unwarranted interpretation and application of the Treaty," of which Mr. Bayard speaks, the undersigned has already discussed that phase of the question in his memorandum of 14th June, which was adopted by Council, and has been forwarded to Her Majesty's Government.

Mr. Bayard's second note is as follows:—

On the 2nd of June last I had the honor to inform you that despatches from Eastport, in Maine, had been received, reporting threats by the Customs officials of the Dominion to seize American boats coming into those waters to purchase herring from the Canadian weirs, for the purpose of canning the same as sardines, which would be a manifest infraction of the right of purchase and sale of herring caught and sold by Canadians in their own waters in the pursuance of legitimate trade.

To this note I have not had the honor of a reply.

To-day Mr. C. A. Boutelle, M. C., from Maine, informs me that American boats visiting St. Andrews, N. B., for the purpose of there purchasing herring from the Canadian weirs, for canning, had been driven away by the Dominion cruiser "Middleton."

345 Such inhibition of usual and legitimate commercial contracts and intercourse is assuredly without warrant of law, and I draw your attention to it, in order that the commercial rights of the citizens of the United States may not be thus invaded and subjected to unfriendly discrimination.

With reference to the above the undersigned observes that so far as his information goes, no collectors of Customs or captains of cruisers have threatened to "seize American boats coming into Canadian waters to purchase herring from Canadian weirs for the purpose of canning them as sardines."

Collectors of Customs have however, in pursuance of their duties under the Customs Law of Canada, compelled American vessels coming to purchase herring to enter and clear in conformity to Customs Law.

With reference to the action of the Dominion cruiser "Middleton," the undersigned cannot do better than quote from the official report of the Captain of that vessel as to the facts of the case referred to. In his report of date 9th July, 1886, Captain McLean of the "General Middleton" says:—

At 9 a. m. made sail and drifted with the tide towards the bay. Seeing a large number of boats of various sizes hovering around the fishing weirs, I ordered the boat in waiting and sent Officer Kent in charge, giving him instructions to row among the boats and see if there were any Americans purchasing fish. On the return of the boat, Chief Officer Kent reported the boats men-

tioned were Americans there for the purpose of getting herring. I immediately directed the Chief Officer to return and order the American boats to at once report themselves to the collector of the port and get permits to load fish or leave without further delay. One of the boatmen complied with the request and obtained a permit to load fish for Eastport; the others were very much disturbed on receiving the above instructions and sailed away towards the American side of the river and commenced blowing their fog horns, showing their contempt. Other boats at a greater distance seeing our boat approaching did not wait her arrival but up sail and left for the American shore.

The above extract from the report of the Chief Officer of the "General Middleton" goes to show that it was not his object to prevent American boats from trading in sardines, but rather to prevent them from so trading without having first conformed to the Customs Law of Canada.

The whole respectfully submitted.

(Sd.) GEORGE E. FOSTER,
Minister of Marine and Fisheries.

No. 213.—1886, September 11th: Letter from Mr. Phelps to the Earl of Iddesleigh (*British Foreign Secretary*).

LEGATION OF THE UNITED STATES,
London, September 11, 1886.

MY LORD: I have the honour to acknowledge the receipt of your note of September 1, on the subject of the Canadian fisheries.

I received also on the 16th of August, last, from Lord Rosebery, then Foreign Secretary, a copy of a note on the same subject, dated July 23, 1886, addressed by his Lordship, through the British Minister at Washington, to Mr. Bayard, the Secretary of State of the United States, in reply to a note from Mr. Bayard to the British Minister of May 10, and also to mine addressed to Lord Rosebery under date of June 2. The retirement of Lord Rosebery from office immediately after I received his note, prevented a continuance of the discussion with him. And in resuming the subject with your Lordship, it may be proper to refer both to Lord Rosebery's note and to your own. In doing so I repeat in substance considerations expressed to you orally in recent interviews.

My note to Lord Rosebery was confined to the discussion of the case of the David J. Adams, the only seizure in reference to which the details had then been fully made known to me. The points presented in my note, and the arguments in support of them need not be repeated.

No answer is attempted in Lord Rosebery's reply. He declines to discuss the questions involved on the ground that they are "now occupying the attention of the Courts of Law in the Dominion, and may possibly form the subject of an appeal to the Judicial Committee of Her Majesty's Privy Council in England."

He adds:

It is believed that the Courts in Canada will deliver judgment in the above cases very shortly, and until the legal proceedings now pending have been brought to a conclusion, Her Majesty's Government do not feel justified in expressing an opinion upon them, either as to facts or the legality of the action taken by the Colonial authorities.

346 And your Lordship remarks, in your note of August 24, "It is clearly right, according to practice and precedent, that such diplomatic action should be suspended pending the completion of the judicial inquiry."

This is a proposition to which the United States' Government is unable to accede.

The seizures complained of are not the acts of individuals claiming private rights which can be dealt with only by judicial determination, or which depend upon facts that need to be ascertained by judicial inquiry. They are the acts of the authorities of Canada, who profess to be acting, and in legal effect are acting, under the authority of Her Majesty's Government. In the Report of the Canadian Minister of Marine and Fisheries, which is annexed to and adopted as a part of Lord Rosebery's note, it is said :

The Colonial Statutes have received the sanction of the British Sovereign, who, and not the nation, is actually the party with whom the United States made the Convention. The officers who are engaged in enforcing the Acts of Canada, or the laws of the Empire, are Her Majesty's officers, whether their authority emanates directly from the Queen or from her Representative the Governor-General.

The ground upon which the seizures complained of are principally justified is the allegation that the vessels in question were violating the stipulations of the Treaty between the United States and Great Britain. This is denied by the United States' Government. The facts of the transaction are not seriously in dispute, and, if they were could be easily ascertained by both Governments without the aid of the judicial Tribunals of either. And the question to be determined is the true interpretation of the Treaty as understood, and to be administered between the High Contracting Parties.

The proposition of Her Majesty's Government amounts to this, that before the United States can obtain consideration of their complaint that the Canadian authorities without justification have seized and are proceeding to confiscate American vessels, the result of the proceedings in the Canadian Courts, instituted by the captors as the means of the seizures, must be awaited, and the decision of that Tribunal on the international questions involved obtained.

The interpretation of a Treaty when it becomes the subject of discussion between two Governments is not, I respectfully insist, to be settled by the judicial Tribunals of either. That would be placing its construction in the hands of one of the parties to it. It can only be interpreted for such a purpose by the mutual consideration and agreement which were necessary to make it. Questions between individuals arising upon the terms of a Treaty may be for the Courts to which they resort to adjust. Questions between nations as to national rights secured by Treaty are of a very different character and must be solved in another way.

The United States' Government is no party to the proceedings instituted by the British authorities in Canada, nor can it consent to become a party. The proceedings themselves are what the United States complain of as unauthorized, as well as unfriendly. It would be inconsistent with the dignity of a Sovereign Power to become a party to such proceedings, or to seek redress in any way in the Courts of another country for what it claims to be the violation of Treaty stipulations by the authorities of that country.

Still less could it consent to be made indirectly a party to the suits by being required to await the result of such defence as the individuals whose property is implicated may be able and may think proper to set up. Litigation of that sort may be indefinitely prolonged. Meanwhile fresh seizures of American vessels upon similar grounds are to be expected, for which redress would in like manner await the decisions of the local Tribunals, whose jurisdiction the captors invoke and the United States' Government denies.

Nor need it be again pointed out how different may be the question involved between the Governments from that which the proceedings raise in the Canadian Courts. Courts in such cases do not administer Treaties. They administer only the Statutes that are passed in pursuance of treaties. If a Statute contravenes the provisions of a Treaty, British Courts are nevertheless bound by the Statute. And if, on the other hand, there is a Treaty stipulation which no Statute gives the means of enforcing, the Court cannot enforce it.

Although the United States' Government insists that there is no British or Colonial Act authorising the seizures complained of, if the British Courts should nevertheless find such authority in any existing Statute, the question whether the Statute itself or the construction given it is warranted by the Treaty would still remain. And also the still higher question, whether if the strict technical reading of the Treaty might be thought to warrant such a result, it is one which ought to be enforced between Sovereign and friendly nations acting in the spirit of the Treaty.

The United States' Government must therefore insist that, irrespective of the future result of the Canadian legal proceedings, the authority and propriety of which is the subject of dispute, and without waiting their conclusion, it is to Her Majesty's Government it must look for redress and satisfaction for the transactions in question, and for such instructions to the colonial authority as will prevent their repetition.

While, as I have observed, Lord Rosebery declines to discuss the question of the legality of these seizures, the able and elaborate Report on the subject from the Canadian Minister of Marine and Fisheries, which is made a part of it, attempts in very general terms to sustain their authority. He says:

It is claimed that the vessel (the David J. Adams) violated the Treaty of 1818, and *consequently* the Statutes which exist for the enforcement of the Treaty.

It is not clear from this language whether it is meant to be asserted that if an act, otherwise lawful, is prohibited by a Treaty, the
 347 commission of the act becomes a violation of a Statute which has no reference to it, if the Statute was enacted to carry out the Treaty, or whether it is intended to say that there was in existence, prior to the seizure of the vessel in question, some Statute which did refer to the act complained of and did authorise proceedings or provide a penalty against American fishing vessels for purchasing bait or supplies in a Canadian port to be used in lawful fishing. The former proposition does not seem to require refutation. If the latter is intended, I have respectfully to request that your Lordship will have the kindness to direct a copy of such Act to be furnished to me. I have supposed that none such existed, and neither in the Report of

the Canadian Minister, nor in the Customs Circulars or Warnings thereto appended, in which attention is called to the various legislation on the subject, is any such Act pointed out.

The absence of such Statute provision, either in the Act of Parliament (59 Geo. III, c. 38) or in any subsequent Colonial Act, is not merely a legal objection, though quite a sufficient one, to the validity of the proceedings in question. It affords the most satisfactory evidence that up to the time of the present controversy no such construction has been given to the Treaty by the British or by the Colonial Parliament, as is now sought to be maintained.

No other attempt is made in the Report of the Canadian Minister to justify the legality of these seizures. It is apparent from the whole of it that he recognises the necessity of the proposed enactment of the Act of the Canadian Parliament already alluded to in order to sustain them.

This remark is further confirmed by the communication from the Marquis of Lansdowne, Governor-General of Canada, to Lord Granville, in reference to that Act, annexed by Lord Rosebery to his second note to the British Minister of July 23, 1886, a copy of which was sent me by his Lordship, in connection with his other note of same date above referred to.

I do not observe upon other points of the Minister's Report not bearing upon the points of note to Lord Rosebery. So far as they relate to the communications addressed to the British Minister by Mr. Bayard, the Secretary of State will doubtless make such reply as may seem to him to be called for.

In various other instances American vessels have been seized or driven away by the provincial authorities when not engaged or proposing to engage in any illegal employment.

Some of these cases are similar to that of the Adams, the vessels having been taken possession of for purchasing bait or supplies to be used in lawful fishing, or for alleged technical breach of Custom-house regulations, where no harm was either intended or committed, and under circumstances in which for a very long time such regulations have been treated as inapplicable.

In other cases, an arbitrary extension of the three-mile limit fixed by the Treaty has been announced so as to include within it portions of the high sea, such as the Bay of Fundy, the Bay of Chaleur, and other similar waters, and American fishermen have been prevented from fishing in those places by threats of seizure. I do not propose, at this time to discuss the question of the exact location of that line. But only to protest against its extension in the manner attempted by the provincial authorities.

To two recent instances of interference by Canadian officers with American fishermen, of a somewhat different character, I am specially instructed by my Government to ask your Lordship's attention, those of the schooners Thomas F. Bayard and Mascot.

These vessels were proposing to fish in waters in which the right to fish is expressly secured to Americans by the terms of the Treaty of 1818; the former in Bonne Bay, on the northwest coast of Newfoundland, and the latter near the shores of the Magdalen Islands.

For this purpose the Bayard attempted to purchase bait in the port of Bonne Bay, having reported at the Custom-house and announced

its object. The Mascot made a similar attempt at Port Amherst, in the Magdalen Islands, and also desired to take on board a pilot. Both vessels were refused permission by the authorities to purchase bait, and the Mascot to take a pilot, and were notified to leave the ports within twenty-four hours on penalty of seizure. They were therefore compelled to depart, to break up their voyages, and to return home, to their very great loss. I append copies of the affidavits of the masters of these vessels, stating the facts.

Your Lordship will observe, upon reference to the Treaty, not only that the right to fish in these waters is conferred by it, but that the clause prohibiting entry by American fishermen into Canadian ports, except for certain specified purposes, which is relied on by the Canadian Government in the cases of the Adams and of some other vessels, has no application whatever to the ports from which the Bayard and the Mascot were excluded. The only prohibition in the Treaty having reference to those ports is against curing and drying fish there, without leave of the inhabitants, which the vessels excluded had no intention of doing. The conduct of the provincial officers towards these vessels was therefore not merely unfriendly and injurious, but in clear and plain violation of the terms of the Treaty. And I am instructed to say that reparation for the losses sustained by it to the owners of the vessels will be claimed by the United States' Government on their behalf as soon as the amount can be accurately ascertained.

It will be observed that interference with American fishing-vessels by Canadian authorities is becoming more and more frequent, and more and more flagrant in its disregard of Treaty obligations and of the principles of comity and friendly intercourse. The forbearance and moderation of the United States' Government in respect to them appear to have been misunderstood, and to have been taken advantage of by the Provincial Government. The course of the United States has been dictated, not only by an anxious desire to preserve friendly relations, but by the full confidence that the interposition of Her Majesty's Government would be such as to put a stop to the transactions complained of, and to afford reparation for what has already taken place. The subject has become one of grave importance, and I earnestly solicit the immediate attention of your Lordship to the question it involves, and to the views presented in my former note, and in those of the Secretary of State.

348 The proposal in your Lordship's note that a revision of the

Treaty stipulations bearing upon the subject of the fisheries should be attempted by the Government upon the basis of mutual concession is one that under other circumstances would merit and receive serious consideration. Such a revision was desired by the Government of the United States before the present disputes arose, and when there was a reasonable prospect that it might have been carried into effect. Various reasons not within its control now concur to make the present time inopportune for that purpose, and greatly to diminish the hope of a favourable result to such an effort. Not the least of them is the irritation produced in the United States by the course of the Canadian Government, and the belief thereby engendered that a new Treaty is attempted to be forced upon the United States' Government.

It seems apparent that the questions now presented and the transactions that are the subject of present complaint must be considered and adjusted upon the provisions of the existing Treaty, and upon the construction that is to be given to them.

A just construction of these stipulations, and such as would consist with the dignity, the interests, and the friendly relations of the two countries, ought not to be difficult, and can doubtless be arrived at.

As it appears to me very important to these relations that the collisions between the American fishermen and the Canadian officials should terminate, I suggest to your Lordship whether an *ad interim* construction of the terms of the existing Treaty cannot be reached by mutual understanding of the Governments to be carried out informally by instructions given on both sides, without prejudice to ultimate claims of either, and terminable at the will of either, by which the conduct of the business can be so regulated for the time being as to prevent disputes and injurious proceedings until a more permanent understanding can be had.

Should this suggestion meet with your Lordship's approval, perhaps you may be able to propose an outline for such an arrangement. I am not prepared nor authorised to present one at this time, but may hereafter be instructed to do so if the effort is thought advisable.

I have, &c.

E. J. PHELPS.

No. 214.—1886, October 6th: Letter from Captain N. F. Blake to the "*Boston Herald*" referred to in Report of Committee of the Privy Council for Canada, dated 28th October, 1886.^a

So much has been written and printed about the experiences of American fishermen in Canadian waters, and the indignities put on them, I wish you would open your columns and give your readers an insight into the other side of the story. I sailed from Boston for North Bay on June 16, not knowing just what the cutters would do or how the law would be interpreted. I neared the coast with fear and anxiety. The first land sighted was Whitehead, and immediately cries came from aloft: "Cutter in sight ahead!" I rushed to the deck, found the vessel which proved to be the "Houlett," commanded by Capt. Lorway, nearing us rapidly. At time of sighting the cutter we were standing in shore. She hoisted her flags to let us know what she was, and we immediately "about ship" and put to sea to get out of her way, for fear we might be placed on the prize list of the captures. We finally headed up for Port Mulgrave in Canso, expecting to receive rough usage from the authorities, but to our surprise found Collector Murray a perfect gentleman, willing to assist me as far as he could without encroaching on the Canadian laws. From there we put in at Port Hawkesbury and boarded the cutter "Conrad," and asked the captain for instructions in regard to the three-mile limit, and what privileges, if any, we had. I was answered, in a courteous and hearty way, that he did not have them aboard, but would go ashore in a few moments and get me a printed copy of the

regulations, which he did, and assured us that if we followed them we would be unmolested; that he was there to see that the law was not violated, but not to cause unnecessary annoyance. After receiving instructions from the Captain, thanks to him, I went to the Custom House and entered my vessel, paying twenty-five cents. I found a very pleasant gentleman in the Collector, who did all in his power to relieve my mind and make us comfortable.

Souris was our next port of landing, where we also reported, and were well treated. From there we went to Malpeque, where we found another gentleman in the Collector. We met the cutter "Houlett" at Cascumpec, and had several interviews with her commander, Captain Lorway, who I found a quiet, just and gentlemanly officer. My vessel was one of the fleet ordered out of harbour by him. At that time it was as good a fish day as one could ask for, and the instructions were plain that at such times we had no right to remain in harbour. At no time is there much water to spare on the bar, and it is a common occurrence for vessels to ground in going in or out, and that some did touch was due to ignorance of the channel or carelessness on the part of captains. At the time the order was issued the weather was fair, but before all the fleet could work out through the channel, one of the sudden changes in weather, so much to be dreaded on such a coast, came, and the cutter rescinded the order and the fleet returned. It has been printed in a Boston paper that, owing to being forced to sea by the cutter's orders in bad weather, my schooner, the "Andrew Burnham," fouled two

349 Englishmen and narrowly escaped serious damage. If true it would look like a hardship. It was simply this: In getting under way, in a small and crowded space, finding I would not have room, I dropped our starboard anchor. That not holding, we let go the other, and it brought us up all right; not much in this to point to as an outrage or danger from stress of weather. I believe Captain Lorway to be a man who would carry out all the requirements of the Canadian laws, but I saw nothing in my experience in those waters that could be considered as being arbitrary, or taking a mean advantage of his official authority to annoy any one. Captain Lorway has been a master of vessels for twenty-five years, is a man of high reputation as a seaman, and as good a judge of whether the weather is favourable for a vessel to go to sea as any man who walks a deck, and when he ordered the fleet to sea he went himself, and I know he would not order a vessel to leave harbour if there was any danger of loss of life or property. We reported at Cascumpec, and were treated the same as at all other ports we touched at. If our vessels would attend to reporting at the Custom House, the same as they do in our ports, no trouble would be met with.

If we had "free fish" it would give the Canadians some recompense for what our fishermen want, viz., the right to go anywhere and everywhere, use their harbours, ship men, get provisions, land, and mend our nets, buy salt and barrels, and ship our catch home by rail or steamer without expense or annoyance, the same as we have heretofore.

If we had had that privilege this year, myself and vessel would have been \$5,000 better off this season, and all the fishermen in the bay would have been in the same boat with me. I do not say that I am too honest not to fish within the three-mile limit, nor do I believe

there is a vessel in the fleet who would not, if the cutter was out of sight. I made two trips to the bay, both of which were very successful, and I lived up to the requirements of the law as well as I knew how, and did not find them obnoxious, or to interfere with my success, and everywhere I went I was courteously treated by the officials—especially so by both the cutters. Should it be a bay year next season, I hope to meet them again. Those who openly preached that they would go where they pleased, do what they wanted to in spite of law or cutters, shipped men, smuggled or openly fished inside of the limit, and indulged in the satisfaction of damning the cutter, the captain, the government, and everything else when they knew they could do it with impunity, and that the men they were talking to could not resent it by word or blow, were looked after sharp and were not extended the courtesy that was shown so many of us.

In the interest of fair-play I could not help writing you and asking you to give this to your readers, if not taking up too much of your valuable space.

Very respectfully,

CAPT. NATHAN F. BLAKE,
Schooner "Andrew Burnham" of Boston.
BOSTON, 6th October, 1886.

No. 215.—1886, October 9th: Extract from the "Boston Herald," referred to in Report of Committee of Privy Council for Canada dated 28th October, 1886.^a

A FISHING CAPTAIN'S EXPERIENCE.

The letter of Captain Nathan F. Blake, of the fishing schooner "Andrew Burnham" of this city, which we published on Wednesday, would apparently indicate that the Canadian officials have not been disposed to push the requirements of their law quite as rigorously as some of our fishermen have maintained. Captain Blake says that he has experienced not the least trouble in his intercourse with the Canadian officials, but that, as he has treated them courteously, they on their side have reciprocated in like terms. There is, undoubtedly, a great deal of bitterness felt on both sides, and probably this bitterness has led both parties to be ungracious in their own conduct, and to exaggerate the wrongs they have endured, hardships frequently due to an unwillingness to observe the requirements of the law as these are now laid down. If all American fishing captains exhibited the same courtesy and moderation that Captain Blake has shown, we imagine that there would be very little trouble in arriving at an equitable and pleasing understanding with Canada.

No. 216.—1886, October 19th: Letter from Mr. Bayard (United States Secretary of State) to Sir L. S. S. West (British Minister).

WASHINGTON, 19th October, 1886.

SIR,—The "Everett Steele," a fishing vessel of Gloucester, Mass., in the United States, of which Chas. E. Forbes, an American citizen,

350 was master, was about to enter, on the 10th September, 1886, the harbour of Shelburne, Nova Scotia, to procure water, and for shelter during repairs. She was hailed when entering the harbour by the Canadian cutter "Terror," by whose Captain, Quigley, her papers were taken and retained. Captain Forbes on arriving off the town anchored and went with Captain Quigley to the Custom House, who asked him whether he reported whenever he had come in. Captain Forbes answered that he had always reported with the exception of a visit on the 25th of March, when he was driven into the lower harbour for shelter by a storm and where he remained only eight hours. The collector did not consider that this made the vessel liable, but Captain Quigley refused to discharge her; said he would keep her until he heard from Ottawa, put her in charge of policemen and detained her until next day, when at noon she was discharged by the Collector.

But a calm having come on she could not get to sea, and by the delay her bait was spoiled and the expected profits of her trip lost.

It is scarcely necessary for me to remind you, in presenting this case to the consideration of your Government, that when the north-eastern coast of America was wrested from France in a large measure by the valour and enterprise of New England fishermen they enjoyed in common with other British subjects, the control of the fisheries with which that coast was enriched; and that by the Treaty of Peace of 1783, which, as was said by an eminent English Judge when treating an analogous question, was a Treaty of "Separation," this right was expressly affirmed. It is true that by the Treaty of 1818, the United States renounced a portion of its rights in these fisheries, retaining, however, the old prerogatives of visiting the bays and harbours of the British north-eastern possessions for the purpose of obtaining wood, water and shelter, and for objects incidental to those other rights of territoriality so retained and confirmed. What is the nature of these incidental prerogatives, it is not, in considering this case, necessary to discuss. It is enough to say that Captain Forbes entered the harbour of Shelburne to obtain shelter and water, and that he had as much right to be there, under the Treaty of 1818, confirming in this respect the ancient privileges of American fishermen on those coasts, as he would have had on the high seas, carrying on, under shelter of the flag of the United States, legitimate commerce. The Government which you so honourably represent has with its usual candour and magnanimity conceded that when a merchant vessel of the United States is stopped in time of peace by a British cruiser on the grounds of being a slave trader, damages are to be paid to this Government, not merely to redress the injuries suffered, but as an apology for the insult offered to the flag of the United States. But the case now presented to you is a much stronger one than that of a seizure on the high seas of a ship unjustly suspected of being a slaver. When a vessel is seized on the high seas on such a suspicion, its seizure is not on waters where its rights, based on prior and continuous ownership are guaranteed by the sovereign making the seizure. If in such case the property of the owners is injured, it is, however wrongful the act, a case of rare occurrence on seas comparatively unfrequented, with consequences not very far reaching; and if a blow is struck at a system of which such vessel is

unjustly supposed to be a part, such system is one which the civilised world execrates.

But seizures of the character of that which I now present to you have no such features. They are made in waters not only conquered and owned by American fishermen, but for the very purpose for which they were being used by Captain Forbes, guaranteed to them by two successive treaties between the United States and Great Britain. These fishermen also, I may be permitted to remind you, were engaged in no nefarious trade. They pursue one of the most useful and meritorious of industries; they gather from the seas, without detriment to others, a food which is nutritious and cheap for the use of an immense population; they belong to a stock of men which contributed, before the revolution, most essentially to British victories on the North-Eastern Atlantic; and it may not be out of place to say they have shown since that revolution, when serving in the navy of the United States, that they have lost none of their ancient valour, hardihood and devotion to their flag.

The indemnity which the United States has claimed, and which Great Britain has conceded, for the visitation and search of isolated merchantmen seized on remote African seas on unfounded suspicion of being slavers, it cannot do otherwise now than claim, with a gravity which the importance of the case demands, for its fishermen seized on waters in which they have as much right to traverse for shelter as have vessels by which they are molested. This shelter, it is important to observe, they will, as a class, be debarred from if annoyances such as I now submit to you are permitted to be inflicted on them by minor officials of the British provinces.

Fishermen, as you are aware, have been considered, from the usefulness of their occupation, from their simplicity, from the perils to which they are exposed, and from the small quantity of provisions and protective implements they are able to carry with them, the wards of civilised nations, and it is one of the peculiar glories of Great Britain that she has taken the position, a position now generally accepted, that even in time of war, they are not to be the subjects of capture by hostile cruisers. Yet in defence [sic] of this immunity, thus generously awarded by humanity and the laws of nations, the very shelter which they own in these seas, and which is ratified to them by two successive treaties, is to be denied to them, not, I am confident, by the act of the wise, humane and magnanimous Government you represent, but by deputies of deputies permitted to pursue, not uninfluenced by local rivalry, these methods of annoyance in fishing waters which our fishermen have as much right to visit on lawful errands as those officials have themselves. For let it be remembered that by annoyances and expulsions such as these, the door of shelter is shut to American fishermen as a class.

If a single refusal of that shelter such as the present be sustained, it is a refusal of shelter to all fishermen pursuing their tasks on those inhospitable coasts. Fishermen have not funds enough, or outfit enough, nor I may add, recklessness enough, to put into harbours where, perfect as is their title, they meet with such treatment as that suffered by Captain Forbes.

351 To sanction such treatment, therefore, is to sanction the refusal to the United States fishermen as a body of that shelter

to which they are entitled by ancient right, by the law of nations, and by solemn treaty. Nor is this all. That treaty is part of a system of mutual concessions, as was stated by a most eminent English judge in the case of *Sutton v. Sutton* (1 Nyl v. r. 675), which I have already noticed, it was the principle of the Treaty of Peace and of the treaties which followed between Great Britain and the United States, that the "subjects of the two parts of the divided empire should be, notwithstanding the separation, protected in the mutual enjoyment" of the rights these treaties affirmed. If, as I cannot permit myself to believe, Great Britain should refuse to citizens of the United States the enjoyment of the plainest and most undeniable of these rights, the consequences would be so serious that they cannot be contemplated by this Government but with the gravest concern.

I have, &c.,

(Sd.) T. F. BAYARD.

The Honourable Sir L. WEST, K. C. M. G.,
&c., &c., &c.

No. 217.—1886, *October 20th: Letter from Mr. Bayard (United States Secretary of State) to Sir L. S. S. West (British Minister).*

WASHINGTON, 20th October, 1886.

SIR,—Permit me to ask you to draw the attention of your Government to the case set forth in the enclosed affidavit of Murdoch Kemp, master of the American fishing vessel "Pearl Nelson," of Provincetown, Mass., which has been subjected to treatment by the Customs officials at Arichat, Nova Scotia, inconsistent with the international law of ordinary amity and hospitality, and also plainly violative of treaty rights under the Convention of 1818, between Great Britain and the United States.

The vessel in question was compelled by stress of weather to seek shelter in the harbour of Arichat, N. S., and arrived late at night when the Custom House was closed. Before the Custom House was opened the next day the captain went there, and after waiting over an hour, the Collector arrived and the usual inward report was made and permission asked to land the clothing of a sailor lost overboard, whose family resided in that vicinity.

He was then informed that his vessel was seized for allowing his crew to go ashore the night before, before reporting at the Custom House.

The cruel irony of this was apparent when the Collector knew such report was impossible and that the landing of the crew was usual and customary, and that no charge of smuggling had been suggested or was possible under the circumstances.

To compel the payment of a fine or a deposit of \$200, which is practically the same in its results, was harsh and unwarranted and was adding a price and a penalty to the privilege of shelter guaranteed to American fishermen by treaty.

This vessel was a fishing vessel and although seeking to exercise no commercial privileges was compelled to pay commercial fees, such

as are applicable to trading vessels; but at the same time was not allowed commercial privileges.

I beg you will lose no time in representing the wrong inflicted upon an unoffending citizen of the United States, and procure the adoption of such orders as will restore the money so compelled to be deposited.

I am, &c.,

(Sd) T. F. BAYARD.

The Honourable Sir L. West, K. C. M. G.,
&c., &c., &c.

No. 218.—1886, *October 28: Report of a Committee of the Privy Council for Canada.*

The Committee of the Privy Council have had their attention called by a cablegram from the Right Honourable Mr. Stanhope, as to when he may expect answer to Despatch No. 195 "Rattler."

The Honourable Mr. Bowell, for the Minister of Marine and Fisheries, to whom the papers were referred, submits for the information of his Excellency in Council that having considered the statements, copies of which are annexed, of Captain Quigley of the Government cutter "Terror" and of the Collector of Customs at Shelburne with reference to the subject matter of the despatch, he is of opinion that these officers only performed their respective
352 duties in the case of the "Rattler," and that no just ground exists for the complaint put forward by Mr. Bayard's despatch of a "violation of that hospitality which all civilised nations prescribe," or of a "gross infraction of Treaty stipulations."

The Minister states that it does not appear at all certain from the statements submitted that this vessel put into Shelburne for a harbour in consequence of stress of weather. It does, however, appear that immediately upon the "Rattler" coming into port, Captain Quigley sent his chief officer to inform the Captain of the "Rattler" that before sailing he must report his vessel at the Custom House, and left on board the "Rattler" a guard of two men to see that no supplies were landed or taken on board or men allowed to leave the vessel during her stay in Shelburne Harbour. That at midnight the guard fired a shot as signal to the cruiser, and the first officer at once again proceeded to the "Rattler," and found the sails being hoisted and the anchor weighed preparatory to leaving port. The Captain being informed he must comply with the Customs regulations and report his vessel, he headed her up the harbour. That on the way up she became becalmed when the first officer of the "Terror" took the Captain of the "Rattler" in his boat and rowed him to the town, when the Collector of Customs received his report at the unusual hour of 6 a. m. rather than detain him, and the Captain with his vessel proceeded to sea.

The Minister observes that under section 25 of the Customs Act every vessel entering a port in Canada is required to immediately report at the Customs, and the strict enforcement of this regulation as regards United States' fishing vessels, has become a necessity, in view of the illegal trade transactions carried on by United States'

fishing vessels when entering Canadian ports under pretext of their Treaty privileges.

That under these circumstances a compliance with the Customs Act, involving only the report of a vessel, cannot be held to be a hardship or an unfriendly proceeding.

The Minister, in view of the repeated groundless complaints of being harshly treated that have been made during the present season by the Captains of United States' fishing vessels, and in almost every instance traceable to a refusal or neglect to observe the Customs regulations which it is proper to state are enforced upon other vessels as well as those of the United States, submits herewith, a letter written by Captain Blake of the United States' fishing schooner "Andrew Burnham," which appear in the Boston (Mass.) *Herald*, of the 7th instant,^a and also the editorial comment thereon,^b made in a subsequent issue of the paper referred to.

The Minister believes that the statements made by Captain Blake are strictly accurate, and as applied to other vessels are substantiated by the weekly boarding reports received by the Fisheries Department from the different Captains engaged in the Fisheries Protection Service. He, the Minister, therefore, respectfully submits that the reflection of Mr. Secretary Bayard characterising the treatment extended to the Captain of the "Rattler" as unwarrantable and unfriendly is not merited in view of the facts as stated by Captain Quigley and Collector Atwood.

The Committee concur in the report of the Acting Minister of Marine and Fisheries, and advise that your Excellency be moved to transmit a copy of this Minute, if approved, to the Right Honourable Her Majesty's Principal Secretary of State for the Colonies.

All which is respectfully submitted for your Excellency's approval.

(Sd.) JOHN J. MCGEE,
Clerk, Privy Council, Canada.

No. 219.—1886, November 6: Letter from Mr. Bayard to Mr. Phelps.

DEPARTMENT OF STATE,
Washington, November 6, 1886.

SIR: On October 7, 1886, the United States' fishing vessel, the Marion Grimes, of Gloucester, Mass., Alexander Landry, a citizen of the United States, being her captain, arrived shortly before midnight, under stress of weather, at the outer harbor of Shelburne, Nova Scotia. The night was stormy, with a strong head-wind against her, and her sole object was temporary shelter. She remained at the spot where she anchored, which was about seven miles from the port of Shelburne, no one leaving her until 6 o'clock the next morning, when she hoisted sail in order to put to sea. She had scarcely started, however, before she was arrested and boarded by a boat's crew from the Canadian cruiser Terror. Captain Landry was compelled to proceed to Shelburne, about seven miles distant, to report to the collector. When the report was made Captain Landry was informed that he was fined \$400 for not reporting on the

^a Document No. 214.

^b Document No. 215.

previous night. He answered that the custom-house was not open during the time that he was in the outer harbor. He further insisted that it was obvious from the storm that caused him to take shelter in that harbor, from the shortness of his stay, and from the circumstances that his equipments were exclusively for deep-sea fishing, and that he had made no effort whatever to approach the shore, that his object was exclusively to find shelter. The fine, however, being imposed principally through the urgency of Captain Quigley, 353 commanding the Terror, Captain Landry was informed that he was to be detained at the port of Shelburne until a deposit to meet the fine was made. He consulted Mr. White, the United States' Consular Agent at Shelburne, who at once telegraphed the facts to Mr. Phelan, United States' Consul-General at Halifax, it being of great importance to Captain Landry, and to those interested in his venture, that he should proceed on his voyage at once. Mr. Phelan then telegraphed to the Assistant Commissioner of Customs at Ottawa that it was impossible for Captain Landry to have reported while he was in the outer harbor on the 8th instant, and asking that the deposit required to release the vessel be reduced. He was told in reply that the Minister declined to reduce the deposit, but that it might be made at Halifax. Mr. Phelan at once deposited at Halifax the \$400 and telegraphed to Captain Landry that he was at liberty to go to sea. On the evening of October 11th Mr. Phelan received a telegram from Captain Landry, who had already been kept four days in the port stating that "the custom-house officers and Captain Quigley" refused to let him go to sea. Mr. Phelan the next morning called on the collector at Halifax to ascertain if an order had issued to release the vessel, and was informed that the order had been given, "but that the collector and captain of the cruiser refused to obey it for the reason that the captain of the seized vessel hoisted the American flag while she was in custody of Canadian officials." Mr. Phelan at once telegraphed this state of facts to the Assistant Commissioner at Ottawa, and received in reply, under date of August 12, the announcement that "collector has been instructed to release the Grimes from customs seizure. This department has nothing to do with other charges." On the same day a dispatch from the Commissioner of Customs at Ottawa was sent to the Collector of Customs at Halifax reciting the order to release the Grimes, and saying "this [the customs] department has nothing to do with other charges. It is Department of Marine."

The facts as to the flag were as follows:

On October 11, the Marion Grimes, being then under arrest by order of local officials for not immediately reporting at the custom-house, hoisted the American flag. Captain Quigley, who, representing, as appeared, not the revenue, but the marine department of the Canadian administration, was, with his "cruiser," keeping guard over the vessel, ordered the flag to be hauled down. This order was obeyed; but about an hour afterwards the flag was again hoisted, whereupon Captain Quigley boarded the vessel with an armed crew and lowered the flag himself. The vessel was finally released under orders of the Customs Department, being compelled to pay \$8 costs in addition to the deposit of \$400 above specified.

The seriousness of the damage inflicted on Captain Landry and those interested in his venture will be understood when it is consid-

ered that he had a crew of twelve men, with full supplies of bait, which his detention spoiled.

You will at once see that the grievances I have narrated fall under two distinct heads.

The first concerns the boarding by Captain Quigley of the Marion Grimes on the morning of October 8th, and compelling her to go to the town of Shelburne, there subjecting her to a fine of \$400 for visiting the port without reporting, and detaining her there arbitrarily four days, a portion of which time was after a deposit to meet the fine had been made.

This particular wrong I now proceed to consider with none the less gravity, because other outrages of the same class have been perpetrated by Captain Quigley. On August 18th last I had occasion, as you will see by the annexed papers, to bring to the notice of the British Minister at this Capital several instances of aggression on the part of Captain Quigley on our fishing vessels. On October 19, 1886, I had also to bring to the British Minister's notice the fact that Captain Quigley had, on September the 10th, arbitrarily arrested the Everett Steele, a United States' fishing vessel, at the outer port of Shelburne. To these notes I have received no reply. Copies are transmitted, with the accompanying papers, to you in connection with the present instruction, so that the cases, as part of a class, can be presented by you to Her Majesty's Government.

Were there no treaty relations whatever between the United States and Great Britain, were the United States fishermen without any other right to visit those coasts than are possessed by the fishing craft of any foreign country simply as such, the arrest and boarding of the Grimes, as above detailed, followed by forcing her into the port of Shelburne, there subjecting her to fine for not reporting, and detaining her until her bait and ice were spoiled, are wrongs which I am sure Her Majesty's Government will be prompt to redress. No governments have been more earnest and resolute in insisting that vessels driven by stress of weather into foreign harbors should not be subject to port exactions than the Governments of Great Britain and the United States. So far has this solicitude been carried that both governments, from motives of humanity, as well as of interest as leading maritime powers, have adopted many measures by which foreigners as well as citizens or subjects arriving within their territorial waters may be protected from the perils of the sea. For this purpose not merely light-houses and light-ships are placed by us at points of danger, but an elaborate life-saving service, well equipped with men, boats, and appliances for relief, studs our seaboard in order to render aid to vessels in distress, without regard to their nationality. Other benevolent organizations are sanctioned by Government which bestow rewards on those who hazard their lives in the protection of life and property in vessels seeking in our waters refuge from storms. Acting in this spirit the Government of the United States has been zealous, not merely in opening its ports freely, without charges to vessels seeking them in storm, but in insisting that its own vessels, seeking foreign ports under such circumstances, and exclusively for such shelter, are not under the law of nations subject to custom-house exactions.

In cases of vessels carried into British ports by violence or stress of weather [said Mr. Webster in instructions to Mr. Everett, June 28, 1842] we insist
 354 that there shall be no interference from the land with the relation or personal condition of those on board, according to the laws of their own country; that vessels under such circumstances shall enjoy the common laws of hospitality, subjected to no force, entitled to have their immediate wants and necessities relieved, and to pursue their voyage without molestation.

In this case, that of the Creole, Mr. Wheaton, in the *Revue Française et Étrangère* (IX, 345), and Mr. Legaré (4 Op. At. Gen., 98), both eminent publicists, gave opinions that a vessel carried by stress of weather or forced into a foreign port is not subject to the law of such port; and this was sustained by Mr. Bates, the umpire of the commission to whom the claim was referred (Rep. Com. of 1853, 244, 245):

The municipal law of England [so he said] cannot authorize a magistrate to violate the law of nations by invading with an armed force the vessel of a friendly nation that has committed no offence, and forcibly dissolving the relations which, by the laws of his country, the captain is bound to preserve and enforce on board. These rights, sanctioned by the law of nations, viz., the right to navigate the ocean and to seek shelter in case of distress or other unavoidable circumstances, and to retain over the ship, her cargo, and passengers, the law of her country, must be respected by all nations, for no independent nation would submit to their violation.

It is proper to state that Lord Ashburton, who conducted the controversy in its diplomatic stage on the British side, did not deny as a general rule the propositions of Mr. Webster. He merely questioned the applicability of the rule to the case of the Creole. Nor has the principle ever been doubted by either Her Majesty's Government or the Government of the United States; while, in cases of vessels driven by storm on inhospitable coasts, both Governments have asserted it, sometimes by extreme measures of redress, to secure indemnity for vessels suffering under such circumstances from port exactions, or from injuries inflicted from the shore.

It would be hard to conceive of anything more in conflict with the humane policy of Great Britain in this respect, as well as with the law of nations, than was the conduct of Captain Quigley towards the vessel in question on the morning of October 8th.

In such coasts, at early dawn, after a stormy night, it is not unusual for boats, on errands of relief, to visit vessels which have been struggling with storm during the night. But in no such errand of mercy was Captain Quigley engaged. The Marion Grimes, having found shelter during the night's storm, was about to depart on her voyage, losing no time while her bait was fresh and her ice lasted, when she was boarded by an armed crew, forced to go 7 miles out of her way to the port, and was there, under pressure of Captain Quigley, against the opinion originally expressed of the collector, subjected to a fine of \$400 with costs, and detained there, as I shall notice hereafter, until her voyage was substantially broken up. I am confident Her Majesty's Government will concur with me in the opinion that, as a question of international law, aside from treaty and other rights, the arrest and detention under the circumstances of Captain Landry and of his vessel were in violation of the law of nations as well as the law of humanity, and that on this ground alone the fine and the costs should be refunded and the parties suffering be indemnified for their losses thereby incurred.

It is not irrelevant, on such an issue as the present, to enquire into the official position of Captain Quigley, "of the Canadian cruiser

Terror." He was, as the term "Canadian cruiser" used by him enables us to conclude, not an officer in His Majesty's distinctive service. He was not the commander of a revenue cutter, for the head of the customs' service disavowed him. Yet he was arresting and boarding in defiance of law, a vessel there seeking shelter, over-influencing the collector of the port into the imposition of a fine, hauling down with his own hand the flag of the United States, which was displayed over the vessel, and enforcing arbitrarily an additional period of detention after the deposit had been made, simply because the captain of the vessel refused to obey him by executing an order insulting to the flag which the vessel bore. If armed cruisers are employed in seizing, harassing, and humiliating storm-bound vessels of the United States on Canadian coasts, breaking up their voyages and mulcting them with fines and costs, it is important for reasons presently to be specified that this Government should be advised of the fact.

From Her Majesty's Government redress is asked. And that redress, as I shall have occasion to say hereafter, is not merely the indemnification of the parties suffering by Captain Quigley's actions, but his withdrawal from the waters where the outrages I represent to you have been committed.

I have already said that the claims thus presented could be abundantly sustained by the law of nations, aside from treaty and other rights. But I am not willing to rest the case on the law of nations. It is essential that the issue between United States' fishing vessels and the "cruiser Terror" should be examined in all its bearings, and settled in regard not merely to the general law of nations, but to the particular rights of the parties aggrieved.

It is a fact that the fishing vessel Marion Grimes had as much right under the special relations of Great Britain and the United States, to enter the harbor of Shelburne, as had the Canadian cruiser. The fact that the Grimes was liable to penalties for the abuse of such right of entrance does not disprove its existence. Captain Quigley is certainly liable to penalties for his misconduct on the occasion referred to. Captain Landry was not guilty of misconduct in entering and seeking to leave that harbor, and had abused no privilege. But whether liable or no for subsequent abuse of the rights, I maintain that the right of free entrance into that port, to obtain shelter, and whatever is incident thereto, belonged as much to the American fishing vessel as to the Canadian cruiser.

355 The basis of this right is thus declared by an eminent jurist and statesman, Mr. R. R. Livingston, the first Secretary of State appointed by the Continental Congress, in instructions issued on January 7, 1782, to Dr. Franklin, then at Paris, entrusted by the United States with the negotiation of articles of peace with Great Britain:

The arguments on which the people of America found their claim to fish on the banks of Newfoundland arise, first, from their having once formed a part of the British Empire, in which state they always enjoyed as fully as the people of Britain themselves the right of fishing on those Banks. They have shared in all the wars for the extension of that right, and Britain could with no more justice have excluded them from the enjoyment of it (even supposing that one nation could possess it to the exclusion of another) while they formed a part of that empire than they could exclude the people of London or Bristol. If so, the only inquiry is, how have we lost this right. If we were tenants in

common with Great Britain while united with her, we still continue so, unless by our own act we have relinquished our title. Had we parted with mutual consent, we should doubtless have made partition of our common right by treaty. But the oppressions of Great Britain forced us to a separation (which must be admitted, or we have no right to be independent); and it cannot certainly be contended that those oppressions abridged our rights or gave new ones to Britain. Our rights, then, are not invalidated by this separation, more particularly as we have kept up our claim from the commencement of the war, and assigned the attempt of Great Britain to exclude us from the fisheries, as one of the causes of our recurring to arms.

As I had occasion to show in my note to the British Minister in the case of the Everett Steele, of which a copy is hereto annexed, this "tenancy in common," held by citizens of the United States in the fisheries, they were to "continue to enjoy" under the preliminary articles of 1782, as well as under the treaty of peace of 1783; and this right, as a right of entrance in those waters, was reserved to them, though with certain limitations in its use, by the treaty of 1818. I might here content myself with noticing that the treaty of 1818, herein reciting a principle of the law of nations as well as ratifying a right previously possessed by fishermen of the United States, expressly recognizes the right of these fishermen to enter the "bays or harbors" of Her Majesty's Canadian dominions "for the purpose of shelter and of repairing damages therein." The extent of other recognitions of rights in the same clause need not here be discussed. At present it is sufficient to say that the placing an armed cruiser at the mouth of a harbor in which United States fishing vessels are accustomed and are entitled to seek shelter on their voyages, such cruiser being authorised to arrest and board our fishing vessels seeking such shelter, is an infraction not merely of the law of nations, but of a solemn treaty stipulation. That, so far as concerns the fishermen so affected, its consequences are far-reaching and destructive, it is not necessary here to argue. Fishing vessels only carry provisions enough for each particular voyage. If they are detained several days on their way to the fishing banks the venture is broken up. The arrest and detention of one or two operates upon all. They cannot as a class, with their limited capital and resources, afford to run risks so ruinous. Hence, rather than subject themselves to even the chances of suffering the wrongs inflicted by Captain Quigley, "of the Canadian cruiser Terror," on some of their associates, they might prefer to abandon their just claim to the shelter consecrated to them alike by humanity, ancient title, the law of nations, and by treaty, and face the gravest peril and the wildest seas in order to reach their fishing grounds. You will therefore represent to Her Majesty's Government that the placing Captain Quigley in the harbour of Shelburne to inflict wrongs and humiliation on United States fishermen there seeking shelter is, in connection with other methods of annoyance and injury, expelling United States' fishermen from waters, access to which, of great importance in the pursuit of their trade, is pledged to them by Great Britain, not merely as an ancient right, but as part of a system of international settlement.

It is impossible to consider such a state of things without grave anxiety. You can scarcely represent this too strongly to Her Majesty's Government.

It must be remembered, in considering this system, so imperilled, that the preliminaries to the article of 1782, afterwards adopted as

the Treaty of 1783, were negotiated at Paris by Dr. Franklin, representing the United States, and Mr. Richard Oswald, representing Lord Shelborne, then Colonial Secretary, and afterwards, when the treaty was finally agreed on, Prime Minister. It must be remembered, also that Lord Shelborne, while maintaining the rights of the colonies when assailed by Great Britain, was nevertheless unwilling that their independence should be recognized prior to the treaty of peace, as if it were a concession wrung from Great Britain by the exigencies of war. His position was that this recognition should form part of a treaty of partition, by which, as is stated by the court in *Sutton v. Sutton* (1 Rus. & M., 675), already noticed by me, the two great sections of the British empire agreed to separate, in their articles of separation recognising to each other's citizens or subjects certain territorial rights. Thus the continuance of the rights of the United States in the fisheries was recognized and guaranteed; and it was also declared that the navigation of the Mississippi, whose sources were, in the imperfect condition of geographical knowledge of that day, supposed to be in British territory, should be free and open to British subjects and to citizens of the United States. Both powers also agreed that there should be no further prosecutions or confiscations based on the war; and in this way were secured the titles to property held in one country by persons remaining loyal to the other. This was afterwards put in definite shape by the following article (Article X) of Jay's treaty.

356 It is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominion of His Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein, and may grant, sell, or devise the same to whom they please in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens.

It was this article which the court in *Sutton v. Sutton*, above referred to, held to be one of the incidents of the "separation" of 1783, of perpetual obligation, unless rescinded by the parties, and hence not abrogated by the war of 1812.

It is not, however, on the continuousness of the reciprocities, recognised by the treaty of 1783, and I desire now to dwell. What I am anxious you should now impress upon the British government is the fact that, as the fishery clause in this treaty, a clause continued in the treaty of 1818, was a part of a system of reciprocal recognitions which are interdependent, the abrogation of this clause, not by consent, but by acts of violence and of insult, such as those of the Canadian cruiser Terror, would be fraught with consequences which I am sure could not be contemplated by the Governments of the United States and Great Britain without immediate action being taken to avert them. To the extent of the system thus assailed I now direct attention.

When Lord Shelburne and Dr. Franklin negotiated the treaty of peace, the area on which its recognitions were to operate was limited. They covered, on the one hand, the fisheries; but the map of Canada in those days, as studied by Lord Shelburne, gives but a very imperfect idea of the territory near which the fisheries lay. Halifax was the only port of entry on the coast; the New England States were there and the other nine were provinces, but no organized govern-

ments to the west of them. It was on this area only, as well as on Great Britain, that the recognitions and guarantees of the treaty were at first to operate. Yet comparatively small as this field may now seem, it was to the preservation over it of certain reciprocal rights that the attention of the negotiators was mainly given. And the chief of these rights were: (1) the fisheries, a common enjoyment in which by both parties took nothing from the property of either; and (2) the preservation to the citizens or subjects of each country of title to property in the other.

Since Lord Shelburne's premiership this system of reciprocity and mutual convenience has progressed under the treaties of 1842 and 1846, so as to give to Her Majesty's subjects, as well as to citizens of the United States, the free use of the River Detroit, on both sides of the island Bois Blanc, and between that island and the American and Canadian shores, and all the several channels and passages between the various islands lying near the junction of the River St. Clair with the lake of that name. By the treaty of 1846 the principle of common border privileges was extended to the Pacific Ocean. The still existing commercial articles of the treaty of 1871 further amplified those mutual benefits, by embracing the use of the inland waterways of either country, and defining enlarged privileges of bonded transit by land and water through the United States for the benefit of the inhabitants of the Dominion. And not only by treaties has the development of Her Majesty's American dominion, especially to the westward, been aided by the United States, but the vigorous contemporaneous growth under the enterprise and energy of citizens of the Northwestern States and Territories of the United States has been productive of almost equal advantages to the adjacent possessions of the British Crown, and the favoring legislation by Congress has created benefits in the way of railway facilities which under the sanction of State laws have been and are freely and beneficially enjoyed by the inhabitants of the Dominion and their Government.

Under this system of energetic and co-operative development the Coast of the Pacific has been reached by the transcontinental lines of railway within the territorial limits of the respective countries, and, as I have stated, the United States being the pioneers in this remarkable progress, have been happily able to anticipate and incidentally to promote the subsequent success of their neighbors in British America.

It will be scarcely necessary for you to say to Lord Iddesleigh that the United States, in thus aiding in the promotion of the prosperity, and in establishing the security of Her Majesty's Canadian dominions, claims no particular credit. It was prompted, in thus opening its territory to Canadian use, and incidentally for Canadian growth, in large measure by the consciousness that such good offices are part of a system of mutual convenience and advantage growing up under the treaties of peace and assisted by the natural forces of friendly contiguity. Therefore it is that we witness with surprise and painful apprehension the United States fishermen hampered in their enjoyment of their undoubted rights in the fisheries.

The hospitalities of Canadian coasts and harbors, which are ours by ancient right, and which these treaties confirm, cost Canada nothing and are productive of advantage to her people. Yet, in defiance of the most solemn obligations, in utter disregard of the facilities and

assurances granted by the United States, and in a way especially irritating, a deliberate plan of annoyances and aggressions has been instituted and plainly exhibited during the last fishing season—a plan calculated to drive these fishermen from shores where, without injury to others, they prosecute their own legitimate and useful industry.

It is impossible not to see that if the unfriendly and unjust system, of which the cases now presented are part, is sustained by Her Majesty's Government, serious results will almost necessarily ensue, great as is the desire of this Government to maintain the relations of good neighborhood. Unless Her Majesty's Government shall effectually check these aggressions a general conviction on the part of the people of the United States may naturally be apprehended that, as treaty stipulations in behalf of our fishermen, based on their ancient rights, cease to be respected, the maintenance of the comprehensive system of mutual commercial accommodation between Canada and the United States could not reasonably be expected.

357 In contemplation of so unhappy and undesirable a condition of affairs I express the earnest hope that Her Majesty's Government will take immediate measures to avert its possibility.

With no other purpose than the preservation of peace and good will and the promotion of international amity, I ask you to represent to the statesmen charged with the administration of Her Majesty's Government the necessity of putting an end to the action of Canadian officials in excluding American fishermen from the enjoyment of their treaty rights in the harbors and waters of the maritime provinces of British North America.

The action of Captain Quigley in hauling down the flag of the United States from the Marion Grimes has naturally aroused much resentment in this country; and has been made the subject of somewhat excited popular comment; and it is wholly impossible to account for so extraordinary and unwarranted an exhibition of hostility and disrespect by that official. I must suppose that only his want of knowledge of what is due to international comity and propriety and overheated zeal as an officer of police could have permitted such action; but I am confident that, upon the facts being made known by you to Her Majesty's Government, it will at once be disavowed, a fitting rebuke be administered, and the possibility of a repetition of Captain Quigley's offence be prevented.

It seems hardly necessary to say that it is not until after condemnation by a prize court that the national flag of a vessel seized as a prize of war is hauled down by her captor. Under the fourteenth section of the twentieth chapter of the Navy Regulations of the United States the rule in such cases is laid down as follows:

A neutral vessel, seized, is to wear the flag of her own country until she is adjudged to be a lawful prize by a competent court.

But, *a fortiori*, is this principle to apply in cases of customs seizures, where fines only are imposed and where no belligerency whatever exists. In the port of New York, and other of the countless harbors of the United States, are merchant vessels to-day flying the British flag which from time to time are liable to penalties for violation of customs laws and regulations. But I have yet to learn that any official, assuming, directly or indirectly, to represent the Government

of the United States, would under such circumstances order down or forcibly haul down the British flag from a vessel charged with such irregularity; and I now assert that if such act were committed, this Government, after being informed of it, would not wait for a complaint from Great Britain, but would at once promptly reprimand the parties concerned in such misconduct and would cause proper expression of regret to be made.

A scrupulous regard for international respect and courtesy should mark the intercourse of the officials of these two great and friendly nations, and anything savoring of the contrary should be unhesitatingly and emphatically rebuked. I cannot doubt that these views will find ready acquiescence from those charged with the administration of the Government of Great Britain.

You are at liberty to make Lord Iddesleigh acquainted with the contents of this letter, and, if desired, leave with him a copy.

I am, Sir, your obedient servant,

T. F. BAYARD.

EDWARD J. PHELPS, Esq.,
&c. &c. &c.

No. 220.—1886, *November 15: Letter from Mr. Bayard to Mr. Phelps.*

[No. 459.]

DEPARTMENT OF STATE,
Washington, 15th November, 1886.

SIR,—The season for taking mackerel has now closed, and I understand the marine police force of the territorial waters in British North America has been withdrawn, so that no further occasion for the administration of a strained and vexatious construction of the Convention of 1818 between the United States and Great Britain, is likely for several months at least.

During this period of comparative serenity, I earnestly hope that such measures will be adopted by those charged with the administration of the respective Governments as will prevent the renewal of the proceeding witnessed during the past fishing season in the ports and harbors of Nova Scotia, and at other points in the maritime Provinces of the Dominion, by which citizens of the United States engaged in open-sea fishing were subjected to much unjust and unfriendly treatment by the local authorities in those regions, and thereby not only suffered serious loss in their legitimate pursuit, but, by the fear of annoyance, which was conveyed to others likewise employed, the general business of open-sea fishing by citizens of the United States was importantly injured.

My instructions to you during the period of these occurrences have from time to time set forth their regrettable character, and they have also been brought promptly to the notice of the representative of Her Majesty's Government at this Capital.

These representations, candidly and fully made, have not
358 produced those results of checking the unwarranted interference (frequently accompanied by rudeness and an unnecessary

demonstration of force) with the rights of our fishermen guaranteed by express treaty stipulations, and secured to them—as I confidently believe—by the public commercial laws and regulations of the two countries, and which are demanded by the laws of hospitality to which all friendly civilised nations owe allegiance. Again I beg that you will invite Her Majesty's Counsellors gravely to consider the necessity of preventing the repetition of conduct on the part of the Canadian officials which may endanger the peace of two kindred and friendly nations.

To this end, and to ensure to the inhabitants of the Dominion the efficient protection of the exclusive rights to their inshore fisheries, as provided by the Convention of 1818, as well as to prevent any abuse of the privileges reserved and guaranteed by that instrument for ever to the citizens of the United States engaging in fishing,—and responding to the suggestion made to you by the Earl of Iddesleigh in the month of September last that a *modus vivendi* should be agreed upon between the two countries to prevent encroachment by American fishermen upon the Canadian inshore fisheries, and equally to secure them from all molestation when exercising only their just and ancient rights,—I now enclose the draft of a memorandum which you may propose to Lord Iddesleigh, and which, I trust, will be found to contain a satisfactory basis for the solution of existing difficulties and assist in securing an assured, just, honorable, and, therefore, mutually satisfactory settlement of the long vexed question of the North Atlantic fisheries.

I am encouraged in the expectation that the propositions embodied in the memorandum referred to will be acceptable to Her Majesty's Government, because, in the month of April, 1866, Mr. Seward, then Secretary of State, sent forward to Mr. Adams, at that time United States' Minister in London, the draft of a protocol which in substance coincides with the first article of the proposal now sent to you, as you will see by reference to Vol. 1 of the United States' Diplomatic Correspondence for 1866, page 98 *et seq.*

I find that, in a published instruction to Sir F. Bruce, then Her Majesty's Minister in the United States, under date of May 11th, 1866, the Earl of Clarendon, at that time Her Majesty's Secretary of State for Foreign Affairs, approved them, but declined to accept the final proposition of Mr. Seward's protocol, which is not contained in the memorandum now forwarded.

Your attention is drawn to the great value of these three propositions, as containing a well-defined and practical interpretation of Article I of the Convention of 1818, the enforcement of which co-operatively by the two Governments, it may reasonably be hoped, will efficiently remove those causes of irritation of which variant constructions hitherto have been so unhappily fruitful.

In proposing the adoption of a width of ten miles at the mouth as a proper definition of the bays in which, except on certain specified coasts, the fishermen of the United States are not to take fish, I have followed the example furnished by France and Great Britain in their Convention signed at Paris on the 2nd of August, 1839. This definition was referred to and approved by Mr. Bates, the Umpire of the Commission under the Treaty of 1853, in the case of the United States' fishing schooner "Washington," and has since been notably approved and adopted in the Convention signed at the Hague in

1882, and subsequently ratified in relation to fishing in the North Sea, between Germany, Belgium, Denmark, France, Great Britain, and the Netherlands.

The present memorandum^a also contains provisions for the usual commercial facilities allowed everywhere for the promotion of legitimate trade, and nowhere more fully than in British ports and under the commercial policies of that nation. Such facilities cannot with any show of reason be denied to American fishing vessels when plying their vocations in deep-sea fishing grounds in the localities open to them equally with other nationalities. The Convention of 1818 inhibits the "taking, drying or curing fish" by American fishermen in certain waters and on certain coasts, and when these objects are effected, the inhibitory features are exhausted. Everything that may presumably guard against an infraction of these provisions will be recognised and obeyed by the Government of the United States, but should not be pressed beyond its natural force.

By its very terms and necessary intentment, the same treaty recognises the continuance permanently of the accustomed rights of American fishermen, in those places not embraced in the renunciation of the treaty, to prosecute the business as freely as did their forefathers.

No construction of the Convention of 1818 that strikes at or impedes the open-sea fishing by citizens of the United States, can be accepted, nor should a treaty of friendship be tortured into a means of such offence, nor should such an end be accomplished by indirection. Therefore, by causing the same port regulations and commercial rights to be applied to vessels engaged therein as are enforced relative to other trading craft, we propose to prevent a ban from being put upon the lawful and regular business of open-sea fishing.

Arrangements now exist between the Governments of Great Britain and France, and Great Britain and Germany, for the submission in the first instance of all cases of seizure to the joint examination and decision of two discreet and able commanding officers of the Navy of the respective countries, whose vessels are to be sent on duty to cruise in the waters to be guarded against encroachment. Copies of these agreements are herewith enclosed for reference. The additional feature of an Umpire in case of a difference of opinion, is borrowed from the terms of Article 1, of the Treaty of June 5, 1854, between the United States and Great Britain.

This same Treaty of 1854 contains in its first article provision for a joint Commission for marking the fishing limits, and is therefore a precedent for the present proposition.

The season of 1886 for inshore fishing on the Canadian coasts has come to an end,—and assuredly no lack of vigilance or promptitude in making seizures can be ascribed to the vessels of the Marine Police of the Dominion. The record of their operations discloses but a single American vessel found violating the inhibitions of the
 359 Convention of 1818, by fishing within three marine miles of the coast. The numerous seizures made have been of vessels quietly at anchor in the established ports of entry, under charges which, up to this day, have not been particularized sufficiently to allow of an intelligent defence. Not one has been condemned after

^a This Memorandum is printed under date of July 12, 1887, at p. 416 of Appendix.

trial and hearing, but many have been fined without hearing or judgment, for technical violations of alleged commercial regulations, although all commercial privileges have been simultaneously denied to them. In no instance has any resistance been offered to Canadian authority, even when exercised with useless and irritating provocation.

It is trusted that the agreement now proposed may be readily accepted by Her Majesty's Ministry.

Should the Earl of Iddesleigh express a desire to possess the text of this despatch, in view of its intimate relation to the subject-matter of the Memorandum and as evidencing the sincere and cordial disposition which prompts this proposal, you will give his Lordship a copy.

I am, Sir, your obedient servant,

(Sd.)

T. F. BAYARD.

EDWARD J. PHELPS, Esq.,

&c. &c. &c.

No. 221.—1886, November 27: *Letter from Mr. Phelps to the Earl of Iddesleigh.*

LEGATION OF THE UNITED STATES,

London, November 27, 1886.

MY LORD, I have the honour to transmit herewith a copy of an instruction, under date of November 6, 1886, received by me from the Secretary of State of the United States, relative to the case of the United States fishing vessel, the "Marion Grimes."

The subject is so fully presented in this document, a copy of which I am authorized by the Secretary to place in the hands of your Lordship, that I can add nothing to what is therein set forth, except to request your Lordship's early attention to the case, which appears to be a very flagrant violation of the rights secured to American fishermen under the treaty of 1818.

I have the honour to be, with the highest consideration, My Lord,
Your most obedient humble servant,

E. J. PHELPS.

The Right Honourable

The EARL OF IDDESLEIGH, G. C. B.,

&c &c &c

No. 222.—1886, November 30: *Letter from the Earl of Iddesleigh (British Foreign Secretary) to Mr. Phelps.*

FOREIGN OFFICE, November 30, 1886.

SIR: I have given my careful consideration to the contents of the note of the 11th September last, which you were good enough to address to me in reply to mine of the 1st of the same month, on the subject of the North American fisheries.

The question, as you are aware, has for some time past engaged the serious attention of Her Majesty's Government and the notes

which have been addressed to you in relation to it, both by my predecessor and by myself, have amply evinced the earnest desire of Her Majesty's Government to arrive at some equitable settlement of the controversy. It is, therefore, with feelings of disappointment that they do not find in your note under reply any indication of a wish on the part of your Government to enter upon negotiations based on the principle of mutual concessions, but rather a suggestion that some *ad interim* construction of the terms of the existing Treaty should, if possible, be reached, which might for the present remove the chance of disputes; in fact, that Her Majesty's Government, in order to allay the differences which have arisen, should temporarily abandon the exercise of the Treaty rights which they claim and which they conceive to be indisputable. For Her Majesty's Government are unable to perceive any ambiguity in the terms of Article I of the Convention of 1818; nor have they as yet been informed in what respects the construction placed upon that instrument by the Government of the United States differs from their own.

They would, therefore, be glad to learn in the first place whether the Government of the United States contest that by Article I of the Convention United States fishermen are prohibited from entering British North American bays or harbours on those parts of the coast referred to in the second part of the Article in question for any purposes save those of *shelter, repairing damages, purchasing wood and obtaining water.*

360 Before proceeding to make some observations upon the other points dealt with in your note, I have the honour to state that I do not propose in the present communication to refer to the cases of the schooners *Thomas F. Bayard* and *Mascot*, to which you allude.

The privileges manifestly secured to United States fishermen by the Convention of 1818 in Newfoundland, Labrador, and the Magdalen Islands are not contested by Her Majesty's Government, who, whilst determined to uphold the rights of Her Majesty's North American subjects, as defined in the Convention, are no less anxious and resolved to maintain in their full integrity the facilities for prosecuting the fishing industry on certain limited portions of the coast which are expressly granted to citizens of the United States. The communications on the subject of these two schooners, which I have requested Her Majesty's Minister at Washington to address to Mr. Bayard, cannot, I think, have failed to afford to your Government satisfactory assurances in this respect.

Reverting now to your note under reply, I beg to offer the following observations on its contents:

In the first place, you take exception to my predecessor having declined to discuss the case of the *David J. Adams* on the ground that it was still *sub judice*, and you state that your Government are unable to accede to the proposition contained in my note of the 1st September last, to the effect that "it is clearly right, according to practice and precedent, that such diplomatic action should be suspended pending the completion of the judicial inquiry."

In regard to this point, it is to be remembered that there are three questions calling for investigation in the case of the *David J. Adams*:

(1) What were the acts committed which led to the seizure of the vessel?

(2) Was her seizure for such acts warranted by any existing laws?

(3) If so, are those laws in derogation of the Treaty rights of the United States?

It is evident that the first two questions must be the subject of inquiry before the third can be profitably discussed, and that those two questions can only be satisfactorily disposed of by a judicial inquiry. Far from claiming that the United States Government would be bound by the construction which the British Tribunals might place on the Treaty, I stated in my note of the 1st September that if that decision should be adverse to the views of your Government it would not preclude further discussion between the two Governments and the adjustment of the question by diplomatic action.

I may further remark that the very proposition advanced in my note of the 1st of September last, and to which exception is taken in your reply, has on a previous occasion been distinctly asserted by the Government of the United States under precisely similar circumstances, that is to say, in 1870, in relation to the seizure of American fishing vessels in Canadian waters for alleged violation of the Convention of 1818.

In a despatch of the 29th of October, 1870, to Mr. W. A. Dart, United States Consul-General at Montreal (which is printed at page 431 of the volume for that year of the Foreign Relations of the United States, and which formed part of the correspondence referred to by Mr. Bayard in his note to Sir L. West of the 20th of May last), Mr. Fish expressed himself as follows:

It is the duty of the owners of the vessels to defend their interests before the Courts at their own expense, and without special assistance from the Government at this stage of affairs. It is for those Tribunals to construe the Statutes under which they act. If the construction they adopt shall appear to be in contravention of our Treaties with Great Britain, or to be (which cannot be anticipated) plainly erroneous in a case admitting of no reasonable doubt, it will then become the duty of the Government—a duty which it will not be slow to discharge—to avail itself of all necessary means for obtaining redress.

Her Majesty's Government, therefore, still adhere to their view that any diplomatic discussion as to the legality of the seizure of the *David J. Adams* would be premature until the case has been judicially decided.

It is further stated in your note that "the absence of any Statute authorising proceedings or providing a penalty against American fishing vessels for purchasing bait or supplies in a Canadian port to be used in lawful fishing" affords "the most satisfactory evidence that up to the time of the present controversy no such construction has been given to the Treaty by the British or by the Colonial Parliament as is now sought to be maintained."

Her Majesty's Government are quite unable to accede to this view, and I must express my regret that no reply has yet been received from your Government to the arguments on this and all the other points in controversy which are contained in the able and elaborate Report (as you courteously describe it) of the Canadian Minister of Marine and Fisheries, of which my predecessor communicated to you a copy.

In that Report reference is made to the argument of Mr. Bayard, drawn from the fact that the proposal of the British negotiators of the Convention of 1818, to the effect that American fishing vessels

should carry no merchandise, was rejected by the American negotiators; and it is shown that the above proposal had no application to American vessels resorting to the Canadian coasts, but only to those exercising the right of inshore fishing and of landing for the drying and curing of fish on parts of the coasts of Newfoundland and Labrador. The Report, on the other hand, shows that the United States negotiators proposed that the right of "procuring bait" should be added to the enumeration of the four objects for which the United States fishing vessels might be allowed to enter Canadian waters; and that such proposal was rejected by the
 361 British negotiators, thus showing that there could be no doubt in the minds of either party at the time that the "procuring of bait" was prohibited by the terms of the Article.

The Report, moreover, recalls the important fact that the United States Government admitted, in the case submitted by them before the Halifax Commission in 1877, that neither the Convention of 1818 nor the Treaty of Washington conferred any right or privilege of trading on American fishermen; that the "various incidental and reciprocal advantages of the Treaty, such as the privileges of traffic, purchasing bait, and other supplies, are not the subject of compensation, because the Treaty of Washington confers no such rights on the inhabitants of the United States, who now enjoy them merely by sufferance, and who can at any time be deprived of them."

This view was confirmed by the ruling of the Commissioners.

Whilst I have felt myself bound to place the preceding observations before you in reply to the arguments obtained in your note. I beg leave to say that Her Majesty's Government would willingly have left such points of technical detail and construction for the consideration of a Commission properly constituted to examine them, as well as to suggest a means for either modifying their application or substituting for them some new arrangement of a mutually satisfactory nature.

I gather, however, from your note that, in the opinion of your Government, although a revision of Treaty stipulations on the basis of mutual concessions was desired by the United States before the present disputes arose, yet the present time is inopportune for various reasons, among which you mention the irritation created in the United States by the belief that the action of the Canadian Government has had for its object to force a new Treaty on your Government.

Her Majesty's Government learn with much regret that such an impression should prevail, for every effort has been made by the Canadian Government to promote a friendly negotiation, and to obviate the differences which have now arisen. Indeed, it is hardly necessary to remind you that, for six months following the denunciation by your Government of the Fishery Articles of the Treaty of Washington, the North American fisheries were thrown open to citizens of the United States without any equivalent, in the expectation that the American Government would show their willingness to treat the question in a similar spirit of amity and good will.

Her Majesty's Government cannot but express a hope that the whole correspondence may be laid immediately before Congress, as they believe that its perusal would influence public opinion in the United States in favour of negotiating, before the commencement of

the next fishing season, an arrangement based on mutual concessions, and which would therefore (to use the language of your note) "consist with the dignity, the interests, and the friendly relations of the two countries."

Her Majesty's Government cannot conceive that negotiations commenced with such an object and in such a spirit could fail to be successful; and they trust, therefore, that your Government will endeavour to obtain from Congress, which is about to assemble, the necessary powers to enable them to make to Her Majesty's Government some definite proposals for the negotiation of a mutually advantageous arrangement.

I have, etc.,

IDDESLEIGH.

No. 223.—1886, *December 2: Letter from Mr. Phelps (United States Minister at London) to Lord Iddesleigh (British Foreign Secretary).*

LEGATION OF THE UNITED STATES.

London, December 2, 1886.

MY LORD: Referring to the conversation I had the honour to hold with your Lordship on the 20th November, relative to the request of my Government that the owners of the *David J. Adams* may be furnished with a copy of the original reports, stating the charges on which that vessel was seized by the Canadian authorities, I desire now to place before you in writing the grounds upon which this request is preferred.

It will be in the recollection of your Lordship, from the previous correspondence relative to the case of the *Adams*, that the vessel was first taken possession of for the alleged offence of having purchased a small quantity of bait within the port of Digby, in Nova Scotia, to be used in lawful fishing. That later on a further charge was made against the vessel of a violation of some Custom-House regulation, which it is not claimed, so far as I can learn, was ever before insisted on in a similar case. I think I have made it clear in my note of the 2d of June last, addressed to Lord Rosebery, then Foreign Secretary, that no Act of the English or of the Canadian Parliament existed at the time of this seizure which legally justified it on the ground of the purchase of bait, even if such an Act would have been authorized by the Treaty of 1818. And it is a natural and strong influence, as I have in that communication pointed out, that the charge of violation of Custom-House regulations was an afterthought, brought forward in order to sustain proceedings commenced on a different charge and found untenable.

362 In the suit that is now going on in the Admiralty Court at Halifax for the purpose of condemning the vessel, still further charges have been added. And the Government of Canada seek to avail themselves of a clause in the Act of the Canadian Parliament of May 22, 1868, which is in these words: "In case a dispute arises as to whether any seizure has or has not been legally made or as to whether the person seizing was or was not authorised to seize under this Act * * * * the burden of proving the illegality of the seizure shall be on the owner or claimant."

I cannot quote this provision without saying that it is, in my judgment, in violation of the principles of natural justice, as well as of

those of the common law. That a man should be charged by police or executive officers with the commission of an offence and then be condemned upon trial unless he can prove himself to be innocent is a proposition that is incompatible with the fundamental ideas upon which the administration of justice proceeds. But it is sought in the present case to carry the proposition much further. And to hold that the party inculpated must not only prove himself innocent of the offence on which his vessel was seized, but also of all other charges upon which it might have been seized, that may be afterward brought forward and set up at the trial.

Conceiving that if the clause I have quoted from the Act of 1868 can have effect (if allowed any effect at all) only upon the charge on which the vessel was originally seized, and that seizure for one offence cannot be regarded as *prima facie* evidence of guilt of another, the counsel for the owners of the vessel have applied to the prosecuting officers to be furnished with a copy of the reports made to the Government of Canada in connection with the seizure of the vessel, either by Captain Scott, the seizing officer, or by the Collector of Customs at Digby, in order that it might be known to the defendant and be shown on trial what the charges are on which the seizure was grounded, and which the defendant is required to disprove. This most reasonable request has been refused by the prosecuting officers.

Under these circumstances I am instructed by my Government to request of Her Majesty's Government that the solicitors for the owners of the *David J. Adams* in the suit pending in Halifax may be furnished, for the purposes of the trial thereof, with copies of the reports above mentioned. And I beg to remind your Lordship that there is no time to be lost in giving the proper direction, if it is to be in season for the trial, which, as I am informed, is being pressed.

I have, etc.,

E. J. PHELPS.

No. 224.—1886, December 3: Letter from Mr. Phelps (United States Minister at London) to the Earl of Iddesleigh (British Foreign Secretary) enclosing proposal for Settlement of Questions in Dispute in relation to Fisheries.

LEGATION OF UNITED STATES,
London, December 3, 1886.

MY LORD: I have the honour to acknowledge the receipt of your note of 30th November, on the subject of the Canadian fisheries, and to say that I shall at an early day submit to your Lordship some considerations in reply.

Meanwhile, I have the honour to transmit, in pursuance of the desire expressed by your Lordship in conversation on November 30, a copy of an outline for a proposed *ad interim* arrangement between the two Governments on this subject which has been proposed by the Secretary of State of the United States.

And I likewise transmit, in connection with it, a copy of the instruction from the Secretary of State which accompanied it, and which I am authorised to submit to your Lordship.

I have, etc.,

E. J. PHELPS.

[Mr. Bayard's Proposal for Settlement enclosed in above.]

PROPOSAL FOR SETTLEMENT OF ALL QUESTIONS IN DISPUTE IN RELATION
TO THE FISHERIES ON THE NORTH-EASTERN COASTS OF BRITISH NORTH
AMERICA.

Whereas in the first Article of the Convention between the United States and Great Britain, concluded and signed in London on the 20th of October, 1818, it was agreed between the high contracting parties "that the inhabitants of the said United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbors, and creeks, from Mount Joly on the southern coast of Labrador to and through the Straits of Belleisle; and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company; and that the American fishermen shall also have liberty forever to dry and cure fish in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland, here above described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground;" and was declared that "the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included within the above-mentioned limits: *Provided, however,* That the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter, and of repairing damages therein, of purchasing wood, and obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them;" and whereas differences have arisen in regard to the extent of the above-mentioned renunciation, the Governments of the United States and Her Majesty the Queen of Great Britain, being equally desirous of avoiding further misunderstanding, agree to appoint a mixed commission for the following purposes, namely:

(1) To agree upon and establish by a series of lines the limits which shall separate the exclusive from the common right of fishing on the coasts and in the adjacent waters of the British North American colonies, in conformity with the first Article of the Convention of 1818, except that the bays and harbors from which American fishermen are in the future to be excluded, save for the purposes for which entrance into bays and harbors is permitted by said article, are hereby agreed to be taken to be such bays and harbors as are ten or less than ten miles in width, and the distance of three marine miles from such bays and harbors shall be measured from a straight line drawn across

the bay or harbor, in the part nearest the entrance, at the first point where the width does not exceed ten miles; the said lines to be regularly numbered, duly described, and also clearly marked on charts prepared in duplicate for the purpose.

(2) To agree upon and establish such regulations as may be necessary and proper to secure to the fishermen of the United States the privilege of entering bays and harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and to agree upon and establish such restrictions as may be necessary to prevent the abuse of the privilege reserved by said convention to the fishermen of the United States.

(3) To agree upon and recommend the penalties to be adjudged, and such proceedings and jurisdiction as may be necessary to secure a speedy trial and judgment with as little expense as possible, for the violators of rights and the transgressors of the limits and restrictions which may be hereby adopted:

Provided, however, that the limits, restrictions and regulations which may be agreed upon by the said commission shall not be final, nor have any effect until so jointly confirmed and declared by the United States and Her Majesty the Queen of Great Britain, either by treaty or by laws mutually acknowledged.

ARTICLE II.

Pending a definitive arrangement on the subject, Her Britannic Majesty's Government agree to instruct the proper colonial and other British officers to abstain from seizing or molesting fishing vessels of the United States unless they are found within three marine miles of any of the coasts, bays, creeks, and harbors of Her Britannic Majesty's dominions in America, there fishing, or to have been fishing, or preparing to fish within those limits, not included within the limits within which, under the treaty of 1818, the fishermen of the United States continue to retain a common right of fishery with Her Britannic Majesty's subjects.

ARTICLE III.

For the purpose of executing Article I of the convention of 1818, the Government of the United States and the Government of Her Britannic Majesty hereby agree to send each to the Gulf of St. Lawrence a national vessel, and also one each to cruise during the fishing season on the southern coasts of Nova Scotia. Whenever a fishing vessel of the United States shall be seized for violating the provisions of the aforesaid convention by fishing or preparing to fish within three marine miles of any of the coasts, bays, creeks, and harbors of Her Britannic Majesty's dominions included within the limits within which fishing is by the terms of the said convention renounced, such vessel shall forthwith be reported to the officer in command of one of the said national vessels, who, in conjunction with the officer in command of another of said vessels of the different nationality, shall hear and examine into the facts of the case. Should the said commanding officers be of opinion that the charge is not sustained, the vessel shall be released. But if they should be of opinion that the vessel should be subjected to a judicial examination, she shall forthwith be sent for

trial before the Vice-Admiralty Court at Halifax. If, however, the said commanding officers should differ in opinion, they shall name some third person to act as umpire between them, and should they be unable to agree upon the name of such third person, they shall each name a person, and it shall be determined by lot which of the two persons so named shall be the umpire.

ARTICLE IV.

The fishing vessels of the United States shall have in the established ports of entry of Her Britannic Majesty's dominions in America the same commercial privileges as other vessels of the United States, including the purchase of bait and other supplies; and such privileges shall be exercised subject to the same rules and regulations and payment of the same port charges as are prescribed for other vessels of the United States.

ARTICLE V.

The Government of Her Britannic Majesty agree to release all United States fishing vessels now under seizure for failing to report at custom houses when seeking shelter, repairs, or supplies, and to refund all fines exacted for such failure to report. And the High Contracting Parties agree to appoint a joint commission to ascertain the amount of damage caused to American fishermen during the year 1886 by seizure and detention in violation of the Treaty of 1818, said commission to make awards therefor to the parties injured.

ARTICLE VI.

The Government of the United States and the Government of Her Britannic Majesty agree to give concurrent notification and warning of Canadian Customs Regulations, and the United States agrees to admonish its fishermen to comply with them, and co-operate in securing their enforcement.

No. 225.—1886, December 16: *Letter from Lord Iddesleigh (British Foreign Secretary) to Mr. Phelps (United States Minister at London).*

FOREIGN OFFICE, December 16, 1886.

SIR: I have the honour to acknowledge the receipt of your note of the 27th ultimo relative to the case of the *Marion Grimes*, stated to have been fined and detained at Shelburne, Nova Scotia, in October last.

As other cases besides that of the *Marion Grimes* are alluded to in the documents forwarded in your note, it will be desirable to take each case separately, and to inform you shortly of the steps which Her Majesty's Government have taken in regard to them.

In respect to the case of the *Marion Grimes*, I have already received, through Her Majesty's Secretary of State for the Colonies, a copy of a despatch from the Dominion Government, in which they express their regret at the action taken by Captain Quigley in haul-

ing down the United States flag. I have transmitted a copy of this despatch to Her Majesty's Minister at Washington, with instructions to communicate it to Mr. Bayard, and I beg leave now to enclose a copy of it for your information.

Her Majesty's Government cannot doubt that, as respects the incident of the flag, the apology thus spontaneously tendered by the Canadian Government will be accepted by the United States Government in the friendly and conciliatory disposition in which it is offered, whilst as regards the other statements concerning Captain Quigley's conduct, Her Majesty's Government do not at present feel themselves in a position to express any opinion.

The Dominion Government have been requested to furnish a full report on the various circumstances alleged, and when this is received I shall have the honour to address a further communication to you upon the subject.

As concerns the case of the *Julia Ellen* and *Shiloh*, it will probably suffice to communicate to you the enclosed copies of reports from the Canadian Government relative to these two vessels.

These reports have already been sent to Her Majesty's Minister at Washington for communication to Mr. Bayard.

The protest made by the United States Government in the case of the *Everett Steele* was not received in this country until the 1st ultimo; and although the Canadian Government have been requested by telegraph to furnish a report upon the circumstances alleged, sufficient time has not yet elapsed to enable Her Majesty's Government to be in possession of the facts as reported by the Dominion Government.

Her Majesty's Government greatly regret that incidents of the description alluded to should occur, and they can only renew the assurance conveyed to you in my note of the 30th ultimo, that whilst firmly resolved to uphold the undoubted Treaty rights of Her Majesty's North American subjects in regard to the fisheries, they will also equally maintain the undoubted rights of United States fishermen to obtain shelter in Canadian ports, under such restrictions as may be necessary to prevent their abusing the privileges reserved to them by treaty.

I notice that in Mr. Bayard's note to you of the 6th ultimo, concerning the case of the *Marion Grimes*, and also in his note to Sir L. West of the 19th October last relative to the case of the *Everett Steele*, an old discussion is revived which Her Majesty's Government had hoped was finally disposed of by the correspondence which took place on the subject in 1815 and 1816.

I allude to the argument that a right to the common enjoyment of the fisheries by Great Britain and the United States, after the
365 separation of the latter from the mother country, was recognized by the Treaty of 1783, although the exercise of that right was made subject to certain restrictions.

I refer to this point merely to observe that the views of Her Majesty's Government in relation to it have not been modified in any way since the date of Lord Bathurst's note of the 30th of October, 1815, to Mr. John Quincy Adams.

I have, &c.

IDDESLEIGH.

No. 226.—1886, *December 28: Letter from Marquis of Lansdowne (Governor-General of Canada) to Mr. Stanhope (British Colonial Secretary).*

OTTAWA, *December 28th, 1886.*

SIR,—I have the honour to inform you that I have received from Sir L. West a despatch dated the 22nd inst., enclosing copies of a letter from Mr. Bayard to Mr. Phelps dated 15th November, 1886, and of a memorandum in which is contained the draft of a proposal by Mr. Bayard "for the settlement of all questions in dispute in relation to the fisheries on the north-eastern coasts of British North America." These papers, of which printed copies were sent to me, have, no doubt, been transmitted to you through the Foreign Office.

2. I have referred Mr. Bayard's letter and the memorandum to my advisers, and I shall as soon as possible lay before you the formal expression of their opinion upon the subject. As, however, many members of my Government are absent from their offices at this season of the year and as some time must necessarily elapse before Mr. Bayard's proposal can be reviewed at length, it is as well that I should without further loss of time make you aware of some of the objections to which it is open, and which will, I have no doubt whatever, be made to it.

3. I would, before going further, observe that I have read with satisfaction Mr. Bayard's expression of his hope that advantage will be taken of the period of "comparative serenity" which is likely to prevail during the next few months, in order to arrive at an understanding which might put an end to any doubts which now exist with regard to the rights and privileges of United States' fishermen in Canadian waters.

4. I should however be slow to admit that the proceedings taken by the Canadian authorities during the past fishing season deserve to be characterised in the terms applied to them by Mr. Bayard. The reports which I have from time to time had the honour of sending to you have shown that the acts of interference which Mr. Bayard describes as involving the unjust and unfriendly treatment of citizens of the United States were rendered necessary in consequence of the violation by them of the laws to which all vessels resorting to Canadian waters are without exception amenable.

5. My Government does not yield to that of the United States in its desire to reduce within the narrowest limits the occasions for interference with the fishermen of the latter Power and should it prove to be the case that there is no prospect of the establishment of closer and mutually advantageous relations between the two countries either in respect of the fish trade and fishing or of commercial intercourse generally, it will certainly be desirable that steps should be taken to determine beyond dispute the precise limits which divide the waters in which Canadian fishermen have the exclusive right of fishing from those in which that right is common to fishermen of all nations. A proposal for the appointment of a mixed Commission to which this duty should, subject to the concurrence of the Governments of the Powers interested, be entrusted, was, as Mr. Bayard points out, made in the year 1866, by the American Government and formed the subject of negotiations which were eventually superseded

by those which led to the Treaty of 1871, and to the appointment of the Halifax Commission, which however did not deal with the question of the limits of the territorial waters of Canada. If Mr. Bayard had simply reverted to the Adams-Clarendon Memorandum of 1866, omitting the concluding paragraph to which objection was taken at the time by Lord Clarendon and which as Mr. Bayard at page two of his letter points out is not contained in the Memorandum which he now submits, I should have regarded more hopefully than I do at this moment the prospect of an understanding being arrived at before another fishing season commences.

6. The first Article however of the Draft Proposal now submitted by Mr. Bayard, while in other respects following closely the Adams-Clarendon Memorandum differs from that memorandum, not only in the omission of the final paragraph of the latter, but also in that it adds (see Mr. Bayard's Draft, Article I, Subsection 1), the important stipulation that the bays and harbours from which American fishermen are in the future to be excluded save for the purposes for which entrance into the bays and harbours is permitted by said Act are hereby agreed to be taken to be such bays and harbours only as are ten or less than ten miles in width.

7. This reservation would involve the surrender of the exclusive right of fishing in bays which have hitherto been regarded as beyond all question within the territorial waters of Canada, such, for instance, as the right of fishing in the inner waters of the Bay of Chaleurs at points 40 or 50 miles from its mouth, which, roughly speaking, may be said to be less than 20 miles wide at its opening.

8. I observe that Mr. Bayard in that part of his letter which refers to this suggestion has cited Conventions entered into by France and Great Britain in 1839 and subsequently by other European Powers in support of his contention that there should be no exclusive rights of fishing in bays measuring more than ten miles at their opening. It is, I think, obvious that local arrangements of this kind must be made with reference to the geographical peculiarities of the coast which they affect, and to the local conditions under which the fishing industry is pursued in different parts of the world, and that it does not by any means follow that because the ten-mile limit is applicable upon portions of the coast of the continent of Europe, it is therefore applicable under the peculiar circumstances, geographical and political, which are present in the case of the North American continent. A reference to the action of the United States' Government, and the admissions made by their statesmen in regard to bays on the American coasts will, I think, strengthen this view of the case. The award in regard to the Bay of Fundy, upon which Mr. Bayard also relies in this part of his argument, was, I believe, justified mainly upon the ground that one of the headlands which formed this bay was in the Territory of the United States, and that it could not therefore be regarded as a Canadian bay.

9. The *ad interim* arrangement embodied in Article II, of the memorandum prejudices in favour of the United States one of the most important of the points which have been in dispute by deciding adversely to Canada the construction which is to be placed upon Imperial and Canadian Statutes, the proper interpretation of which is at this moment the subject of litigation before the Canadian

Courts. It is to be observed that this article might, in the event of the failure of the two Governments to arrive at a definite arrangement, a contingency which, considering the relations of the United States' Senate and the President, cannot be dismissed from our contemplation, remain in the operation for an indefinite time, greatly to the disadvantage of the people of this country.

10. The procedure suggested in Article III, for the investigation on the spot of all cases of trespass by United States' fishing vessels, appears to be open to criticism as capable of being used for the purpose of frustrating the ends of justice. I would submit that no case has yet been made out for depriving of their jurisdiction particularly in those cases where the offence must *ex hypothesi* have been committed within the territorial waters of the Dominion, the properly constituted and trustworthy tribunals of this country, and substituting for them an irregularly composed Court of First Instance, such as that which would come into existence if this article were to be adopted.

11. Article IV prejudices in favour of the United States the important question which has arisen as to the commercial privileges to which United States' fishing vessels are entitled while in Canadian waters. My Government will, I have no doubt, insist upon the necessity of maintaining the distinction made by the Convention of 1818 between fishing vessels endeavouring to use Canadian bays and harbours as a basis of operation from which to prosecute their industry in competition with Canadian fishermen, and trading vessels resorting to such bays and harbours in the ordinary course of business.

12. The history of the negotiations which preceded the Convention of 1818 makes it perfectly clear that the purchase of bait was not one of the purposes for which it was intended that United States' fishing vessels should have a right of entering Canadian waters. It is, I observe, proposed by Mr. Bayard in the Article under consideration, that this point also should be decided in anticipation against the Dominion without further discussion.

13. Under Article V it is assumed that the seizures and detentions which have taken place during the past season in consequence of non-compliance by United States' fishermen with the Customs Laws of Canada have in all cases involved the violation of the Treaty of 1818 by the Canadian authorities, and we are accordingly invited before submitting our case to examination by the proposed mixed Commission, to release all United States' fishing vessels now under seizure for a breach of our Customs Laws, and to refund all fines exacted for such illegality. We are, in other words, before going into Court, to plead guilty to all the counts contained in this part of the indictment against us.

14. Indeed, if Mr. Bayard's proposal be considered as a whole it amounts to this—that the Government of the Dominion is to submit its conduct in the past and its rights in the future to the arbitrament of a Commission, without any assurance whatever that the recommendations of that Commission are likely to be accepted by Congress and that before the enquiry commences it is to place upon record the admission that it has been in the wrong upon all the most important points in the controversy. Such an admission would involve the public renunciation of substantial and valuable rights and privileges for

all time without any sort of equivalent or compensation. Mr. Bayard can, I venture to think, scarcely expect that my Government should agree to so one-sided a proposal or should make without any return, concessions so damaging to the interests of this country or so injurious to its self respect.

15. I trust that Her Majesty's Government will, to the utmost of its ability, discourage that of the United States from pressing the proposals in their present shape, and will avoid any action which might induce the belief that the offer embodied in them is one which deserved a favourable reception at the hands of the Government of the Dominion.

I have, &c.,

(Sd)

LANSDOWNE.

The Right Hon. EDWARD STANHOPE,
&c. &c. &c.

367 No. 227.—1887, January 10: Report by Mr. Daniel Manning, United States Secretary of the Treasury, to the Speaker of the United States House of Representatives.

[49th Congress, 2nd Session. House of Representatives. Ex. Doc. No. 78.]

AMERICAN FISHERIES.

Reply of the Secretary of the Treasury.

TREASURY DEPARTMENT, *January 10, 1887.*

SIR, I have the honour to receive the resolution of the House of the 14th ultimo, making enquiry in regard to the "interpretation now given by the Treasury Department to the tariff law of 1883, which in one section declares that 'fish, fresh for immediate consumption,' shall be free of tax on arrival at our sea ports or lake ports, and in another section declares that 'foreign caught fish, imported fresh,' shall be taxed at the rate of fifty cents for each hundred pounds," and also requesting me "to transmit to the House copies of all official correspondence, opinions and decisions bearing on the subject, together with a statement of the duties collected each year, since eighteen hundred and sixty-five, on the several descriptions of fish caught on the lakes, or the Canadian tributaries thereof, and also on the several descriptions caught in the North Atlantic, or on the shores of the islands thereof."

FROZEN FISH.

A satisfactory reply to these enquiries will make necessary a preliminary statement, and an exhibition of certain details connected therewith.

By the tariff law of 1846 there was levied 20 per cent. *ad valorem*, on the foreign value of:

Fish, foreign, whether *fresh*, smoked, salted, dried, or pickled, not otherwise provided for.

The same schedule, and language, were preserved in the tariff law of 1857, but the rate was reduced to 15 per cent.

The tariff law of 2nd March, 1861, levied in the tenth section the following rates:

On mackerel, two dollars per barrel; on herrings, pickled or salted, one dollar per barrel; on pickled salmon, three dollars per barrel; on all other fish, pickled, in barrels, one dollar and fifty cents per barrel; on all other foreign-caught fish, imported otherwise than in barrels or half-barrels, or whether fresh, smoked or dried, salted or pickled, not otherwise provided for, fifty cents per one hundred pounds.

In its twenty-third section that law declared that "fish, fresh caught, for daily consumption," shall be exempt from duty.

Then began a perplexity which has embarrassed the department up to the present day. Someone at the port of entry must, under that clause, decide whether or not the fish, entered as free thereunder, is "fresh caught," and is "for daily consumption." Did the qualification "for daily consumption" refer to the "fish," or to the catching, and the purpose of the catching? Who can correctly pass judgment on the motive of the fishermen, or of the importer?

On 18th June, 1866, this department decided (see Appendix A) that the phrase included all fish imported for consumption, while fresh, and did not include fish imported fresh, but to be afterwards dried, or pickled, or cured for future use. "Daily consumption," said this department, twenty years ago, "means consumption within a short time." That view seems correct, but, nevertheless, the law was intrinsically incapable of exact execution, inasmuch as it might be difficult for a customs officer to foresee or foreknow the intentions or purposes referred to.

I believe that the fish clause quoted above from the law of the 2nd March, 1861, and which levied a tax on fish, stood till 1870, but the free clause was made in 1870 to read:

Fish fresh, for immediate consumption.

The substitution of "immediate" for "daily" did not remove the perplexity.

The Tariff Commission did not report on the subject.

The tariff law of 1883 taxes fish at our sea ports, our lake ports, and on the frontier, by these words in the schedule for "provisions":

Mackerel, one cent per pound.

Herrings, pickled or salted, one-half of one cent per pound.

Salmon, pickled, one cent per pound; other fish, pickled, in barrels, one cent per pound.

Foreign-caught fish, imported otherwise than in barrels or half-barrels, whether fresh, smoked, dried, salted, or pickled, not specially enumerated or provided for in this Act, fifty cents per hundred pounds.

368 A subsequent section declared that the following articles, when imported, shall be exempt from duty:

Fish, fresh, for immediate consumption.

Fish for bait.

Oil, spermaceti, whale and other fish oils of American fisheries, and all other articles the produce of such fisheries.

Shrimps or other shell-fish.

Fish sounds or fish bladders.

The kinds of fish just described having been "specially enumerated, or provided for" in 1883, were thereby taken out of the clause levying a tax on foreign-caught fresh fish.

What has happened in the execution of the free-fish clause, during the last quarter of a century, whether the clause required "daily" or "immediate" consumption, is exhibited in the subjoined Appendix A. It is an unsatisfactory record of an effort to discover and execute an intention of the law-makers which was so ambiguously expressed as to lead to doubt and dispute. In 1877, and after the law of 1870, the difficulties were increased, partly by reason of new contrivances for the artificial freezing of fish.

At first it was doubted by collectors whether or not a fish caught in winter, thrown on the ice and frozen stiff while lying there, and imported in that condition, could be a "fresh fish," as if either a fresh fish cannot be frozen, or a frozen fish cannot be fresh. It was also insisted that a fish caught in summer, and frozen by an artificial method could not be deemed fresh, even though as fresh as one frozen by the natural coldness of winter air in a northern climate. Then it was said that the produce of American fisheries could not be carried into Canada, there artificially frozen, and afterwards be exempt from tax when entered at our ports. It was argued by customs officers that the quantity entered could be made a safe test of "*immediate consumption*," as if customs officers could correctly ascertain and decide on the "immediate" buying and consuming powers of the people. There were customs officers who urged the department to make the distance of the probable place of sale from the place of entry a test of "*immediate consumption*," as if transportation from Portland in Maine to a market at Boston could be a legal test, and "*immediate*" referred to place rather than time. One collector thought twenty tons of fish on one entry at a port on the lakes, could not be for "*immediate consumption*" by subsequent shipment and sale in the great markets of Chicago, Philadelphia, and New York. It could not be affirmed that the fish thus frozen, whether naturally or artificially, was either "smoked, or dried, or salted, or pickled." If freezing deprived the fish of freshness, it could not well be dutiable as foreign-caught fish, *fresh*! What sort of fish was it? Was it old, stale, and decayed fish that buyers and consumers sought, bought, and would eat? The contention has gone on for well nigh a quarter of a century, nor has Congress intervened to tax frozen fish by other and explicit words!

In June last the interpretation of the law was referred to the solicitor of this department. His opinion, subjoined in Appendix A, does not relieve the enactment from difficulties in uniform application at each port such as the constitution commands. If a collector shall, in order to secure such uniformity at every port, await the decision of this department after an exhibition of the facts surrounding each entry, the fish might become anything but "*fresh*."

This fish clause of the tariff law affords a pertinent illustration of the need there is of revising our taxing legislation. The draughtsman of a great many of its sections, apparently unable to set down clearly his purpose, and his own idea of the method of executing it, has thrown upon appraising or collecting officers the work of ascertaining the intentions of importers, or the uses to which merchandise can be, or may be, thereafter put, which those officers are unable to perform in any reasonable time, or in any satisfactory way. To appraising and collecting work in practical administration there is a limit, which our present law too frequently ignores, and customs

officers are unjustly criticised, or condemned for not doing such work properly.

I have dwelt upon this incident in our tariff legislation because it makes clear, even to the superficial observer, how man's inventions and improved methods of rapid communication by steam, not only crowd down prices, and extend the saleable area of one article after another, year by year, and month by month, but even modify the necessary interpretation to be given to classifications in our taxing laws. One hundred and three years ago,—when the treaty of peace was signed, which apportioned the British Empire in America and its rights of fishing, between the British Government and the thirteen independent American States,—railways and steam engines were practically unknown, and the use of ice as now applied in the fishing industry, was also unknown. Even half a century ago the purchase and enjoyment of fresh fish as food was confined to places near the spot where the fish were caught. Thus it has come to pass that ice and railways have changed, even since 1870, the most obvious definition and the strictly literal application of the phrase in our tariff law, “fish, fresh, for *immediate* consumption.” Such causes of change are constantly occurring as to other articles, by reason of modifications in methods of production, new combinations of component materials, new nomenclature, and new commercial classifications, which enforce the need of frequent revisions of our tariff law, when the law, instead of taxing simply a few articles, requires the executive to levy and collect multifarious duties on so many hundreds and even thousands of articles.

The United States' Commissioner of Fish and Fisheries says in his report for 1881:

“In the earlier years of the American fisheries, and in the greater abundance of inshore fisheries, with a comparatively slight demand in consequence of the small population of the country, and the difficulties of transporting the fish, it was quite possible to obtain, within easy reach of our coast, fish enough to meet all the requirements.

In the earlier years of the American fisheries, and in the greater abundance of inshore fisheries, with a comparatively slight demand in consequence of the small population of the country, and the difficulties of transporting the fish, it was quite possible to obtain, within easy reach of our coast, fish enough
369 to meet all the requirements. Now, with a population of fifty millions of people, the great decline of the inshore fisheries, and the ability not only to transport fresh fish to any distance inland without deterioration, but with also the growing demand for salted, dried, and canned fish, it is of the utmost importance that every facility be furnished the fishermen in the prosecution of their business.

In the report of the commissioner for 1882 it is said:

The work of increasing the supply of valuable fishes in the waters of the United States, whether by artificial propagation or by transplantation, although very successful, may be considered as yet in its infancy. It must be remembered that the agencies which have tended to diminish the abundance of the fish have been at work for many years, and are increasing in an enormous ratio. This, taken in connection with the rapid multiplication of the population of the United States, makes the work an extremely difficult one. If the general conditions remained the same as they were fifty years ago, it would be a very simple thing to restore the former equilibrium.

At that time, it must be remembered, the methods of preservation and of wholesale transfer, by means of ice, were not known, while the means of quick transportation were very limited. Hence, a small number of fish supplied fully the demand, with the exception, of course, of species that were salted down,

like the cod, the mackerel, and the herrings (including the shad). At that time a comparatively small quantity supplied the demand for *fresh* fish, and it was easy to more than meet the demand. Now, however, the conditions are entirely changed.

In Appendix A will be found the "official correspondence, opinions and decisions," on the subject of frozen fish, the record of which will disclose to your honourable body the vast amount of labour which even one ambiguous phrase in a tariff law throws upon your Treasury Department and its customs officers. Our existing drag-net war-tariff law contains not one only, but hundreds of such phrases, and these are the least of its discreditable, scandalous, and easily remediable imperfections.

THE PRODUCTS OF AMERICAN FISHERIES EXEMPT FROM DUTY.

The clause, already quoted from the law of 1883, which exempts from seaport taxation all fish-oils of American fisheries, and "all other articles the produce of such fisheries," has a large bearing on the enquiry made of me by the House. That exemption stands in the law of 1883, as it stood in the Revised Statutes, excepting the immaterial addition in the former of the word "oils" after "fish." The exactment is in the law of the 2nd March, 1861, which law secured the freedom of such articles from tariff taxes down to the Revised Statutes. The tariff laws of 1857, and 1846, contain the clause of 1861. The law of 1841 declares that "whale and other fish oils of American fisheries," and all other articles the produce of such fisheries shall be exempt from duty. Before 1841 the clause does not appear in the statutes, and yet a manual issued in New York by Deputy Collector Lyon in 1828, and another in 1832, put down as free: "fisheries of the United States and their territories,—all products."

I also find substantially the same language in two compilations of the tariff laws—one by Meyer Moses in 1830, and one by E. D. Ogden in 1840 and still another compilation, in 1828, by "James Campbell, entry clerk, custom house, New-York," in which he enumerates "fish of the fisheries of the United States or its Territories, free." Mr. Ogden was for many years chief entry clerk at the port of New York, and a compiler of the revenue laws. In his edition for 1840 he cites as authority for the phrase the Acts of 14th July, 1832, 1840, and 1841. The explanation is probably this: The final clause of the first section of Act of 10th August, 1790, levies duties on a plan unlike that now used. It taxes at five per cent. *ad valorem* certain classes of merchandise, and then rescues from taxation certain specified commodities, "and, generally, all articles of the growth, the *product*, or manufactures of the *United States*." The two sentences next to the last in the first section of the law of 27th April, 1816, impose duties "on spermaceti oil of *foreign* fishing, (and) on whale and other fish oil of *foreign* fishing." The language in that law, as to the products named, is precisely the same as that used in the present tariff, with the single substitution in the latter "of *American* fisheries" for the words "of *foreign* fishing" in the former. My conclusion is that only the products of *foreign* fishing having been provided for as dutiable, the products of American fisheries were by a clear implication exempted from duty as the products of the United States. That they were the products of the United States is, it seems

to me, put beyond question by the fact that bounties were paid to vessels engaged in American fisheries.

In 1836, it was decided by Mr. Justice Story that when whales have been caught, and oil has been therefrom produced, by the crew of an American vessel, the oil is not the product of "foreign fishing" and dutiable, even although owned by aliens when entered at our ports. He said that the enquiry whether or not the oil was of "foreign fishing" depended upon the nationality of the vessel when the whales were caught and the oil extracted, and not upon any subsequent events.

In a series of comparatively recent decisions by this department, copies of the text of which will be found in Appendix B, fisheries have been defined as "*American*" within the meaning of our revenue laws, although the taking of the fish be on the high seas, or within a foreign jurisdiction. That should in part be so for other reasons than were assigned in those decisions inasmuch as customs duties are, in general, only imposed on articles when imported from a port, or place, within the exclusive dominion of a foreign State, which could not be said of fish, or their products, arriving from the ocean where the fish were caught.

370 The phrase "fisheries of the United States," is in the first tariff laws enacted by the first Congress which sat under the constitution, and the test of American fishing has, from that day to this uniformly been the nationality of the vessel, regardless of the place where the fish were taken. Even the treaty of Washington, which admitted free of duty into each country fish of all kinds being the produce of the fisheries of either country, excepting fish of the inland lakes, and of the rivers falling into them, left fish caught therein by American vessels entitled to free entry in our ports as formerly. Our Supreme Court declared in 1876, that, subject to the paramount right of navigation (the power to regulate which is in the Federal Government) each State owns the bed of the tide-waters within its jurisdiction, and may appropriate them to be used exclusively by its citizens as a common for cultivating and taking fish if navigation be not impeded; but the treaty of 1854 gave, nevertheless, to British subjects, in common with American citizens, the liberty to fish on our coasts north of the 36th parallel of north latitude, and the treaty of 1871 gave the liberty north of the 39th parallel. Those treaties having fallen, and the fishing rights of Massachusetts on her coasts having returned to her, she may permit British vessels to fish on her coasts, but then it could not be said that the fish, if entered at our ports, had been imported from a foreign port. But apart from such an improbable incident to complicate the proposition, it may be safely affirmed that all fishing-grounds, whether on the high seas, or on the Canadian coasts secured to us by treaty stipulations, are "*American fisheries*" if the fish are caught by vessels regularly documented by the Treasury Department. In that sense and to that end, the ocean and certain Canadian coasts are (under the treaties of 1783 and 1818) *our* "fishing-grounds."

WHAT VESSELS ARE AMERICAN VESSELS?

In this relation, which concerns the freedom from taxation at our ports of fish products taken in the sea, or on Canadian coasts, and also

concerns our pending serious differences with the British Government—it is important to realise what constitutes an American vessel thus capable of enlarging the area from which free fish can be entered at our ports. Congress, notably by the enactment of 5th July, 1884, has committed to the head of this department the supervision of the commercial marine, and merchant seamen of the United States, and of the decision of all questions relating to the issue of registers, enrolments, and licences of vessels, and to the preservation of those documents. Whether or not a private vessel, claiming to be American, is American, and entitled to carry and display that flag, depends solely on the character of the ship's papers that it carries by the permission of Congress, given under the attestation of this department. The only question is this: Has the vessel conformed to the laws, not of a foreign country, but of the United States? In the decision of that question her papers must be *primâ facie* evidence against all the world. These considerations are elementary, but they are important now as defining what are "American fisheries," whose products are in our ports exempt from customs taxes.

The section of our law which authorises a vessel, licensed for carrying on fishery, to "touch and trade at any foreign port" is not a modern contrivance for modern exigencies, as Canadian local officials intimate, but has been on our statute-book since 1793. As literally reproduced in section 4364 of the Revised Statutes, it gives the permission of this department to any vessel, so licensed for carrying on the fisheries of the United States, to enter British or other foreign ports, as a commercial vessel, and to there enjoy the rights and privileges accorded to vessels of the United States sailing "foreign" under a register, and not engaged in the fisheries. The permission thus given to fishing vessels to "touch and trade" has been understood by this department for nearly 100 years as conferring upon the vessel a right to land, and to receive on board a cargo of merchandise, in the same manner as if she were not engaged in the fisheries. On the return of the vessel to the United States, she is required to make regular entry, and to be in all respects subject to the regulations prescribed for vessels arriving from foreign ports.

MEDIEVAL RESTRICTIONS ON FREE NAVIGATION.

The stipulations of the treaty of 1815 only applied in our favour to British territories in Europe. If they were applicable now to British territories in America the present differences in British North America should not exist, for the first article of that convention declares that "the inhabitants of the two countries, respectively, shall have liberty, freely and securely, to come with their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively."

The second article stipulates that, as to "the intercourse" between the United States and British possessions in North America, "each party shall remain in the complete possession of its rights."

In 1827, when the treaty of 1815 was extended for an indefinite time, the United States struggled in vain with England for a more liberal agreement, or a more liberal interpretation of that of 1815, but could obtain neither.

Such liberty of access by American vessels to British colonial ports on this continent was the subject of fruitless negotiation by each of the first six Presidents. The endeavour was continued during forty years, and was only successful in the hands of General Jackson, as President, Mr. Van Buren as Secretary of State, and Mr. McLane as Minister to London, and then by concerted legislation relating at first only to the British West Indies. It having been arranged that there would be legislation at London opening to us the British colonial ports to the south of us on this continent, Congress, on 29th May, 1830, authorised President Jackson to proclaim our ports open “in-
 371 definitely, or for a fixed term,” to British vessels from the islands, provinces, or colonies of Great Britain, on or near the North American continent,” and *north*, south, or east of the United States.

Soon thereafter, and on 5th October, 1830, President Jackson did issue the proclamation, and on 26th June, 1834, Congress again reduced tonnage dues on Canadian vessels of all sorts entering our ports. By such concerted and reciprocal legislation the mediæval barriers around colonial possessions in America by which the mother country had so long endeavoured for her own benefit to hamper and restrict the trade of the colonies, and to levy differential duties in favour of colonial produce, have been broken down. The Privy Council and the Governor-General of the Dominion of Canada, while conceding that Canadian ports are now open to American trading vessels, attempt to apply that mediæval and discarded restrictive system to American fishermen on the high seas.

In 1845, after many years of effort by the United States, England again relaxed the rigour of the restrictions of her ancient laws of transportation, as applied to her colonies, and the two countries entered upon a new period of prosperity flowing from the unhindered carriage of merchandise in bond by land and water. That legislation covering the British North American provinces began, on our part, on 3rd March, 1845. In 1846 came the comprehensive system of warehousing, the general features of which are now in force, devised and perfected, during the administration of President Polk, by my distinguished predecessor, Mr. Robert J. Walker. In 1849, 1850, 1854, and subsequently, that system of warehousing, and transportation in bond by railway and steamboat, has been amended and improved so that to-day we of the United States and they of the Dominion of Canada are reaping the advantages of an international organisation by which merchandise, whether dutiable or free, and if dutiable without payment of duties in transit, can if entered at one of our ports proceed immediately over our territory to Canada, or, if landed at a Canadian port, can come freely to its destination in the United States, or can pass from one of our own ports to another over Canadian soil, and, in like manner, from one Canadian port to another over American soil. It is to be regretted that the British North American provinces impede and impair the full fruition of this beneficent system of international intercourse and transportation by unworthy and petty spite in their ports against American deep sea fishermen.

From 1821 to 1832, the aggregate annual traffic between the United States and the British North American provinces averaged only \$3,257,153; from 1832 to 1845 it rose to \$6,313,780, but, under liberal transportation arrangements, it rose from 1846 to 1853 to no less an

annual average than \$14,230,763, leaving in our favour, during that period of eight years, a balance of trade of over 40 $\frac{1}{4}$ millions of dollars.

It was in 1845 that England, changing her colonial policy, empowered the Canadian provinces to make a tariff on imports to suit themselves. During the next year those provinces removed the barrier against American products which existed, in the form of differential rates in favour of British products, and admitted commodities from our side of the line on the same terms as commodities were admitted coming from British ports. In 1849, England, having by her Minister at Washington previously communicated with the Treasury Department, presented a further proposition for a further reciprocal relaxation of commercial restrictions which impeded trade across the boundary line. The administration of President Fillmore endeavoured to promote the object for which my predecessor in this department, Mr. Robert J. Walker, strove, in 1846, in his correspondence with the British Minister.

This good result of only a partial experiment of reciprocal comity naturally led to negotiations for a more comprehensive international arrangement, and such a one was concluded in 1854 by negotiations conducted at Washington on our side during the administration of President Pierce by a wise and illustrious statesman and citizen of New York, Mr. Marcy, who was then Secretary of State. That reciprocity treaty was in force till 1866, a period covering our civil war. Under its influence, the aggregate interchange of commodities between ourselves and the inhabitants of all the British provinces,—numbering not as many as those of the State of New York,—rose from an annual average of a little over 14 millions of dollars, in the previous eight years to over 33 $\frac{1}{4}$ millions in gold in 1855, to nearly 50 millions in 1856, and to 84 millions in the last year of its existence. During the thirteen years the British provinces, according to their official returns, purchased from us articles valued at over 359 $\frac{1}{2}$ millions of dollars in gold, and we bought from them 197 millions, thus making an international traffic of nearly 556 $\frac{1}{2}$ millions of dollars on a gold valuation. I can but think that if that treaty of 1854 had remained in force till this day, the two peoples,—divided by a boundary line which can only with difficulty be discerned from the Arctic Ocean to the Pacific, from the Pacific to Lake Superior, and from Lake Ontario to the Atlantic,—would now be one people, as least for all purposes of production, trade, and business.

During the past summer, while American vessels, regularly documented, have been excluded from the hospitality and privileges of trading in Canadian ports, Canadian fishing-vessels have been permitted freely to enter and use American ports along the New England coast, have been protected by this department in such entry and use, and have not been required to pay any other fees, charges, taxes, or dues than have been imposed upon the vessels of other Governments similarly situated. The hospitality elsewhere, and generally extended in British ports to American commercial vessels has not been less, in quality or quantity, as I am informed, than the hospitality extended to British vessels in American ports; but there is this marked difference, that, while this department protects Canadian fishermen in the use of American ports, the Dominion of Canada *brutally excludes* American fishermen from Canadian ports. This

dependence of port hospitality, as between this Government and the British Government, in respect to vessels of either, is emphasized by the 17th section of the law of 19th June, 1886, empowering the President to suspend commercial privileges to the vessels of any country denying the same to United States' vessels. That section is in harmony with a section in the British navigation law which authorises the Queen, whenever British vessels are subject in any foreign country to prohibitions or restrictions, to impose by Order in Council such prohibitions, or restrictions upon ships of such foreign country, either as to voyages in which they may engage, or as to the articles which they may import into or export from any British possession in any part of the world, so as to place the ships of such country on as nearly as possible the same footing in British ports as that on which British ships are placed in ports of such country.

REVENUE LAWS AND REGULATIONS.

The head of this department, having the responsibility of enforcing the collection of duties upon such a vast number of imported articles, under circumstances of so long a sea-coast and frontier line to be guarded against the devices of smugglers, should not be inclined to underestimate the solicitude of the local officers of the Dominion of Canada to protect its own revenue from similar invasion. The laws for the collection of duties on imports in force in the United States and in the Dominion of Canada, respectively, will be found, on comparison, to be on many points similar in their objects and methods. They should naturally be similar, for both had, in the beginning, the same common origin. In the United States, Congress has divided the territory of each State by metes and bounds, usually by towns, cities, or counties, into collection districts, for the purpose of collecting duties on imports, and in each collection district has established a port of entry and ports of delivery. In that manner all our sea-coast frontier is sub-divided for revenue purposes. The object of our law is to place every vessel arriving from a foreign port in the custody of a customs officer immediately upon her arrival, in order that no merchandise may be unladen therefrom without the knowledge of the Government. The Canadian law is much the same as our own in that regard, and in comparison with our own does not seem to me [to] be unnecessarily severe in its general provisions. Our own law provides, for example (sec 2774, Rev. Stat.,) that:—

Within twenty four hours after the arrival of any vessel, from any foreign port, at any port of the United States established by law, at which an officer of the customs resides, or within any harbour, inlet, or creek thereof, if the hours of the business of the office of the chief officer of customs will permit, or as soon thereafter as such hours will permit, the master shall report to such officer, and make report to the chief officer, of the arrival of the vessel; and he shall within forty-eight hours after such arrival make a further report in writing to the collector of the district, which report shall be in the form, and shall contain all the particulars required to be inserted in and verified like the manifest. Every master who shall neglect or omit to make either of such reports or declaration, or to verify any such declaration as required, or shall not fully comply with the true intent and meaning of this section, shall, for each offence be liable to a penalty of one thousand dollars.

Condemnation does not, in the opinion of this department, justly rest upon the Dominion of Canada because she has upon her statute-

books and enforces a law similar to the foregoing, but because she refuses to permit American deep sea fishing vessels, navigating and using the ocean, to enter her ports for the ordinary purposes of trade and commerce, even though they have never attempted to fish within the territorial limits of Canada, and intend obedience to every requirement of the customs laws, and of every other law of the port which such vessels seek to enter. American fishing-vessels duly authenticated by this department, and having a permit "to touch and trade," should be permitted to visit Canadian ports, and buy supplies, and enjoy ordinary commercial privileges, unless such a right is withheld in our ports from Canadian vessels. That right is denied by the Privy Council and the Governor General of the Canadian Dominion, upon the ground that it would be in effect a *pro tanto* abrogation of the treaty of 1818. That contention is an error, in the opinion of this department, because the treaty of 1818 has no application to the subject matter. If the right claimed by this department for American vessels authenticated by this department were conceded by Canada, it would only apply to a few ports established by law for the entry of foreign vessels, and would merely enable United States' fishing vessels to pursue their regular business after entry into or departure from such ports, under the same rules and regulations as are applied to the commercial vessels of other nations. We ask that American fishing-vessels shall enjoy hospitality in such Canadian ports as are set apart for the entry of foreign vessels, for the unloading and shipment of merchandise, and generally for foreign commerce.

This department has had occasion in the past, and may be compelled in the future, to seize and prosecute to forfeiture foreign as well as domestic vessels violating in our own ports, the customs law, but I believe there never has been in the past, and I hope there never will be in the future, such *passionate spite* displayed by the officers of this Government, as has during the last summer been exhibited in the Dominion of Canada toward well meaning American fishermen. Congress has forbidden the head of this department to prosecute even for evasion of tariff law unless satisfied of "an actual intention to defraud."

TONNAGE OF VESSELS ENGAGED IN AMERICAN FISHERIES, AND THE NATIONALITIES OF THE FISHERMEN.

During the periods of the enquiry made of me by the House, the tonnage of American fishing-vessels of over twenty tons burden, other than whalers, will be seen in Appendix D.

373 That tonnage reached its maximum 203,459 in 1862, and during the subsequent seven years diminished by more than 70 per cent. The lowest number of tons was touched in the middle of the period between the expiration of the reciprocity treaty of 1854 and the conclusion of the treaty of Washington of 1871. The falling off is perhaps to be attributed in great part to the repeal in 1866 of the laws allowing bounties to the vessels engaged in the fisheries. By the law of 1813 there was paid by the collector of the district where such vessels belonged, to the owner thereof, if the vessel had been employed at sea, in fishing for the term of four months, and for

each ton burden, a specified sum, not to exceed \$272 on any one vessel for one season, of which bounty three-eighths accrued to the owner and the other five-eighths to the several fishermen. In 1817 it was enacted that the bounty shall be paid only to vessels whereof the officers, and at least three-fourths of the crew, shall be citizens of the United States, or persons not the subject of any foreign Prince or State. In 1819, soon after the conclusion of the treaty of 1818, the bounties were increased, but not to exceed \$360 for each vessel. In 1864 it was enacted that the bounty shall not thereafter be paid to any vessel until satisfactory proof shall have been furnished to the collector of customs that the import duty imposed by law upon foreign salt has been paid on all foreign salt used in curing the fish on which the claim to the allowance to the bounty is based, and the law was repealed on 28th June, 1864, (U. S. Stats. at Large, vol. 13, p. 201,) which required two-thirds of those on board to be American citizens. On 28th July, 1866, all laws and parts of laws allowing fishing-bounties to vessels thereafter licensed to engage in the fisheries was also repealed, but under the condition that duties shall be remitted on all foreign salt used by such vessels in curing fish. It seems quite probable that anticipation of the enactment repealing bounties induced, in great part, the great falling off in tonnage between 1862 and 1869.

The best estimate that can be made by this department of the relation of aliens to citizens engaged in American fisheries, in the North Atlantic, other than whalers, is that during the last year (1886) of the 14,240 employed, seventy-eight per cent, were American citizens.

PRESENT CONDITION OF AMERICAN FISHERIES, AND THE SUM OF DUTIES COLLECTED ON FOREIGN FISH.

On May 28, 1886, and in furtherance of a suggestion made by our fish commissioner, this department issued a circular letter of instruction to collectors, a copy of which will be found in Appendix (E). The replies received have been transmitted to that commission, and therefrom valuable facts, respecting our fisheries, have been obtained, some of which the commissioner has kindly grouped and placed at my disposition. They are respectfully submitted to the House in Appendix (E). In Appendix (C) will be found such an exhibition of the duties collected on fish as the records of this department, for reasons set forth in the Appendix, make available for immediate presentation to the House.

Respectfully yours, (Sd.) DANIEL MANNING,
Secretary of the Treasury.

The Honourable the SPEAKER OF THE HOUSE OF REPRESENTATIVES.

No. 228.—1887, January 15: *Report of a Committee of the Privy Council for Canada, approved by His Excellency the Governor-General in Council.*

The Committee of the Privy Council have had under consideration a despatch dated 22nd November, 1886, from the Right Honorable the Secretary of State for the Colonies, enclosing letters from Mr.

Secretary Bayard, bearing date 19th October, and referring to the cases of the schooners "Everitt Steele" and "Pearl Nelson."

The Minister of Marine and Fisheries to whom the despatch and enclosures were referred, reports that in reply to a telegram from the Secretary of State for the Colonies, an Order in Council, passed on the 18th November last, containing a full statement of facts regarding the detention of the above-named vessels, was transmitted to Mr. Stanhope. It will not, therefore, be necessary to repeat this statement in the present report.

The Minister observes, in the first place, that the two fishing schooners, the "Everitt Steele" and "Pearl Nelson" were not detained for any alleged contravention of the Treaty of 1818, or the Fishery Laws of Canada, but solely for violation of the Custom's Law. By this law all vessels of whatever character are required to report to the Collector of Customs immediately upon entering port, and are not to break bulk or land crew or cargo before this is done.

The Minister states that the captain of the "Everitt Steele" had, on a previous voyage, entered the port of Shelburne on the 25th March, 1886, and after remaining for eight hours had put to sea again without reporting to the Customs. For this previous offence, he was, upon entering Shelburne Harbor on the 10th September last, detained, and the facts were reported to the Minister of Customs at Ottawa. With these facts was coupled the captain's statement that on the occasion of the previous offence he had been misled by the Deputy Harbor Master, from whom he understood that he would not be obliged to report unless he remained in harbor for twenty-four hours. The Minister accepted the statement in excuse as satisfactory, and the "Everitt Steele" was allowed to proceed on her voyage.

The Customs Law had been violated. The captain of the "Everitt Steele" had admitted the violation, and for this the usual penalty could have been legally enforced. It was, however, not enforced, and no detention of the vessel occurred beyond the time necessary to report the facts to headquarters and obtain the decision of the Minister.

The Minister submits that he cannot discern in this transaction any attempt to interfere with the privileges of United States' fishing vessels in Canadian waters or any sufficient cause for the protest of Mr. Bayard.

The Minister states that, in the case of the "Pearl Nelson," no question was raised as to her being a fishing vessel, or her enjoyment of any privileges guaranteed by the Treaty of 1818. Her captain was charged with a violation of the Custom's Law and of that alone, by having, on the day before reporting to the Collector of Customs at Arichat, landed ten of his crew.

This he admitted upon oath. When the facts were reported to the Minister of Customs he ordered that the vessel might proceed upon depositing \$200.00 pending a fuller examination. This was done, and the fuller examination resulted in establishing the violation of the law, and in finding that the penalty was legally enforceable. The Minister, however, in consideration of the alleged ignorance of the captain as to what constituted an infraction of the law, ordered the deposit to be returned.

In this case there was a clear violation of Canadian law, there was no lengthened detention of the vessel, the deposit was ultimately remitted, and the United States' Consul General at Halifax, expressed himself by letter to the Minister as highly pleased at the result.

The Minister observes that in this case he is at a loss to discover any well-founded grievance or any attempted denial of or interference with any privileges guaranteed to United States' fishermen by the Treaty of 1818.

The Minister further observes that the whole argument and protest of Mr. Bayard appears to proceed upon the assumption that these two vessels were subjected to unwarrantable interference, in that they were called upon to submit to the requirements of Canadian Customs Law, and that this interference was prompted by a desire to curtail or deny the privileges of resort to Canadian harbours for the purposes allowed by the Treaty of 1818. It is needless to say that this assumption is entirely incorrect.

Canada has a very large extent of sea coast with numerous ports into which foreign vessels are constantly entering for purposes of trade. It becomes necessary in the interests of legitimate commerce that stringent regulations should be made by compulsory conformity to which, illicit traffic should be prevented.

These Customs' regulations all vessels of all countries are obliged to obey, and these they do obey without in any way considering it a hardship. United States fishing vessels come directly from a foreign and not distant country, and it is not in the interests of legitimate Canadian commerce that they should be allowed access to our ports without the same strict supervision as is exercised over all other foreign vessels. Otherwise there would be no guarantee against illicit traffic of large dimensions to the injury of honest trade and the serious diminution of the Canadian revenue. United States' fishing vessels are cheerfully accorded the right to enter Canadian ports for the purpose of obtaining shelter, repairs, and procuring wood and water, but in exercising this right, they are not and cannot be independent of the Customs' Laws.

They have the right to enter for the purposes set forth, but there is only one legal way in which to enter and that is by conformity to the Customs' regulations.

When Mr. Bayard asserts that Captain Forbes had as much right to be in Shelburne Harbour seeking shelter and water "as he would have had on the high seas carrying on under the shelter of the flag of the United States legitimate commerce," he is undoubtedly right, but when he declares as he in reality does, that to compel Captain Forbes in Shelburne Harbour to conform to Canadian Customs' regulations, or to punish him for their violation, is a more unwarrantable stretch of power than "that of a seizure on the high seas of a ship unjustly suspected of being a slaver," he makes a statement which carries with it its own refutation. Customs' regulations are made by each country for the protection of its own trade and commerce, and are enforced entirely within its own territorial jurisdiction; while the seizure of a vessel upon the high seas, except under extraordinary and abnormal circumstances, is an unjustifiable interference with the free right of navigation common to all nations.

As to Mr. Bayard's observation that by treatment such as that experienced by the "Everitt Steele" "the door of shelter is shut to American fishermen as a class," the Minister expresses his belief that Mr. Bayard cannot have considered the scope of such an assertion or the inferences which might reasonably be drawn from it.

If a United States' fishing vessel enters a Canadian port for shelter, repairs or for wood and water her captain need have no difficulty in reporting her as having entered for one of these purposes and the "Everitt Steele" would have suffered no detention had her captain on the 25th March simply reported his vessel to the Collector. As it was, the vessel was detained for no longer time than was necessary to obtain the decision of the Minister of Customs, and the penalty for which it was liable was not enforced. Surely Mr. Bayard does not wish to be understood as claiming for United States fishing vessels total immunity from all Customs regulations or as intimating that if they cannot exercise their privileges unlawfully they will not exercise them at all.

Mr. Bayard complains that the "Pearl Nelson," although seeking to exercise no commercial privileges, was compelled to pay commercial fees such as are applicable to trading vessels. In reply
375 the Minister observes that the fees spoken of are not "commercial fees;" they are harbor masters dues which all vessels making use of legally constituted harbours are by law compelled to pay, and entirely irrespective of any trading that may be done by the vessel.

The Minister observes that no single case has yet been brought to his notice in which any United States' fishing vessel has in any way been interfered with for exercising any rights guaranteed under the Treaty of 1818, to enter Canadian ports for shelter, repairs, wood or water; that the Canadian Government would not countenance or permit any such interference, and that in all cases of this class when trouble has arisen, it has been due to a violation of Canadian Customs law, which demands the simple legal entry of the vessel so soon as it comes into port.

The Committee, concurring in the above report, recommend that your Excellency be moved to transmit a copy thereof to the Right Honorable the Secretary of State for the Colonies.

All which is respectfully submitted for Your Excellency's approval.

(Sd.)

JOHN J. MCGEE,
Clerk, Privy Council.

No. 229.—1887, January 18: *Report of the Committee on Foreign Affairs of the United States House of Representatives.*

[49th Congress, 2nd Session. House of Representatives. Report No. 3648.]

NORTH AMERICAN FISHERIES.

JANUARY 18, 1887.—Committed to the Committee of the whole House on the state of the Union, and ordered to be printed.

Mr. Belmont, from the Committee on Foreign Affairs, submitted the following report (to accompanying Bill H. R. 10241).

The Committee on Foreign Affairs, to which were referred the President's Message, of 8th December, 1886 (Ex. Doc. No. 19), and the reply of the Secretary of the Treasury on 10th January, 1887 (Ex. Doc. No. 78), to the resolution of the House adopted on 14th December, 1886, and House Bill 10241, submits the following report:—

Your Committee has not only given to those communications the very careful consideration which they deserve, but, during the last session of the House, made diligent inquiry into the whole subject of American fisheries. They were attended in the committee-room by, among others, William Henry Trescot, Esq., and Charles Levi Woodbury, Esq., of Boston. Mr. Woodbury represented all, or a large majority of, New England owners of fishing vessels, and both of the gentlemen favoured your committee with valuable opinions on different phases of the important subject under consideration.

Your Committee is of opinion that the rightful area of our "American fisheries" has been reduced, and the quantity of fish—fresh, dried, cured, or salted—landed in the United States free of duty has been diminished, by the conduct of the local officers in Canada. That conduct has been not only in violation of treaty stipulations and of international comity, but during the fishing season just passed has been inhuman, as the Message of the President clearly establishes.

THE TREATY OF 1783.

The treaty of peace defined, in 1783, the area of American fisheries which might, in that portion of the world, be prosecuted by American vessels. Its third article declares:

ARTICLE III.

It is agreed that the people of the United States shall *continue* to enjoy unmolested the RIGHT—

(1.) To take fish of every kind on the Grand Bank and all other banks of Newfoundland;

(2.) Also in the Gulf of Saint Lawrence;

376 (3.) And at all other places *in the sea*, where the inhabitants of both countries used at any time heretofore to fish. And also that the inhabitants of the United States shall have LIBERTY—

(1.) To take fish of every kind on such part of the *coast* of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island);

(2.) And also on the coasts, bays, and creeks of *all* other of His Britannic Majesty's dominions in America;

(3.) And that the American fishermen shall have liberty to *dry* and *cure* fish in any of the unsettled bays, harbours, and creeks of Nova Scotia, Magdalen Islands and Labrador, so long as the same shall remain unsettled; but so soon as the same, or either of them, shall be settled, it shall not be lawful for the said fishermen to *dry* or *cure* fish at such settlement without a previous agreement for that purpose with the inhabitants, proprietors or possessors of the ground.

When that treaty of peace was signed, the British Navigation Act of Charles II, and other laws, prevented trade in foreign vessels with the Anglo-American colonies. The corner-stone of that policy was a monopoly of colonial trade for British vessels. The American colonies were founded in subservience to British commerce. A double monopoly was established by England—a monopoly of their whole import, which is all to be from England; a monopoly of their whole export, which is to be sent nowhere but to Great Britain. The

colonies were to send all their products raw to England, and take everything from England in the last stage of manufacture. The treaty of peace did not stipulate for a change of that policy as between the United States and Canada, although the American Congress did, in April, 1776, sweep away, so far as it could, that monopoly system from the ports it controlled, abolish British custom houses and put none in their stead, proclaim absolute free trade in the place of heavy restrictions, invite products from any place to come in friendly vessels, and authorise American products to be exported without tax.

After the thirteen States had acquired their independence, American vessels were not only excluded from the ports of the British colonies, but Canada, as a reward for its loyalty, received the exclusive privilege of supplying the British West Indies with timber and provisions, to the great injury of the latter, whose nearest ports were the American Gulf ports and South American ports.

It will be observed that this article, in continuing, confirming, and establishing the thirteen States and their inhabitants in the taking of fish on the banks, in the Gulf and in the sea, uses the word "*rights*," but uses the word "*liberty*" in confirming to American fishermen the taking of fish on the coasts, bays and creeks of every part of the British dominions in America. The word "*rights*" is thus applied to fishing in the open sea, which by public law is common to all nations, and was intended to affirm that Great Britain did not claim to hold by treaty engagements, or in any other manner, an exclusive right of fishing therein. The word "*liberty*" is thus applied to taking fish, to drying and curing fish, on what was, anterior to the treaty, within the jurisdiction, or territorial waters of Great Britain, but an exclusive right of taking fish therein was not hers. "*Liberty*," as thus used, implies a freedom from restraint or interference in fishing along the British coasts.

Canada having been, by the aid of men of the New England colonies, conquered for the English in 1759, the conquest having been confirmed in 1763 by the treaty of Paris, and the sovereignty of Newfoundland having been conceded to Great Britain by the peace of Utrecht in 1713, the American Colonists, who bravely endured sacrifices in war to accomplish those results, shared therein, as British subjects down to 1783, when, by treaty, England stipulated that the citizens of the "free, sovereign, and independent" States of America shall *continue* to share, and share alike, with British subjects in such coast fishing. Lord North having in 1775, proposed to the House of Commons to exclude the fishermen of New England from the Banks of Newfoundland, and to restrain them from a toil in which they excelled the world, the joint right to the fisheries became a vital part of the great American struggle. "God and nature," said Johnston, "have given that fishery to *New England* and not to *Old*." Americans, Britons, and British Canadians became, by the treaty, partners in the fisheries. It created a "servitude of public law" in favour of American fishermen. "ALL British coasts, bays, and creeks" in America were thereby, as Secretary Manning so aptly says, made a part of our "American fisheries," to which our tariff laws, thereafter enacted, referred and attached, and so made the products thereof exempt from duty on entry at our ports.

TREATY OF GHENT.

Thus stood American rights and liberties of fishing on the high seas, and within the limits of British Dominion in North America, down to the war of 1812, and to the treaty of peace negotiated at Ghent, which closed that war. Till then it was nowhere denied that American fishermen could fish on the high seas and on those coasts wherever British fishermen could fish. But during the negotiations at Ghent, in 1814, the British negotiators declared that their Government "did not intend to grant to the United States gratuitously the privileges formerly granted by treaty to them of *fishing* within the limits of the British sovereignty and of using the shores of the British territories for purposes connected with the British fisheries." In answer to this declaration the American negotiators said they were "not authorised to bring into discussion any of the rights or liberties which the United States have heretofore enjoyed in relation thereto."

England contended that the word "*right*" in the treaty of 1783 was used as applicable to what the United States were to enjoy in virtue of a recognised independence, and the word "*liberty*" to what they were to enjoy as concessions strictly dependent on the existence of the treaty in full force, which concession fell, as England asserted, on the declaration of war by the United States, and would not be revived excepting for an equivalent.

377 In the alarming condition of affairs, at home and abroad, in the autumn of 1814, our Government did finally authorise our negotiators at Ghent to agree to the *status quo ante bellum* as the basis of negotiation, provided only that our national independence was preserved. (See introductory notes by Hon. J. C. Bancroft Davies to "Treaties and Conventions," published by the Department of State in 1873, p. 1021.) The treaty was signed on 24th December, 1814. How different might have been its terms had there been procrastination till the news came of General Jackson's brilliant victory at New Orleans only fifteen days afterwards, or till the escape of Napoleon from Elba only two months later.

THE TREATY OF 1818.

Within a short time after the close of the year 1814, England announced her purpose to exclude American fishermen from the "*liberty*," of fishing within one marine league of her shores in North America, and of drying and curing fish on the unsettled parts of those territories.

The announcement led up to the treaty of 1818, whereby the "*liberty*" conceded in 1783 to belong to American fishermen was confined within narrower limits, and the area of American fisheries was greatly reduced as well as the quantity of American caught fish arriving exempt from taxation at our ports. The treaty of 1818, and the misunderstanding under it, led up to the Marcy-Elgin Reciprocity Treaty of 1854, terminated in 1866, which covered by a new stipulation, a part of the stipulations contained in the treaty of 1818. Your Committee do not now express an opinion whether or not the termination of the Reciprocity Treaty of 1854, revived the superseded and dead stipulation of the convention of 1818, contained in its

renunciation sentences, which are the last sentences of the first article, for which stipulation in the treaty of 1818, a new positive stipulation was substituted and inserted in the Treaty of 1854, which last-named treaty might, in accordance with its terms, have been in force indefinitely.

The first article of the treaty of 1818, which has been the cause of such unnumbered international differences and disputes, is in these words:—

Whereas differences have arisen respecting the *liberty* claimed by the United States, for the inhabitants thereof, to take dry and cure fish on certain *coasts, bays, harbours, and creeks* of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties that the inhabitants of the said United States shall have, for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind—

1. On that part of the southern coast of Newfoundland, which extends from Cape Ray to the Rameau Islands, on the western and northern coasts of Newfoundland from the said Cape Ray to the Quirpon Islands;

2. *On the shores of the Magdalen Islands;*

3. And also on the coasts, bays, harbours and creeks from Mount Jolly, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson Bay Company.

And that the American fishermen shall also have liberty for ever to *dry and cure fish* in any of the unsettled bays, harbours and creeks of the southern part of the coast of Newfoundland, hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground.

And the United States hereby renounce for ever any *liberty* heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbours of His Britannic Majesty's dominions in America *not included within the above-mentioned limits.*

Provided, however, that the American fishermen shall be permitted to enter such bays or harbours (1) for the purpose of shelter and (2) of repairing damages therein; of (3) purchasing wood and (4) of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever, abusing the privileges hereby reserved to them.

That article does not allude to, or attempt to interfere with, our rights in the open sea, on the banks, or in the gulf, which were confirmed by the concession of the independence of the thirteen States. It refers only to the liberty claimed and recognised by the treaty of 1783, "on certain coasts, bays, harbours and creeks." It begins by a recital that differences have arisen respecting the "liberty" claimed by American fishermen *in those places*. It neither mentions nor alludes to any differences about fishing on the high seas. It stipulates that American fishermen may fish on certain specified coasts, bays, harbours, creeks, and shores, and may dry and cure fish in certain unsettled bays, harbours and creeks, and especially dry and cure on the coasts of Newfoundland, which last the treaty of 1783 did not embrace. The United States "renounces" any "liberty" to take, dry, or cure fish within three miles of any other coasts, bays, creeks, or harbours than those specified in the article, but the sentence of renunciation contains a stipulation that the American fishermen may enter "*such bays or harbours*" for four specified purposes, "and for no other purpose whatever," under such restrictions as may be *necessary* to prevent fishing, drying, or curing "*therein.*"

378 Unless English words were in 1818 used in that article in an unusual sense, there is not a sentence or word therein that has reference to anything else than taking, drying, or curing fish, by American fishermen, on or within certain coasts, bays, creeks, or harbours therein described. No word or phrase mentioned alludes or refers to deep-sea fishing, or ordinary commercial privileges. The restrictions refer only to fishing, or drying, or curing, ordinary commercial privileges. The restrictions refer only to fishing, or drying, or curing "in such bays or harbours."

It is to be assumed that when this treaty of 1818 was signed, the British statutes of Charles II, in restraint of navigation, the rudiments of which are to be seen in 1650, and were aimed at Dutch trade with British sugar colonies, were, on the English side, rigorously enforced, so that no merchandise could be lawfully imported into Canadian ports excepting in English bottoms. The treaty of 1818 was concluded on 20th October, of that year, but ratifications were not exchanged till 30th January, 1819. Certainly on our side there was then in force legislative restriction on navigation almost as severe as was the English enactment after the restoration of Charles II. America had not then emerged from the era of the embargo, Berlin and Milan decrees, and the influences of the war of 1812. On 18th April, 1818, the President approved a law closing our ports after 30th September, 1818, against British vessels coming from a colony which, by the ordinary laws, is closed against American vessels. Touching at a port open to American vessels could not modify the restriction. Vessels and cargoes entering, or attempting to enter, in violation of the law were forfeitable. And any English vessel that could lawfully enter our ports was compelled to give a bond, if laden outward with American products, not to land them in a British colony or territory from which American vessels were excluded. The presumption is that, quite independently of fishing rights and liberties, no American vessel was for long before and after 1818 permitted by English law to touch and trade in Canadian ports. How that system of exclusion was gradually broken down, not by treaty, but by concerted legislation, the Secretary of State and the Secretary of the Treasury have clearly exhibited in the communications referred to your committee.

Not till 1822 were American wheat and lumber permitted to go directly from American ports to the British West Indies and be entered there. In 1843 Canada was allowed to import American wheat, and then send it through the Saint Lawrence to the English market as native produce—an indirect open blow at the English corn laws. Canadian trade entered upon another stage of prosperity in 1846, when the restrictive navigation laws of England were again relaxed for her benefit, and in 1850, when Canada was quite relieved from the injurious influences of those laws; but yet Canada, at this late date, endeavours to return to those obsolete and condemned restraints on trade by excluding deep-sea American fishermen from her ports.

That a sovereign State has exclusive jurisdiction in its own territory, and over its own vessels on the high seas, is nowhere denied. Mr. Fish announced, as Secretary of State, in 1875, "we have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond a marine league from the

coast." No nation has asserted, independently of a treaty, an exclusive dominion over the sea surrounding its coast applicable to the *passing* ships of other nations. Why should a vessel which, under stress of weather or necessities of navigation, casts anchor for a few hours in a bay be subjected to a larger or fuller foreign jurisdiction than a passing vessel, provided inshore fisheries are not thereby poached upon, or the revenue evaded, or safe navigation endangered, or crime attempted or committed? Why need a powerful State take any cognisance of such innocent and casual presence of a little body of foreign seamen? The treaties which have been made applicable thereto refer to neutrality in war and the exclusive right of fishing, thereby proving the general rule. There is, no doubt, a well-founded claim, based on *usage*, over an exclusive dominion of *some* narrow zone of the sea for *some* purposes, but those purposes are carefully restricted, among other things, to navigation, rules of the road, lighthouses, quarantine, pilotage, anchorage, revenue, or local fisheries. By the treaties of 1783 and 1818 there is a zone of the Canadian and Newfoundland coasts open and free to American fishermen.

The dispute was settled, and a new contract entered into by the reciprocity treaty of 1854, which stipulated:

ARTICLE 1. It is agreed by the high contracting parties *that in addition to the liberty secured to the United States fishermen by the above-mentioned convention of 20th October, 1818*, of taking, curing, and drying fish on certain coasts of British North American colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbours, and creeks of Canada, New Brunswick, Nova Scotia, Prince Edward Island, and of the several islands thereunto adjacent (and, by another article, Newfoundland), without being restricted to any distance from shore, with permission to land upon the coasts and shores of those colonies and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property, or with British fishermen in the peaceable use of any part of the same coast in their occupancy for the same purpose. It is understood that the above-mentioned liberty applies solely to the sea-fishery, and that the salmon and shad fisheries and all fisheries in rivers and the mouths of rivers are hereby reserved exclusively for British fishermen.

Similar provision was made in article II, with like exception, for the admission of British subjects to take fish on a part of the sea-coasts and shores of the United States.

379 The United States purchased the fishery provisions of this treaty, and exemption from certain restrictions in the treaty of 1818, by stipulations that certain enumerated articles of the growth and produce of the British colonies of Canada, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland should be admitted at our ports free of duty.

They were the incidents of a larger question, namely, the terms of commercial intercourse between the United States and the British colonies in North America.

It is not contended anywhere, by anybody, that the stipulations in the treaty of peace of 1783, by which the sovereignty and independence of the thirteen States were acknowledged, their boundaries fixed, their right established to navigate the high seas and to fish therein, fell by the war of 1812. Nor is it pretended that the war of 1812 grew out of the exercise of fishing rights under the treaty

of 1783, so as that whatever stipulations therein were intended to be permanent, to bind during war, and to survive war, were extinguished by the war. Even if it be conceded that the "liberty to Americans," in the treaty of 1783, to catch or cure and dry fish on the coast of Newfoundland, and "on the coasts, bays, and creeks of all other of Her Britannic Majesty's dominions in America," could, on a declaration of war by the United States, have been annulled by England, they were not at any time expressly annulled. If they could have been suspended by the will of England, they were not expressly suspended. If they were suspended by the fact of war, if they were like temporary commercial engagements, or like postal treaties, there was nothing in the facts of the war of 1812 to prevent them from recommencing their operations automatically with the peace. Nothing in the relations of the two Governments, was inconsistent with their survival. Mr. Dana, in his note on Wheaton (p. 353), has stated the rule thus:

If a war arises from a cause independent of the treaty, the survival of any clause in the treaty must depend upon its nature and the circumstances under which it was made.

The question of amendment or survival of the treaty of 1783, as to certain specified parts of the British coast in America, was, however, by the treaty of 1818, made of no practical consequence (so long as that treaty endured) by the renunciation signed by the United States.

THE CANADIAN CONVENTION.

The legal effect of the First article of the treaty of 1818 may be sketched in outline in this wise:

All the British coast, shores, bays, harbours, and creeks in America were, by that article, separated into two portions, which were bounded, defined and indentified. The two may be marked respectively as A. and B. In the sixth volume of "*Papers relating to the Treaty of Washington*," published by the Department of State in 1874, is a map of New Brunswick, Nova Scotia, Newfoundland and Prince Edward Island, coloured in a way to plainly exhibit these two portions. In all that portion marked A it was agreed that the inhabitants of the United States shall have for ever, in common with British subjects, the *liberty* to take fish of every kind; but as to the portion marked B, the United States renounced for ever any liberty theretofore enjoyed or claimed to take, dry, or cure any fish. It was stipulated, nevertheless, that "the American fishermen shall be permitted to enter" the portion marked B for the purpose of shelter, repairing damages, purchasing wood, obtaining water, and "for no other purpose whatever."

The entire article referred to inshore *fishing*. No right and no liberty whatever, that might concern deep-sea fishermen, did the United States, by the treaty of 1818, renounce.

This obvious intent and purpose of the article is confirmed by the last words of the section, which declares: "But they" (the American fishermen) "shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein" (in portion B) "or in any other manner abusing the privileges hereby reserved to

them." The "restrictions to be imposed upon the American fishermen, while in portion B, are expressly limited, not to such as concern navigation or revenue, but to such as were specifically renounced, namely, to such as "may be *necessary* to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them" *in order to take, dry, or cure fish therein.*

Was it not clearly the intention of the negotiators of this treaty that the character of these restrictions should be agreed upon by the parties to the treaty? Is it reasonable to assume that the American negotiators intended that the Canadian provinces, or even the British Government, should have the exclusive power to prescribe "restrictions" which might entirely destroy the value of any unrenounced right and liberty theretofore claimed and enjoyed, or of any conceded "privileges" thereby reserved to American fishermen in portion B?

These preliminary explanations will assist to measure the force and bearing upon American deep-sea fishermen of the interpretation put upon the treaty by the Canadian Dominion during the last summer.

The following extracts are taken from the message of the President to Congress of the 8th ultimo.

WHAT CANADA HAS SAID.

On 5th June, 1886, the Canadian Minister of Marine and Fisheries declared:

It appears the "*Jennie and Julia*" is a vessel of about 14 tons register, that she was to all intents and purposes a fishing vessel, and, at the time of her entry into the Port of Digby had fishing gear and apparatus on board, and that the collector fully satisfied himself of these facts. According to the master's declaration, she was there to purchase fresh herring only, and wished to get them direct from the weir fishermen. The collector, upon his conviction that she was a fishing vessel, and, *as such, debarred by the treaty of 1818 from entering Canadian ports for the purposes of trade*, therefore, in the exercise of his plain duty, warned her off.

The treaty of 1818 is explicit in its terms, and by it United States' fishing vessels are allowed to enter Canadian ports for shelter, repairs, wood, and water, and "for no other purpose whatever."

The undersigned is of the opinion that it cannot be successfully contended that a *bona-fide* fishing vessel can, by simply declaring her intention of purchasing fresh fish for other than baiting purposes, evade the provisions of the treaty of 1818, and obtain privileges not contemplated thereby. If that were admitted, the provision of the treaty which excludes United States' fishing vessels for all purposes but the four above-mentioned would be rendered null and void, and the whole United States' fishing fleet be at once lifted out of the category of fishing vessels and allowed the free use of Canadian ports for baiting, obtaining supplies, and transshipping cargoes.

It appears to the undersigned that the question as to whether a vessel is a fishing vessel or a legitimate trader or merchant vessel is one of fact, and to be decided by the character of the vessel and the nature of her outfit, and that the class to which she belongs is not to be determined by the simple declaration of her master that he is not at any given time acting in the character of a fisherman.

At the same time the undersigned begs again to observe that Canada has no desire to interrupt the long established and legitimate commercial intercourse with the United States, but rather to encourage and maintain it, and that Canadian ports are at present open to the whole merchant navy of the United States on the same liberal conditions as heretofore accorded.

On 7th of June, 1886, the Canadian Governor General advised the Minister of Foreign Affairs at London:

No attempt has been made either by the authorities entrusted with the enforcement of the existing law or by the Parliament of the Dominion to interfere with vessels engaged in *bona-fide* commercial transactions upon the coasts of the dominion. The two vessels which have been seized are both of them beyond all question fishing vessels, and not traders, and therefore liable, subject to the findings of the courts, to any penalties imposed by law for the enforcement of the convention of 1818 on parties violating the terms of that convention.

On 14th June, 1886, a committee of the Privy Council for Canada put forth the following opinions and conclusions, which were approved by the Governor General:

It is not, however, the case that the convention of 1818 affected only the inshore fisheries of the British provinces; it was framed with the object of affording a complete and exclusive definition of the rights and liberties which the fishermen of the United States were thenceforward to enjoy in following their vocation, so far as those rights could be affected by facilities for access to the shores of waters or [or waters of] the British provinces, or for intercourse with their people. It is, therefore, no undue expansion of the scope of that convention to interpret strictly those of its provisions by which such access is denied, except to vessels requiring it for the purposes specifically described.

Such an undue expansion would, upon the other hand, certainly take place, if, under cover of its provisions or of any agreement relating to general commercial intercourse which may have since been made, permission were accorded to United States' fishermen to resort habitually to the harbours of the dominion, not for the sake of seeking safety for their vessels, or of avoiding risk to human life, but in order to use these harbours as a general base of operations from which to prosecute and organize with greater advantage to themselves the industry in which they are engaged.

It was in order to guard against such an abuse of the provisions of the treaty that amongst them was included the stipulation that not only should the inshore fisheries be reserved to British fishermen, but that the United States, should renounce the right of their fishermen to enter the bays or harbours, excepting for the four specified purposes, which do not include the purchase of bait or other appliances, whether intended for the deep-sea fisheries or not.

The undersigned, therefore, cannot concur in Mr. Bayard's contention that "to prevent the purchase of bait, or any other supply needed for deep-sea fishing, would be to expand, the convention to objects wholly beyond the purview, scope, and intent of the treaty, and to give to it an effect never contemplated."

Mr. Bayard suggests that the possession by a fishing vessel of a permit to "touch and trade" should give to her a right to enter Canadian ports for other than the purposes named in the treaty, or, in other words, should give her perfect immunity from its provisions. This would amount to a practical repeal of the treaty, because it would enable a United States' collector of customs, by issuing a licence originally only intended for purposes of domestic customs regulation, to give exemption from the treaty to every United States' fishing vessel. The observation that similar vessels under the British flag have the right to enter the ports of the United States for the purchase of supplies loses its force when it is remembered that the convention of 1818 contained no restriction on British vessels and no renunciation of any privileges in regard to them.

On August 14, 1886, the Minister of Marine and Fisheries said:

There seems no doubt, therefore, that the "Novelty" was in character and in purpose a fishing vessel, and as such comes under the provisions of the
381 treaty of 1818, which allows United States' fishing vessels to enter Canadian ports "for the purpose of shelter and repairing damages therein, and of purchasing wood and of obtaining water, and for no other purpose whatever."

The object of the captain was to obtain supplies for the prosecution of his fishing, and to tranship his cargoes of fish at a Canadian port, both of which are contrary to the letter and spirit of the convention of 1818.

On October 30, 1886, a committee of the Canadian Privy Council contended, and the administrator of the government in council upheld the contention:—

That the convention of 1818, while it grants to United States' fishermen the right of fishing in common with British subjects on the shores of the Magdalen Islands, does not confer upon them privileges of trading or of shipping men, and it was against possible acts of the latter kind, and not against fishing in-shore, or seeking the rights of hospitality guaranteed under the treaty, that Captain Vachem (McEachern) was warned by the collector.

On November 24, 1886, a committee of the Canadian Privy Council declared, and the Governor General approved the declaration:

The Minister of Marine and Fisheries, to whom said despatch was referred for early report, states that any foreign vessel, "not manned nor equipped, nor in any way prepared for taking fish," has full liberty of commercial intercourse in Canadian ports upon the same conditions as are applicable to regularly registered foreign merchant vessels; nor is any restrictions imposed upon any foreign vessels *dealing* in fish of any kind different from those imposed upon foreign merchant vessels dealing in other commercial commodities.

That the regulations under which foreign vessels may *trade* at Canadian ports are contained in the Customs Laws of Canada (a copy of which is herewith), and which render it necessary, among other things, that upon arrival at any Canadian port a vessel must at once enter inward at the custom house, and upon the completion of her loading, clear outwards for her port of destination.

AMERICAN FISHERMEN ARE NOT OUTCASTS.

The foregoing contention, set up not merely by the Canadian Privy Council, but by the governor general of the Dominion of Canada, sweeps into the meshes of Canadian legislation to enforce the first article of the treaty of 1818, every deep-sea fisherman in his relation to Canadian ports, no matter on what sea or ocean, Atlantic or Pacific, he may have pursued, or may intend to pursue, his industry. That contention places all American deep-sea fishermen entitled to wear the flag of the Union at the mast-head of their boats or vessels, be they little or big, under much the same ban in respect to the hospitality of Canadian ports as they would be if pirates, or slave-traders, or filibusters, or other enemies of the human race. "She was a *fishing vessel*," says, on June 5, 1886, the Canadian Minister of Marine and Fisheries, "and therefore debarred by the treaty of 1818 from entering Canada for the purposes of trade." "The two vessels which have been seized are, both of them, beyond all question *fishing vessels*, and not traders," says the governor general of the Dominion of Canada to Lord Granville on June 7, 1886, "and therefore liable, subject to the finding of the courts, to any penalties imposed by law for the enforcement of the convention of 1818." "We cannot concur in Mr. Bayard's contention," said the Canadian Privy Council on June 14, 1886, that "to prevent the purchase of bait or any other supply needed for deep sea fishing, would be to expand the convention to objects wholly beyond the purview, scope, and intent of the treaty, and give to it an effect never contemplated." "American deep-sea fishermen cannot," said the Canadian Minister of Marine and Fisheries, on October 14, 1886, "obtain supplies for the prosecution of his fishing, and to tranship his cargoes of fish at a Canadian port," because both "are contrary to the letter and spirit of the convention of 1818." "The convention of 1818," said a committee of the Canadian Privy Council, on October 30, 1886, "does not

confer upon United States *fishermen* 'privileges of trading or of shipping men' in Canadian ports." And, finally, a committee of the Canadian Privy Council declared, in effect, on November 24, 1886, that an American vessel, *manned, equipped, and prepared for taking fish*, has not the liberty of commercial intercourse in Canadian ports, such as are applicable to other regularly registered foreign merchant vessels.

Such an interpretation of the present legal effect of the first article of the treaty of 1818, is, in the opinion of your Committee, so preposterous, in view of concerted laws of comity and good neighbourhood enacted by the two countries, that, had it not been formally put forth by the Dominion of Canada, would not deserve serious consideration by intelligent persons. If all the stipulations of 1818 restraining American fishermen are now in full force (which may well be doubted), your Committee concedes that American fishermen have no more liberty to take fish or to dry or cure fish in what has been described as portion B, than a British fisherman has to take fish in the inner harbour of New York, and to dry or cure fish in the City Hall Park of that city. But the liberty of an American fisherman to take, dry, and cure fish in portion A, in common with British subjects, is as complete and absolute as is the right of citizens of New York to fish in the waters of the Hudson River. The treaty of 1818 furnishes no more excuse for the exclusion of a deep-sea fisherman from the port of Halifax, or any other open port of the Dominion of Canada, than for the exclusion by the secretary of the Treasury of a deep-sea fisherman from entering the port of New York according to the forms of law, and for the ordinary purposes of trade and commerce. The exclusion, if made, must be justified, if at all, for other reasons than any yet given by Canada.

382 Keeping in mind the words of the third article of the treaty of peace in 1783, which not only acknowledged the *right* of the united American colonies to fish in the open sea as freely as to navigate the open sea, but also acknowledged and stipulated for the *liberty* to "take fish of every kind" on coasts, bays, and creeks of *all* of His Britannic Majesty's dominions in America, it will be discerned that this contention of the Privy Council of Canada makes of the renunciation by the United States, in 1818, of the liberty theretofore enjoyed or claimed by American fishermen within three miles of certain carefully defined coasts, bays, creeks, or harbours, not merely a renunciation of specific local liberty, but a forsaking, a relinquishment a surrender, an abandonment by the United States of other rights held up to 1818.

CERTAIN CANADIAN COASTS ARE SUBSERVIENT TO AMERICAN FISHERMEN.

The treaty of 1783 diminished and impaired, and was intended to diminish and impair, British sovereignty over the remaining British colonies of North America. The United States had conquered full and complete dominion over the right of fishing in the jurisdictional waters of each of the thirteen United States, but the British colonies did not emerge from the negotiations of the treaty of peace with similar dominion over the fisheries on the shores and coasts of the thirteen recognised States. British fishermen cannot fish on the coasts of Massachusetts, but American fishermen can fish on certain shores and

coasts of the Dominion of Canada and of Newfoundland. Apart from fishing and the incidents of fishing, it is conceded that the British Government has exclusive control, as against the United States, of the customary and usual rights of navigation in the jurisdictional waters of the British colonies. What we claim for ourselves, under the rules of public law, and apart from treaties, we concede to others. Rights of *navigation* are ordinarily separate from rights of *fishing*. The Commonwealth of Massachusetts may control the right and liberty of *fishing* on her coast, as against any Power other than the Government of Washington, but the right of navigation of the jurisdictional waters of Massachusetts is always subject to the control of the United States. The *use* of waters in respect of navigation is easily distinguishable from the *fruit* of waters in respect to fishing or fish. The United States have, so far as the British North American colonies, and all the world, are concerned, the right of navigating and fishing on the high seas, and in addition the right of *fishing* in certain British territorial and jurisdictional waters. That right of fishing, either inshore or offshore, should carry with it the natural and necessary navigating incidents of the right.

It may be conceded that, apart from the right of American fishermen to take fish of all kinds within certain clearly defined British waters, American deep-sea fishermen have no greater rights, by treaty or public law, in British ports, than British fishermen have in American ports, so far as concerns revenue police, maritime tolls or taxes, pilotage, lighthouses, quarantine, and all matters of ceremonial. But the contention of the Privy Council of Canada is that if a vessel bearing the registry, or enrolment, or licence of the Treasury department (which alone makes her an American vessel) be licensed, equipped and under contract with her seamen as an American fisherman on the open sea, she thereby comes under the ban of the treaty of 1818, and is thereby abandoned by the nation whose flag is at her mast-head, and is, by the treaty, excluded from an entrance into a Canadian or Newfoundland port, excepting for one of the objects enumerated in that treaty. Canadian ports are closed to her as to an outcast. An American or a Canadian fishing vessel on the high seas, and lawfully wearing the flag of its country, should be, if permitted by its own Government to touch and trade, entitled to the same rights of navigation and the same treatment in a foreign port as any trading

CANADIAN INHUMANITY.

If the Privy Council and the Governor General of the Canadian Dominion excluded all American vessels from all rights of touching or trading in Canadian ports, excepting to obtain shelter, repairs, wood or water, the contention would be logical and more tolerable; but to every American vessel other than a fishing vessel, be the fisherman big or little—a schooner, a sloop, a ship, or a steamer of large tonnage—Canadian ports seem to be wide open. If, however, she be an American fishing vessel on the high seas, she cannot go into a Canadian bay even to bury those of her dead who, in life, may have been British subjects with a domicile in Canada and a residence on the land near the bay, and may have expressed a wish not to be committed to the sea, but to be lain at rest by their kindred on the spot which gave them birth.

The treaty of 1818 gave rights of fishing independent of general commercial rights, although it may be said that, as to shelter, repairs, wood and water, the treaty did give to fishermen certain commercial rights, or rather a few rights of humanity. The treaty did not restrain the granting or the exercising of commercial rights. The right, if it be a right, of an American to buy anything in Canada does not come of the inshore fishing treaty of 1818. Your committee are not aware of any Canadian or Newfoundland law which, having been approved by the British Crown, forbids a British subject to there sell ice, or bait, or anything else, to an American, or to trade with him. If there be such a law, then non-intercourse has to that extent been proclaimed against our countrymen.

CANADIAN VIOLATIONS OF TREATIES.

The contention of your committee is that the treaty of 1818 covers differences and disputes about the liberty of American fishermen to take, dry and cure fish on certain British North American coasts, bays, harbours and creeks. The Privy Council of Canada, at the bottom of page 32 (Ex. Doc. No. 19, Forty-ninth Congress, second session), concedes the correctness of this contention. They say:

“The *sole* purpose of the convention of 1818 was to establish and define the rights of citizens of the two countries in relation to the fisheries on the British North American coast.”

The treaty is limited to coast fishing, drying or curing. On certain defined portions of the coast “American fishermen” may fish, but elsewhere on the coast they may not fish, and yet those coast “American fishermen” may, nevertheless, and for certain purposes, enter the bays and harbours in which they cannot fish, under restrictions—to prevent them from doing what? “Taking, drying or curing fish therein?”

Your committee contend that the term “American fishermen” as used in the treaty of 1818, means the “American fishermen” of and under that treaty. The rule *noscitur a sociis*, as understood and applied by judges and lawyers in England and America, limits and defines the term. They have a treaty right to enter “such bays and harbours” and to remain there, subject, and subject only, to such restrictions “as may be necessary to prevent their taking, drying or curing fish therein.” The restrictions can only apply to the prevention of such *fishing* in those bays or harbours. Whatever concerns or is preparation for fishing elsewhere is not thereby to be prevented. It is true that, by the treaty of 1818, we have stipulated that our fishermen “shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein,” but the treaty says nothing of “preparing to fish” somewhere else. A fair presentation of the opinions of the Vice-Admiralty Court of Canada, in regard to the meaning of the Canadian phrase “preparing to fish”—which is a stranger to the treaty of 1818—can be seen in Dr. Wharton’s “International Law Digest,” vol. iii, § 304.

If it be said that our view of the treaty is strict, severe, and rigid as against Canadian statutes and officials, your committee answer that when Canada proposes and endeavours to use a treaty to arrest and fine American fishermen, seize and confiscate American vessels for the benefit of Canadian seizers, the Government of the United States

is entitled to stand on such an interpretation. But even if the treaty of 1818 covers (which it does not) every American fisherman entering a Canadian harbour, on whatever sea or ocean he may cast a line or draw a seine, the Canadian statutes do not preserve and enforce the treaty. They destroy it, so far as the privileges are concerned that are given to American fishermen by the treaty.

First of all in order of time and authority is the Imperial legislation at London in 1819 to enforce the treaty of the previous year. After forbidding everyone, excepting British subjects and American citizens (who could do so within defined limits), to fish, dry, or cure fish anywhere within three miles of British coasts in America, that law of 1819 punishes by forfeiture any offending vessel, and all the articles on board. Then comes this:

That if any person or persons, upon requisition made, by the governor of Newfoundland, or the person exercising the office of governor, or by any governor or person exercising the office of governor, in any other parts of His Majesty's dominions in America, as aforesaid, or by any officer or officers acting under such governor or person exercising the office of governor, in the execution of any orders or instructions from His Majesty in Council, shall refuse to depart from such bays or harbours; or if any person or persons shall refuse or neglect to conform to any regulations or directions which shall be made or given for the execution of any of the purposes of this Act, every such person so refusing or otherwise offending against this Act shall forfeit the sum of £200, to be recovered, &c.

It will be seen that not forfeiture, but a fine to be recovered by a suit, is inflicted for refusing or neglecting to depart on notice. The statutes of Canada are not, as the Canadian Privy Council asserted (p. 32), "expressed in almost the same language" as the foregoing Imperial statute.

The Prince Edward Island's enactment of 1844 gives the key-note of Canadian enactments. It declares:

Whereas by the convention (made between His late Majesty King George the Third and the United States of America, signed at London on the twentieth day of October, in the year of our Lord one thousand eight hundred and eighteen), and the statute (made and passed in the Parliament of Great Britain in the fifty-ninth year of the reign of his late Majesty King George the Third,) all foreign ships, vessels or boats, or any ship, vessel or boat, other than such as shall be navigated according to the laws of the United Kingdom of Great Britain and Ireland, found fishing, or to have been fishing, or preparing to fish, within certain distances of any coast, bays, creeks or harbours whatever, in any part of His Majesty's dominions in America not included within the limits specified in the first article of the said convention, are liable to seizure; and whereas the United States did, by the said convention, renounce for ever any liberty enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on or within the above mentioned limits: *Provided however*, that the American fishermen be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purposes whatever, but under such restrictions as might be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges thereby reserved to them; and whereas no rules or regulations have been made for such purpose, and the interests of the inhabitants of this island are materially impaired; and whereas the said Act does not designate the persons who are to make such seizure as aforesaid, and it frequently happens that persons found within the distances of the coasts aforesaid, infringing the articles of the convention aforesaid, and the enactments of the statute aforesaid, on being

384 taken possession of, profess to have come within said limits for the purpose of shelter and repairing damages therein, or to purchase wood and obtain water, by which the law is evaded, and the vessels and cargoes escape confiscation, although the cargoes may be evidently intended to be smuggled into this island, and the fishery carried on contrary to the said convention and statute.

The Canadian enactment of 1868 came next, the second and third sections of which say:

2. Any commissioned officer of Her Majesty's navy serving on board of any vessel of Her Majesty's navy cruising and being in the waters of Canada for purpose of affording protection to Her Majesty's subjects engaged in the fisheries, or any commissioned officer of Her Majesty's navy, fishery officer, or stipendiary magistrate on board of any vessel belonging to or in the service of the Government of Canada and employed in the service of protecting the fisheries, or any officer of the customs of Canada, sheriff, magistrate, or other person duly commissioned for that purpose, may go on board of any ship, vessel or boat within any harbour in Canada, or hovering (in British waters) within three marine miles of any of the coasts, bays, creeks, or harbours in Canada, and stay on board so long as she may remain within such place or distance.

3. If such ship, vessel, or boat be bound elsewhere, and shall continue within such harbour or so hovering for twenty-four hours after the master shall have been required to depart, any one of such officers or persons as are above mentioned may bring such ship, vessel, or boat into port and search her cargo, and may also examine the master upon oath touching the cargo and voyage; and if the master or person in command shall not truly answer the questions put to him in such examination, he shall forfeit \$400; and if such ship vessel or boat be foreign, or not navigated according to the laws of the United Kingdom or of Canada, and have been found fishing, or preparing to fish, or to have been fishing (in British waters) within three marine miles of any of the coasts, bays, creeks or harbours of Canada, not included within the above-mentioned limits, without a licence, or after the expiration of the period named in the last licence granted to such ship, vessel or boat under the first section of this Act, such ship, vessel or boat, and the tackle, rigging, apparel, furniture, stores, and cargo thereof shall be forfeited.

The treaty stipulates that the fishermen shall be under "necessary restrictions" to prevent the doing of the things forbidden by the treaty, but what may be "necessary" to prevent the prohibited fishing is a political and diplomatic question for the two signatory Governments to decide. The treaty permits American fishermen to enter and remain for—

1. "Shelter," which includes a refuge from fogs, winds, storms, and whatever may imperil fishing.

2. "Repairing damages," which includes every damage to fishing boat or fishing gear.

3. "Purchasing wood."

4. "Obtaining water."

Conceding that Canada can place an officer on every arriving fisherman as soon as found, the treaty does not even then authorise a twenty-four hour limit with the result of forfeiture. Nor does the treaty authorise forfeiture for "*preparing to fish*."

The Customs circular issued at Ottawa on 7th May, 1886, and called a "Warning," recited the first article of the treaty of 1818, together with the two sections of the law of 1868 just quoted, and adds:

Having reference to the above, you are requested to furnish any foreign vessels, boats, or fishermen found within three marine miles of the shore, within your district, with a printed copy of the warning enclosed herewith.

If any fishing vessel or boat of the United States is found fishing, or to have been fishing, or preparing to fish, or hovering within the three-mile limit, does not depart within twenty-four hours *after receiving such warning*, you will please place an officer on board of such vessel, and at once telegraph the facts to the Fisheries Department at Ottawa, and await instructions.

J. JOHNSON,
Commissioner of Customs.

To the Collector of Customs at —,

Thus, twenty-four hours after finding the American fisherman is made the limit.

Not satisfied with the severity of this legislation of 1868, the Canadian Dominion, in 1870, and while preliminary negotiations for the joint high commission and the treaty of Washington were in progress, amended it so as to enable seizures of our vessels to be made on sight, and without any warning or any notice to depart. The following is a text of the enactment of 1870:

(83 Victoria, chap. 15.)

An Act to amend the Act respecting Fishing by Foreign Vessels. Assented to 12 May, 1870.

Whereas it is expedient, for the more effectual protection of the inshore fisheries of Canada against intrusion by foreigners, to amend the Act entitled "An Act respecting fishing by foreign vessels," passed in the thirty-first year of Her Majesty's reign: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. The third section of the above-cited Act shall be, and is hereby repealed, and the following section is enacted in its stead:

385 "3. Any one of such officers or persons as are above-mentioned may bring any ship, vessel, or boat being within any harbour in Canada, or hovering (in British waters) within three marine miles of any of the coasts, bays, creeks, or harbours in Canada, into port and search her cargo, and may also examine the master upon oath touching the cargo and voyage; and if the master or person in command shall not truly answer the questions put to him in such examination he shall forfeit \$400; and if such ship, vessel, or boat be foreign or not navigated according to the laws of the United Kingdom or of Canada, and have been found fishing or preparing to fish, or to have been fishing (in British waters) within three marine miles of any of the coasts, bays, creeks, or harbours of Canada, not included within the above-mentioned limits, without a licence or after the expiration of the period named in the last licence granted to such ship, vessel, or boat, under the first section of this Act, such ship, vessel, or boat, and the tackle, rigging, apparel, furniture, stores and cargo thereof shall be forfeited."

2. This Act shall not be construed as one with the said Act "respecting fishing by foreign vessels."

But this is not all. Canadian officials endeavoured, during the last summer, in the fury of their malevolence, to forfeit American vessels for acts which, if committed, their own laws had not inflicted punishment. In the libel of information against the "Ella M. Doughty" is this article, among other allegations of fishing, preparing to fish, being found having fished, and fishing, drying, and curing in the bay and harbour of St. Anne's:

Between the 10th and 17th days of May, 1886, the said Warren A. Doughty, the master of the said ship or vessel "Ella M. Doughty," and the officers and crew of the said ship or vessel "Ella M. Doughty," did, in and with the said ship or vessel "Ella M. Doughty," enter into the bay and harbour of St. Anne's aforesaid within three marine miles of the shore of said bay and harbour of St. Anne's, and within three miles of the coasts, bays, creeks, and harbours of those portions of the dominions in America of his said late Majesty King George the third, being now the dominions in America of her Majesty Queen Victoria, not included in the limits specified and defined in the said first article of the said convention and set out and recited in the first paragraph hereof, *for the purpose of procuring bait*, that is to say, herrings, wherewith to fish, *and ice for the preservation on board said vessel of bait to be used in fishing*, and of fresh fish to be fished for, taken, and caught by and upon the said vessel and by the master, officers, and crew thereof, and *did procure such bait* wherewith to fish, and *such ice* for the purposes aforesaid, and did so enter for other purposes than for the purposes of shelter or repairing damages, or of purchasing wood, or of obtaining water, contrary to the provisions of the said convention and of the said several Acts, and the said vessel "Ella M. Doughty" and her cargo were thereupon seized within three marine miles of the coast or shores of the

said bay and harbour of St. Anne's by Donald McAuley and Lauchlin G. Campbell, officers of the customs of Canada, as being liable to forfeiture for the breach or violation of the said convention and of the said several Acts.

Your committee has been unable to find a Canadian statute which, at the date of the alleged offence, punished those acts, by forfeiture of the offending vessel. None is averred. The article quoted from the "Ella M. Doughty" libel does not set forth where the fishing was to be done, for which bait and ice were bought, whether on the ocean, or elsewhere, outside of Canadian jurisdiction. The laws of 1868 and 1870 denounce only fishing or preparing to fish "*in British waters*," which must be, of course, under the treaty, the prohibited and not permitted British waters.

Thus stood Canadian legislation at the beginning of the summer fishing season which has recently come to an end. There was no Canadian or other law, at the end of forty-eight years from the date of the treaty, inflicting forfeiture of the vessel and the cargo on board excepting on proof of the offence of fishing or having been found to have fished, or preparing to fish, on the prohibited coasts. But Canadian officials wished to forfeit the vessels and cargoes of American deep sea fishermen exercising the liberty "to touch and trade," and send fish by railway, or vessel, to our own markets. What could be done? Nothing less than a new law could avail them, and it was enacted in these words:

(49 Victoria, chap. 114.)

An Act further to amend the Act respecting Fishing by Foreign Vessels.

(Reserved by the Governor General on Wednesday, 2nd June, 1886, for the signification of the Queen's pleasure thereon. Royal assent given by Her Majesty in Council, on the 26th day of November, 1886. Proclamation thereof made on the 24th day of December, 1886.)

Whereas it is expedient for the more effectual protection of the inshore fisheries of Canada against intrusion by foreigners, to further amend the Act intituled "An Act respecting fishing by foreign vessels," passed in the thirty-first year of Her Majesty's reign, and chaptered 61:

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. The section substituted by the first section of the Act thirty-third Victoria, chapter 151, intituled "An Act to amend the Act respecting fishing by
336 foreign vessels," for the third section of the hereinbefore recited Act, is hereby repealed, and the following section substituted in lieu thereof:

3. Any one of the officers or persons hereinbefore mentioned may bring any ship, vessel, or boat, being within any harbour of Canada, or hovering in British waters within three marine miles of any of the coasts, bays, creeks, or harbours in Canada, into port and search her cargo, and may also examine the master upon oath touching the cargo and voyage; and if the master or person in command does not truly answer the questions put to him in such examination, he shall incur a penalty of \$400.00; and if such ship, vessel, or boat is foreign, or not navigated according to the laws of the United Kingdom or of Canada, and (A) has been found fishing, or preparing to fish, or to have been fishing in the British waters within three marine miles of any of the coasts, bays, creeks, or harbours of Canada, not included within the abovementioned limits, without a licence, or after the expiration of the term named in the last licence granted to such ship, vessel, or boat under the first section of this Act or (B) *has entered such waters for any purpose not permitted by treaty or convention, or by any law of the United Kingdom or of Canada for the time being in force, such ship, vessel, or boat, and the tackle, rigging, apparel, furniture, stores, and cargo thereof shall be forfeited.*

2. The Acts mentioned in the schedule hereto are hereby repealed.

3. This Act shall be construed as one with the said "*Act respecting fishing by foreign vessels*," and the amendments thereto.

SCHEDULE.

ACTS OF THE LEGISLATURE OF THE PROVINCE OF NOVA SCOTIA.

Year, Reign, and Chapter.	Title of Act.	Extent of Repeal.
Revised Statutes, 3rd series, c. 94.	Of the coast and deep-sea fisheries.....	The whole.
29 Vic. (1866), c. 35	An Act to amend Chapter 94 of the revised Statutes: "Of the coast and deep-sea fisheries."	The whole.

ACTS OF THE LEGISLATURE OF THE PROVINCE OF NEW BRUNSWICK.

16 Vic. (1853), c. 69	An Act relating to the coast fisheries and for the prevention of illicit trade.	The whole.
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By comparing the foregoing with the law of 1870 the object will in the italicised portion of the former, be clearly discovered, which is to deter deep-sea American fishermen from entering Canadian ports which are as open to all trading vessels as American ports are to Canadian vessels of every sort.

Forfeiture is to be inflicted for an entry for any purpose, excepting shelter, repairs, wood, or water. Even to get coal for a fishing vessel propelled by steam is condemned. What the purpose may be for which seizure is to be made may or may not be disclosed by the seizer. The statute does not require it. The libel, or complaint, filed in court may not disclose it. The averment may be merely a general one that the vessel entered for a purpose forbidden by treaty or statute. The owner must file a claim and answer, or his property will be condemned by default. He must, among strangers, give security for costs, or his claim will be dismissed. Worse than that, the statute of 1868 declares that, if the owner questions the legality of the seizure, the burden of proof shall be on him. How can he meet a general averment and prove a negative of what is not definitely averred, and of every conceivable purpose of entry? None but the captain may be able to testify to the motive, and what will happen if he, after the seizure, shall die or be absent? The owner will be helpless to contend with the greed of informers or seizors, for the law of 1871 distributes the possible plunder thus:

6. All goods, vessels, and boats, and the tackle, rigging, apparel, furniture, stores, and cargo condemned as forfeited under this Act, shall be sold by public auction, by direction of the officer having the custody thereof, under the provisions of the next preceding section of this Act, and under regulations to be from time to time made by the governor in council; and the proceeds of every sale shall be subject to the control of the Minister of Marine and Fisheries, who shall first pay therefrom all necessary costs and expenses of custody and sale, and the governor in council may from time to time apportion three-fourths or less of the net remainder among the officers and crew of any Queen's ship or Canadian Government vessel, from on board of which the seizure was made, as he may think right, reserving for the Government and paying over to the receiver-general at least one-fourth of such net remainder to form part of the consolidated revenue of Canada.

CONCLUSIONS.

The treaties of 1783 and 1818 were made with the British Crown. With that Crown alone can restrictions, regulations, penalties, and

measures be concerted by the United States to enforce and guard their stipulations. With the Dominion of Canada the Government at Washington is not called, or required, or to be expected, either to deliberate or debate, any more than is the British Crown, with a separate member of our Union. It is not to be supposed
 387 that a local colonial court will, on the trial of a suit for forfeiture begun under an imperial or a colonial statute, hear or decide an issue with the treaty of 1818, or rules of international law, or those statutes. Nor will those courts award damages for seizures in violation of the treaty, if made on "probable cause" by the seizers to believe that the statutes had been violated. Nor can the United States appeal to colonial courts for redress against the possible conduct of those courts under influences of local passion or prejudice.

It plainly appears to your committee from the foregoing considerations that, by the treaty of peace in 1783, American citizens became partners with British subjects in all the coast fisheries in North America remaining to Great Britain; that the treaty of Ghent, which closed the war of 1812, not having referred to the stipulations of the treaty of peace in any way affecting the fisheries, Great Britain thereupon urged and obtained in 1818 a diminution of American liberty to take fish on certain well-defined portions of the British coast in North America; that in 1819 there was enacted by Parliament, sitting in London, a law in execution of that treaty which punished by forfeiture of vessel and cargo a preparation to fish, and only by a fine a refusal or neglect to depart on a warning or notice so to do; that in 1844 the Island of Prince Edward enacted a law in punishment of what it assumed to be a violation of the treaty of 1818, which went far beyond the imperial statute of 1819; that in 1868 the Canadian Senate and House of Commons prescribed additional proceedings and penalties not warranted by the treaty, which were in 1870 made more severe and unwarranted and that in 1886, nearly half a century after signing the treaty, an offence, entirely new in legislation, was denounced in most general terms and punished by confiscation of everything seized.

THE BRITISH CROWN PROCLAIMS NON-INTERCOURSE.

A very serious feature of this last-named legislation is that it has been approved by the British Crown, and it proclaims non-intercourse in Canada with American fishing vessels for general purposes of trade. To that alarming feature your committee has given careful consideration, and is unanimously of opinion that if, and so long as, non-intercourse with American fishing vessels shall be thus maintained in the ports or bays of the Dominion of Canada or Newfoundland, a non-intercourse should be immediately begun and maintained in our own ports against Canadian vessels. Those vessels, whether trading or fishing, have, within the meaning of the seventeenth section of the Law of Congress of 19th June, 1886, "been placed on the same footing" in our ports as our own vessels clearing or entering "foreign." Canadian vessels are British vessels. The British Crown has denied to American fishing vessels commercial privileges accorded to other national vessels in Canadian ports. The motive and purpose of such denial have been openly and plainly avowed by Canada to be, first, the punishment of such vessels because the United

States levies a duty on Canadian fish not "fresh for immediate consumption," such as the Government levies on all such fish not the product of American fisheries and imported from any foreign place whatever; and, secondly, to coerce the United States to exempt such Canadian fish from all customs duties, and to enter into other new reciprocal customs relations with the Canadian Dominion and Newfoundland. It is a policy of threat and coercion, which, in the opinion of your committee, should be instantly and summarily dealt with. The circumstances will warrant and require, in the opinion of your committee, not only non-intercourse with Canadian vessels bringing Canadian or Newfoundland fish to our ports, but an exclusion of such fish from entry at our ports, whether brought by railway cars or by any other vehicle or means. It is difficult to believe that Canada having within the last twenty years so severely burdened herself with taxation by the construction of railways and bridges to bring about easy communication with Detroit, Chicago, Saint Paul, and the whole west of our country, as well as with New York and Boston, will now deliberately and offensively enter upon and pursue a policy toward our fishermen which, if persisted in, can but end either in a suspension of commercial intercourse, by land and sea, between her and ourselves, or in consequences even more grave.

A LAW TO MAKE A PERPETUAL RECORD OF THE FACTS.

And, furthermore, in regard to seizures of American vessels made during the summer which has just passed, inasmuch as a true record of the facts under which the seizures were made may be lost, by death of the victims, or by wanderings of a class so migratory as seamen, or by other casualties, and inasmuch as Congress may see fit to compensate American fishermen for the injuries wantonly inflicted on them by the rude hand of tyrannical Canadian officials, there having been no adequate American force at hand for their protection, your committee advise the enactment of the following:

Bill for the Appointment of a Commission to investigate concerning Losses and Injuries, inflicted since December thirty-first, eighteen hundred and eighty-five, on United States Citizens engaged in the North American Fisheries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and is hereby authorised to appoint a commissioner to proceed to such places in the United States or elsewhere as may be designated by the Secretary of State, to take testimony, under oath or affirmation, in relation to the losses and injuries inflicted since the thirty-first of December, eighteen hundred and eighty-five, by British authorities, imperial or colonial, upon citizens of the United States engaged in the fisheries on the north-east coasts of British North America. Said
388 commissioner shall everywhere have, in respect to the administration of oaths or affirmations and the taking of testimony, the same powers as a commissioner of a circuit court, and shall be paid the same fees as are prescribed for similar services of a commissioner of a circuit court, together with travelling expenses.

No. 230.—1887, January 19: *Report of the Committee on Foreign Relations of the United States Senate.*

[49th Congress, 2nd Session, In the Senate of the United States. Report No. 1683.]

JANUARY 19, 1887.—Ordered to be printed.

Mr. Edmunds, from the Committee on Foreign Relations, submitted the following report (to accompany Bill S. 3173).

The Committee on Foreign Relations was at the last session of the Senate instructed to make inquiry into the matter of the rights and interests of the American fisheries and fishermen by Resolution in the following words:—

Resolved,—That the Committee on Foreign Relations be, and it hereby is, instructed to inquire into the rights of American fishing-vessels and merchant vessels within the North American possessions of the Queen of Great Britain, and whether any rights of such vessels have been violated, and if so, to what extent; that said committee report upon the subject, and report whether any and what steps are necessary to be taken by Congress to insure the protection and vindication of the rights of citizens of the United States in the premises; that said Committee have power to send for persons and papers, to employ a stenographer, and to sit during the recess of the Senate, either as a full committee or by any sub-committee thereof, and that any such sub-committee shall for the purposes of such investigation be a committee of the Senate to all intents and purposes.

Resolved,—That the necessary expenses of said committee in said investigation be paid out of the appropriation for the miscellaneous items of the contingent fund of the Senate, upon vouchers to be approved by the chairman thereof.

Pursuant to this authority the committee has proceeded to make the inquiries directed by the Senate, so far, as it was practicable to do during the vacation, and has taken a considerable amount of testimony which the Committee believes to be of much value and importance to a proper understanding of the difficulties that have arisen between citizens of the United States and the authority of Her Majesty's dominions in North America, and which also, as the committee thinks, bears upon other questions of public policy that can be readily understood by those reading this testimony.

The questions touching the right of our citizens engaged either in the operations of fishing or commerce in the North American waters contiguous to Her Majesty's dominions depend, of course, not only upon public law, but upon the conventional arrangements that have hitherto been entered into between the United States and Her Britannic Majesty's Government.

Without going into a general review of the discussions that have in former years taken place concerning these matters, it is, as the committee thinks, sufficient to now treat these questions as they are affected by the principles of public law, and by the presently existing treaty between the United States and Great Britain bearing upon the subject.

This treaty was concluded in the year 1818. To understand its just and true application it is perhaps proper to refer, by way of inducement, to the state of things theretofore existing.

The treaty of peace concluded at the end of the revolutionary war, which acknowledged the independence of the United States, provided in its IIIrd article that the people of the United States "shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulf of Saint Lawrence, and at all other places in the sea where the inhabitants of both countries used at any time heretofore to fish. And also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use, but not to dry or cure the same on that island, and also on the coast, bays, and creeks of all other of His Britannic Majesty's dominions in America; and that the

American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same, or either of them, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground."

This article, it will be observed, recognised an existing right and practice in respect of American fishermen exercising their calling not only at sea on the banks of Newfoundland, but in all places in the sea, within what would be strictly British waters. And it will be observed also that this treaty said nothing on the subject of commercial intercourse between the people of the United States and those of the British provinces.

The next treaty was that of 1794, by the IIIrd article of which it was provided as follows:—

It is agreed that it shall at all times be free to His Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of said boundary line (being the land boundary line between the United States and the British provinces of North America), freely to pass and repass, by land or inland navigation, into the respective countries of the two parties, on the continent of America (the country within the limits of the Hudson Bay Company only excepted), and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other. But it is understood that this article does not extend to the admission of vessels of the United States into the sea-ports, harbors, bays, or creeks of His Majesty's said territories; nor into such parts of the rivers in His Majesty's said territories as are between the mouth thereof and the highest port of entry from the sea, except in small vessels trading *bond fide* between Montreal and Quebec, under such regulations as shall be established to prevent the possibility of any frauds in this respect; nor to the admission of British vessels from the sea into the rivers of the United States, beyond the highest ports of entry for foreign vessels from the sea.

A later article in the treaty of 1794 (article XII) provided that for a limited period, named in the treaty, citizens of the United States might engage in carrying trade to any of His Majesty's islands and ports in the West Indies under certain conditions named. A later article (article XIII) provided that vessels belonging to the citizens of the United States should be admitted into all the sea-ports and harbors of the British territories in the East Indies, &c. A later article (article XIV) provided that there should be between the dominions of His Majesty in Europe and the territories of the United States a reciprocal and perfect liberty of commerce and navigation, &c. Another article (article XIII) provided for admitting American vessels in distress into all of His Majesty's ports on manifesting its necessity to the satisfaction of the Government of the place.

So far as the present question is concerned the foregoing represents the state of the treaty arrangements between the United States and Great Britain down to the close of the war of 1812. By the treaty of 1815, following the treaty of peace of 1814, it was provided in article I that there should be between the territories of the United States and all the territories of His Britannic Majesty in Europe, reciprocal liberty of commerce, &c.

In a later article of the same treaty (article II) it was provided that the intercourse between the United States and His Majesty's

possessions in the West Indies and on the continent of North America should not be affected by any of the provisions of that article, but that each party should remain in complete possession of its rights with respect of such intercourse.

No other article of the treaty touched the question of intercourse between the United States and His Majesty's dominions in North America.

The next treaty bearing upon the present question was that of 1818, which is now understood to regulate so far as it goes, fishing interests of whatever kind of the citizens of the United States in the territorial waters of the British dominions in North America.

All of this treaty that bears directly upon the present subject is contained in article I which is in the following words:—

Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof to take, dry and cure fish on certain coasts, bays, harbours and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties that the inhabitants of the said United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands; on the western and northern coast of Newfoundland from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours and creeks, from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company: And that the American fishermen shall also have liberty for ever to dry and cure fish in any of the unsettled bays, harbours and creeks of the southern part of the coast of Newfoundland above described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled without previous agreement for such purpose with the inhabitants, proprietors or possessors of the ground. And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on or within 3 marine miles of any of the coasts, bays, creeks or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits: Provided, however, that the American fishermen shall be permitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

This article sets out with stating the precise subject with which it has to deal, viz., that differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof to take, dry and cure fish on certain coasts, bays, harbours and creeks of His Britannic Majesty's dominions in America.

Thus it will be seen that the matter to be dealt with was a claim in favour of the inhabitants of the United States to do certain things within the territorial dominion of His Majesty, and not a matter touching the right of the inhabitants of the United States to cruise, fish or do any other thing in waters that by the public law of nations did not belong to the territorial jurisdiction of His Majesty. The matter to be dealt with being, then, simply that affecting American fishermen coming within the territorial dominion of His Majesty, it was provided that Americans might fish on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands; and on the western and northern coast of Newfoundland

from the said Cape Ray to the Quirpon Islands and on the shores of the Magdalen Islands, and also on the coasts, bays, harbours and creeks from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company; and that the American fishermen should have the liberty to dry and cure fish in any of the unsettled bays, harbours and creeks of the southern part of the coast of Newfoundland above described, and of the coast of Labrador, subject to non-interference with settlers, &c.

And by the same article the United States renounced any liberty "to take, dry or cure fish on or within 3 marine miles of any of the coasts, bays, creeks or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits; provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, and of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any manner whatever abusing the privileges hereby reserved to them."

The committee is of opinion, in view of this history and of the plain language above quoted, that this article was intended to deal, and did deal, only with the subject of the admission of American fishermen within the territorial jurisdiction of His Britannic Majesty, as defined by the public law of nations.

The first question for consideration, then, is whether the pretension that has been sometimes asserted by the Government of Great Britain, that American fishing vessels or others have no right, except at the pleasure of the British Government, to be in or to prosecute lawful pursuits in the great arms of the sea extending between parts of the mainland belonging to the British, and which are more than 6 marine miles broad, is well founded.

The committee cannot doubt that any such pretension is ill founded. It is plain that such a pretension is an invasion of the principles of public law now almost universally recognised by all civilised Powers, and one which it is believed, the British Government would be indisposed to accede to when applied as against its subjects. It would seem to be clear that by the universally recognised public law among civilised nations, territorial jurisdiction of every nation along the sea is limited to 3 marine miles from its coasts, as they may happen to be, whether embracing long lines of open coast or embracing great curvatures of sea-shore, which may, and often do, almost surround vast bodies of the waters of the ocean. The phase of the treaty, therefore, speaking of bays, creeks and harbours of His Britannic Majesty's dominions, must be understood as being such bays, creeks and harbours as by the public law of nations were and are within the territorial jurisdiction of the British Government. The committee is therefore clear in its opinion that any pretension that exclusive British jurisdiction exists, either by force of public law or of this treaty, within headlands embracing such great bodies of water, and more than 6 marine miles broad, must be quite untenable.

Another question may arise in respect of whether American fishing-vessels or other American vessels may lawfully traverse the Gut of Canso (a narrow strait connecting the waters of the Atlantic on the south-east of Nova Scotia and Cape Breton with the waters of the Gulf of St. Lawrence on the north-west.) This strait is a few miles long, and much less in some of its parts than 6 miles wide. It is naturally navigable for sea-going vessels, and always has been navigated and used for the passage of vessels from the southward into the Gulf of St. Lawrence, and back again southward by vessels finding it convenient so to use it.

The committee is of opinion that, in the absence of special treaty arrangements, such straits as the Gut of Canso are free for public and peaceable navigation in the same manner that the seas which they connect are. A comparatively recent and notable instance of the application of this principle is found in the case of the Simonoseki Strait, in Japan, connecting the Korean Channel, to the north west of Japan, with the Pacific Ocean on the south-east. This strait at one of its points is very much less than 3 miles in width; and the passage of mercantile vessels of the United States, Great Britain, France, and the Netherlands having been interrupted there by Japanese batteries, &c., Japan was compelled by these four Governments to make reparation, after both British and American vessels of war had forcibly destroyed the Japanese batteries.

Of course, the right of peaceful passage through the Gut of Canso by unarmed vessels is entirely distinct from any right to fish or do any other thing there than merely to pass through. And if, in such an instance, a purely fishing vessel of the United States, having no other character whatever, should wish to pass through that strait from one part of the sea to another, it is presumed that it would

hardly be insisted by the British Government that such a passage for such a purpose was prohibited by the 1st article of the treaty of 1818, which, as we have before stated, was applicable only to the matter of taking fish, &c., on the specified coasts, and to the prohibition of American fishermen, as such, to enter the British bays or harbours for any other purposes than those of shelter, repairing damages, purchasing wood, and obtaining water. The general right of passage for all vessels entitled to sail the seas was not in any way mentioned, and it must be presumed it was not intended by the language used in the treaty to limit or modify such rights.

On the termination of the reciprocity treaty of 1854 the fishermen of the United States were remitted to the 1st article of the treaty of 1818, already cited, for the definition and regulation of their rights in the British waters therein mentioned. Between the period of the termination of the treaty of 1854 (namely, 1866) and the treaty of 1871 some considerable difficulty and discussion took place concerning the question whether the 3-mile line should be ascertained by drawing the same from headland to headland (as across the Bay of Fundy and the Bay of Chaleur), or whether it should be drawn 3 miles from the actual shores of such bays and headlands. The general result of those discussions would seem to have been an acquiescence by the British Government in the right of American fishermen to fish within those bays and exterior to a line 3 miles from the shores. By the treaty of 1871 it was agreed that the fishermen

of the United States should have the right to fish inshore under certain limitations therein stated. This last treaty was terminated through the action of the United States on the 1st day of July, 1885, and the 1st article of the treaty of 1818 again came into operation.

Concluding, then, from what has been before stated, that there is no serious difficulty in respect of the question where American fishermen can carry on their operations, it would seem to be easy to know precisely what our fishermen may and may not do in the territorial waters adjacent to the British dominions.

What they may do may be stated as follows:—

1. They have the liberty to take fish “on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands.”

2. They have the right to take fish “on the western and northern coast of Newfoundland from the said Cape Ray to the Quirpon Islands.”

3. Also “on the shores of the Magdalen Islands.”

4. Also “on the coasts, bays, harbours, and creeks from Mount Joly on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast,” subject to any exclusive rights of the Hudson Bay Company.

5. The right “to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland,” before described, and of the coast of Labrador, without interfering with the rights of settlers, &c.

6. The right of American fishermen in their character as such to enter the bays and harbours of Great Britain in America for the purpose (a) of shelter, (b) of repairing damages, (c) of purchasing wood, (d) of obtaining water, and for no other purpose whatever.

But they are to be under such restrictions in respect of their entry into bays and harbours where they are not entitled to fish “as may be necessary to prevent their taking and drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.”

The things that by this article American fishermen must not do are:—

1. Fish within 3 miles of any of the shores of the British dominions, excepting those specially above named.

2. Enter within this 3-mile limit except for the purposes last stated.

The American fishermen, in their character as such purely, must not enter the prohibited waters other than for the purposes of shelter, repairing damages, purchasing wood, and obtaining water; and in doing this they are subject to such reasonable restrictions as shall be necessary to prevent their fishing or curing fish in prohibited waters or on prohibited shores, and thereby abusing the privilege of entering those waters for the necessary purposes stated.

What, then, are such necessary restrictions?

Following the treaty of 1818, Great Britain passed the Act of the 14th June, 1819 (59 Geo. III, cap. 38), on the subject of American fishing and other vessels within the waters of the British dominions in North America, which provided—

1. That the British King might make such orders in council, either directly or through the governor of Newfoundland or others, as should be deemed proper and necessary for carrying into effect the purposes of the fishery article of that treaty.

2. A prohibition and punishment of fishing, &c., within the 3-mile limit, other than the coasts in respect of which the treaty provided that Americans might fish.

3. Forfeiture of vessels, &c., found fishing, &c., within the prohibited limits. This forfeiture was to be enforced in the ordinary course, as in the case of forfeitures under the Revenue laws.

4. That American fishermen might enter any of the bays and harbours of the British dominions in America for the purposes named in the treaty, subject to such restrictions for preventing abuse of that privilege as His Majesty, or the governor, or person exercising the office of governor in any part of the British dominions in America, might make.

5. That if any person should refuse to depart from such bays, &c., on the requirement of the governor, &c., or neglect to conform to any of the regulations so made, he should be punished by a fine of £200.

The next Legislative Act touching American fishermen appears to be the Act of Prince Edward's Island of the 3rd September, 392 1844, which provided that the officers of Her Majesty's Customs, &c., or any person specially holding a commission for that purpose, should have authority to go on board any ship, vessel, or boat, within any port, bay, creek, or harbour in that island, or "hovering" within 3 marine miles of any of the coasts, bays, &c., thereof; and in either case freely to stay on board such ship, vessel, or boat as long as she shall remain within such port or distance; and if any such ship, vessel, or boat be bound elsewhere, and shall continue so hovering for the space of twenty-four hours after the master shall have been required to depart, it shall be lawful for any of the above enumerated officers, &c., to bring such ship, &c., into port, and to search and examine her cargo, and examine the master upon oath touching the cargo and voyage; and if there be any goods on board prohibited to be imported into this island, such ship, &c., and the cargo laden on board thereof, shall be forfeited; and if said ship, &c., shall be foreign, and not navigated according to the laws of Great Britain and Ireland, and shall have been found fishing, or preparing to fish, or to have been fishing, within such distance of such coasts, bays, creeks, or harbours of this island, such ship, &c., and its cargo shall be forfeited; and if the master or any person in command thereof shall not truly answer the question which shall be demanded of him in such examination, he shall forfeit the sum of £100.

The Act then provides for the methods of investigation, condemnation, &c.

The Revised Statutes of Nova Scotia of 1851, chapter 94 (which may have re-enacted some earlier Act), provided:—

1. That officers of the colonial revenue, sheriffs, magistrates, or any other person duly commissioned for that purpose, "may go on board any vessel or boat within any harbour in the province, or hovering within 3 marine miles of any of the coasts or harbours thereof, and stay on board so long as she may remain within such place or distance."

2. That "if such vessel or boat be bound elsewhere, and shall continue within such harbour or so hovering for twenty-four hours after the master shall have been required to depart, any one of the officers

above-mentioned may bring such vessel or boat into port and search her cargo, and also examine the master upon oath touching the cargo and voyage; and if the master or person in command shall not truly answer the questions demanded of him in the examination he shall forfeit £100; and if there be any prohibited goods on board, then such vessel or boat, with the cargo thereof, shall be forfeited."

3. That "if the vessel or boat shall be foreign, and not navigated according to the laws of Great Britain and Ireland, and shall have been found fishing, or preparing to fish, or to have been fishing, within 3 marine miles of such coasts or harbours, such vessel or boat, or cargo shall be forfeited."

It then provides for the method of procedure, &c. This provision was re-enacted in the Revised Statutes of Nova Scotia by the Provincial Act of the 7th May, 1858. This re-enactment contained in its 22nd section or title 25, chapter 94, a provision suspending those parts of it relating to American fishing-vessels during the continuance of the treaty of reciprocity of 1854.

The committee has not been able to discover any orders in council made by the British King, as authorized by the Act (59 Geo. III, cap. 58); and, so far as we have been able to examine, the regulation of the entrance of American fishermen within the limits wherein they were not entitled to fish has been made by colonial statutes such as have been above recited. That of Prince Edward's Island of 1843 (6 Vic., cap. 14) the committee thinks fairly illustrates the nature of legislative regulations on the subject down to the reciprocity treaty of 1854, and so, in effect, until the expiration of that treaty in 1866. This Act provided:—

1. Proper officers were authorized to go and remain on board an American fishing vessel during her continuance within the waters where she was not entitled to fish.

2. If the vessel was bound elsewhere, and should continue hovering within the 3 mile limit for twenty-four hours after she had been required to depart, then the officer might take her into port, search her cargo, examine the master, &c.

3. If, on such examination, any goods should be found prohibited to be imported into the island, there should be a forfeiture.

4. If the vessel should have been found fishing, or preparing to fish, or to have been fishing, in prohibited waters, a forfeiture should follow.

It will be seen that this provision carefully excludes the right to seize and proceed against an American fishing vessel that had come within British waters, where fishing was not allowed, for the purposes named in the treaty, and only authorised British officers to require the vessel to depart if, instead of coming into a bay or roadstead and coming to anchor, she was "hovering" on the coast and within the prohibited limits, and provided for her forfeiture when so "hovering" only upon its being discovered, on an examination, that she had contraband goods on board, or had been violating the provisions of the treaty by abusing the privilege of her entrance and shelter by fishing, &c. And in all these cases the ordinary modes of judicial investigation and fair play were provided for, except—

(a.) That the burden of proof was thrown on the claimant of the vessel in case of dispute as to whether the seizure had been lawful;

(b.) That no suit should be brought for an illegal seizure until one month after notice in writing had been served on the seizing officer of an intention to sue, and the grounds of action;

393 (c.) And, further, that a statute of limitations, in respect of all such illegal seizures, of three months only, was provided.

The committee does not see any just ground of criticism of those parts of this Act that relate to the conduct of American fishing vessels coming within waters where fishing was prohibited; but when it comes to the matter of just and reasonable judicial determination of any question arising, the committee does think that the methods and limitations of procedure were harsh and unjust, and beyond the right of the British Government to provide, under its authority by the treaty to make only such restrictions as should be necessary to prevent the abuse by the American fishermen of their right to enter non-fishing waters.

But the foregoing species of legislation has been considerably improved upon, in an unjust direction, by the Dominion Act of the 22nd May, 1868 (31 Vic., cap. 61), which authorised the officials to require any vessel which was not hovering on the coast, but which had come within a harbour, to depart from such harbour on twenty-four hours' notice, and, on failure of such departure, to bring her into port for that mere cause, and without any suspicion or ground of suspicion that she had violated, or intended to violate, either the treaty or the laws of Canada, and without any limitation as to the length of time she might be detained in port, or any security for just and fair treatment of the American fishing vessel, which might have sought shelter in such harbour, or come there for any of the lawful causes named in the treaty.

It also provided for punishing the master if he failed to answer any question put to him touching the cargo or voyage.

It also provided that the consent of the seizing person should be necessary in order to enable the judge of the Admiralty Court to release the vessel on proper security.

It also, as in the case of the former Act, put the burden of proving innocence on the claimant.

It also provided that no suit should be brought for any illegal conduct of those officers until after a month's notice in writing, and that the notice should contain the cause of action.

It also provided that "no evidence of any cause of action shall be produced except such as shall be contained in such notice."

It also provided that every such action should be brought within three months after the cause of action had arisen.

It also provided that if, in any such suit, judgment should be given against the seizing person, and there should be a certificate of probable cause, then the plaintiff should only recover $3\frac{1}{2}$ cents damages and no costs, and that no fine beyond 20 cents should be imposed upon the respondent.

On the 12th May, 1870, the Dominion Act of 33 Vic., cap. 15, was passed, repealing the 3rd section of the last-mentioned Act on the subject of bringing vessels into port, &c., and provided, in lieu thereof, that any of the officers or persons before-mentioned might bring any vessel, being within any harbour in Canada, or hovering in British waters within 3 miles of the coast, into port, search her cargo, examine her master on oath, &c., without any previous notice to de-

part, which had been required by the former Act. So that an American vessel fishing at sea, being driven by stress of weather, want of wood or water, or need of repairing damages, which should run into a Canadian harbour, under the right reserved to it by the treaty of 1818, the moment her anchor was dropped or she was within the shelter of a headland, was, at the discretion of the Canadian official, to be immediately seized and carried into port which might be, and often would be, many miles from the place where she would have her safe shelter or could obtain her wood and water or repair her damages.

The committee thinks it is not too much to say that such a provision is, in view of the treaty, and of the common principles of comity among nations, grossly in violation of the rights secured by the treaty and of that friendly conduct of good neighborhood that should exist between civilised nations holding relations such as ought to exist between the United States and Her Majesty's dominions.

This last provision was substantially re enacted, with the Royal approval of the Queen, given on the 26th November, 1886, with the addition that if any such vessel had entered such waters for any purpose not permitted by treaty or convention, or by any law of the United Kingdom or Canada for the time being in force, she should be forfeited, &c.

From all this it would seem that it is the deliberate purpose of the British Government to leave it to the individual discretion of each one of the numerous subordinate magistrates, fishery officers, and customs officers of the Dominion of Canada to seize and bring into port any American vessels, whether fishing or other, that he finds within any harbour in Canada or hovering within Canadian waters. The statute does not even except those Canadian waters in which, along a large part of the southern coast and the whole of the western coast of Newfoundland, they are entitled to fish, to say nothing of the vast extent of the continental coast of Canada.

The committee repeats its expression of the firm opinion that this legislation is in violation of the treaty of 1818, as it respects American fishing-vessels, and in violation of the principles of comity and good neighborhood that ought to exist in respect of the commercial intercourse, or the coming of the vessels of either, having any commercial character, within the waters of the other. Had it been intended to harass and embarrass American fishing and other vessels, and to make it impracticable for them to enjoy their treaty and other common rights, such legislation would have been perfectly adapted to that end.

The instances in which this sort of legislation has been applied during the last year, to the great embarrassment and injury of American rights and interests—although in some of them it may doubtless appear that there has been some merely formal or technical violation of some Canadian Customs statute or regulation—are the following:—

394 *Vessels denied the Right or Privilege of purchasing Coal or Ice or of transshipping Fish at Ports of the Dominion, or refused other Rights or Privileges therein.*

“Novelty” (steamship) denied the right to take in coal, or purchase ice, or tranship fish in bond to the United States, at Pictou,

N. S., July, 1886. (H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, pp. 24-25, 49-50-51. This rep., 3, 15, 105, 106.)

"Golden Hind," of Gloucester, Mass., was refused the right to take water in Port Daniel, Bay of Chaleur, July 23, 1886. (H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, pp. 43, 47, 192-193. This rep., 162.)

"Mollie Adams," of Gloucester, Mass., Solomon Jacobs, master; his water supply having become exhausted by accident, Captain Jacobs put into Port Mulgrave, N. S., on the 31st August 1886, to replenish the same, but was refused the privilege of buying barrels, and was notified that if he did purchase barrels his vessel would be seized. A serious loss was occasioned through this action. (H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, pp. 45-46, 61-63. This rep., 88, 146.)

"A. R. Crittenden," of Gloucester, Mass., Joseph E. Graham, master. Stopped at Steep Creek, Strait of Canso, on July 21, 1886, homeward bound from the open-sea fishing grounds to obtain a supply of water, which was refused, the customs officer notifying Captain Graham that if he took in water his vessel would be seized. (H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, pp. 47, 48, 152. This rep., 153, 196.)

"Pearl Nelson," of Provincetown, Mass., Murdock Kemp, master. Was seized in the harbour of Arichat, N. S., September 8, 1886, and compelled to pay commercial fees, but was denied privileges which such fees are paid to secure. (H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, pp. 54-61, 193-197. This rep., 54, 66.)

"Laura Sayward," of Gloucester, Mass., Medeo Rose, master. Was on the 6th October, 1886, while in the port of Shelburne, N. S., refused permission to buy provisions, &c., sufficient to last the crew on the homeward trip of the vessel; the vessel's papers were retained by the collector for an undue length of time, &c. (H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, pp. 58-59.)

"Jeannie Seaverns," of Gloucester, Mass., Joseph Tupper, master. While in the port of Liverpool, N. S., Captain Quigley, of the Dominion cruiser "Terror," prevented Captain Tupper from landing to visit relatives in Liverpool, and forbade Captain Tupper's relatives from going on board the "Jeannie Seaverns," placing a guard aboard of her while she was in that port. (H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, 58-59, and 60.)

"Jennie and Julia," of Eastport, Me., W. H. Farris, master. While in Digby harbour, N. S., April (?) 18, 1886, was denied the privilege of buying herring. (H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, pp. 169-170.)

"James A. Garfield," threatened with seizure on opportunity; charged with having purchased bait or ice in Dominion port or ports. (H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, p. 171.)

"Abbie A. Snow," of Gloucester, Mass., Jeremiah Hopkins, master. Subjected to constant surveillance in harbour at Shelburne, N. S., by Captain Quigley, of Dominion cruiser "Terror," who finally boarded her with an armed guard, took Captain Hopkins ashore under armed guard, and threatened him with trouble if he revisited Shelburne. (This rep., pp. 135-36, 138.)

"Highland Light," of Provincetown, Mass. Seized off the north-east point of Prince Edward Island for catching fish within 3-mile limit. (This rep., pp. 34, 153.)

"Eliza A. Thoms," of Portland, Me., having gone ashore at Malpeque, laden with a fare of fish, the owners were not permitted to ship home either the fish, boats, or seines by vessels, but were, after delay, compelled to ship them by rail. (This rep., pp. 259-260.)

Vessels seized by Canadian Authorities on the Charge of Violating the Fishery Regulations of the Dominion.

"David J. Adams," owned at Newburyport, Mass.; Aldon Kinney, master. Seized at Digby, N. S., May 7, 1886. (Senate Ex. Doc. No. 217, Forty-ninth Congress, first session; H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, pp. 6, 13, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 140, 141, 142, 148, 149, 150, 164, 168, 176, 177, 178, *et seq.* This rep., p. 151.)

"Ella M. Doughty," owned at Kennebunk, Me.; Warren A. Doughty, master. Seized at Englishtown, C. B., May 17, 1886. Released June 19, 1886; bail, \$3,400. Proceedings for remission. (Senate Ex. Doc. No. 217, Forty-ninth Congress, first session; H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, pp. 141, 142, 143, 144, 145, 146. This rep., 255.)

"City Point," owned at Booth Bay, Me.; Stephen Keene, master. Seized at Shelburne, N. S., July 3, 1886. Released on payment of \$400 alleged fine. (Senate Ex. Doc. No. 217, Forty-ninth Congress, first session; H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, pp. 44, 178, 193. This rep., 238.)

"George W. Cushing," owned at Bath, Me.; C. B. Jewett, master. Seized at Shelburne, N. S., July 3, 1886. Released on payment of \$400 alleged fine. (Senate Ex. Doc. No. 217, Forty-ninth Congress, first session; H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, pp. 142, 178, 182, 184. This rep., 262.)

"C. B. Harrington," owned at Portland, Me.; John Frelick, master. Seized at Shelburne, N. S., July 3, 1886. Released on payment of \$400 alleged fine. (Senate Ex. Doc. No. 217, Forty-ninth Congress, first session. This rep., 262.)

395 *Vessels seized by the Canadian Authorities on the Charge of Violating Commercial or Trading Laws or Regulations of the Dominion.*

"W. D. Daisley," of Gloucester, Mass. Seized at Souris, October 1886, on the charge that one of the crew had landed flour at Canso in the previous August. (This rep., p. 197.)

"The Druid," of Gloucester, Mass.; John McQuinn, master. Sailing under register to buy fish, not to catch, and having on board no apparatus for fishing, was twice boarded by the captain of the Dominion cruiser "Houlett," with armed men, and once detained two nights and a day under armed guard at Malpeque on a charge of technical violation of Customs regulations; subsequently released. (This rep., pp. 129-132.)

"Moro Castle," of Gloucester, Mass.; Edwin Joyce, master. Seized at Port Mulgrave, in the Strait of Canso, September 11, 1886; stripped and held for an offence alleged to have been committed in 1884. (This rep., p. 217, *et seq.*)

Vessels detained by Canadian Authorities on the Charge of Violating of Fishery or Trading Regulations of the Dominion of Canada.

"Joseph Story," owned at Essex, Mass. Seized at Baddeck, Cape Breton, April 24, 1886; released April 25, 1886. (Senate Ex. Doc. No. 217, Forty-ninth Congress, first session.)

"Matthew Keany," owned at Bath, Me. Detained twenty-four hours. (Sen. Ex. Doc. No. 217, Forty-ninth Congress, first session.)

"Hereward," owned at Essex, Mass.; McDonald, master. Seized July 3, 1886, at Canso. (Sen. Ex. Doc. No. 217, Forty-ninth Congress, first session; H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, p. 190.)

"Everett Steele," of Gloucester, Mass.; Charles E. Forbes, master. Detained in the port of Shelburne, N. S., 10th September, 1886, by Captain Quigley, of the "Terror," who boarded the "Steele," took her papers, and put her in charge of a policeman till the following day, when she was discharged by the collector. (H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, pp. 52, 53, 54, 56, 153. This rep., 216.)

Vessels warned off by Canadian Authorities on the ground that they were about to Violate the Fishery or Trading Laws or Regulations of the Dominion.

"Annie M. (or H.) Jordon," of Gloucester, Mass., was refused entry at the port of St. Andrews, N. B., although licensed to touch and trade. (H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, pp. 15, 171-172, 175-176. This rep., 461.)

"Martha A. Bradley," "Rattler," "Eliza Boynton," and "Pioneer," of Gloucester, Mass., were warned by the sub-collector of customs at Canso to keep outside an imaginary line drawn from a point 3 miles outside Canso Head to a point outside St. Esprit, on the Cape Breton coast, a distance of 40 miles. This line, for nearly its entire continuance, is distant 12 to 25 miles from the coast. (H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, pp. 16, 42, 44, 48-49, 56-57, 120-123, 190-191. This rep., 153, 195.)

"Thomas F. Bayard," of Gloucester, Mass.; James McDonald, master. Warned off by customs officials at Bonne Bay, Newfoundland, July 12, 1886. (H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, pp. 26-27, 46-47, 146-147, 150-151, 187-189.)

"Mascot," of Gloucester, Mass.; Alexander McEachern, master. Warned by customs officials at Port Amherst, Magdalen Islands, June 10, 1886, that if fresh bait was purchased vessel would be seized. (H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, pp. 46-47, 118-119-120, 146-147, 150-152.)

Vessels subjected to Hostile Treatment by Dominion Officials.

The "Shiloh" and the "Julia Ellen." While these vessels were entering the harbour of Liverpool, N. S., Captain Quigley, of the Canadian cruiser "Terror," fired a gun across their bows to hasten their coming to, and placed a guard of two armed men on board each vessel, which guard remained on board until the vessels left the harbour. (H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, pp. 44, 122-123. This rep., 168.)

“Marion Grimes,” of Gloucester, Mass.; Alexander Landry, master. Was in port of Shelburne, N. S., October 11, 1886, under detention for alleged infraction of customs regulations, and while so there Captain Quigley, of the Dominion cruiser “Terror,” compelled Captain Landry to haul down his (the United States’) flag; upon its being run up a second time, Captain Quigley went on board the “Grimes” and hauled the flag down with his own hands. (H. R. Ex. Doc. No. 19, Forty-ninth Congress, second session, pp. 124–125, 153–163.)

It will be seen from the correspondence and papers submitted by the President, in his Message on the subject of the 8th December last (Ex. Doc. No. 19, Forty-ninth Congress, second session), and from the testimony taken by the committee, that some of these instances of seizure or detention, or of driving vessels away by threats, &c., were in clear violation of the treaty of 1818, and that others were on such slender and technical grounds, either as applied to fishing rights or commercial rights, as to make it impossible to believe that they were made with the large and just object of protecting substantial
 396 rights against real and substantial invasion, but must have been made either under the stimulus of the cupidity of the seizing officer, sharpened and made safe by the extraordinary legislation to which the committee has referred, whereby the seizing officer, no matter how unjust or illegal his procedure may have been, is made practically secure from the necessity of making substantial redress to the party wronged, or of punishment, or else they must have arisen from a systematic disposition on the part of the Dominion authorities to vex and harass American fishing and other vessels so as to produce such a state of embarrassment and inconvenience with respect to intercourse with the provinces as to coerce the United States into arrangements of general reciprocity with the Dominion.

In respect of general reciprocity, the experience of the United States during the existence of the treaty of 1854 was such as to lead Congress, with great unanimity, to terminate it; and the experience of the United States, under such so-called reciprocity as was provided for by the treaty of 1871, was such as to lead both Houses, with very great unanimity, to terminate that. Each of these instances continued long enough to show fully the general working of the arrangement. The great balance of gain and advantage appeared to be in favour of the Canadians, while the great balance of loss and disadvantage fell on the people of the United States.

Indeed, the treaty of 1871, so far as it related to the fisheries, &c., was based upon the idea that the right of American fishermen to fish within 3 miles of the Dominion shores was of some considerable value, which the United States thought would be fully compensated by admitting Dominion fishermen to the waters of the United States and admitting their fish free of duty. Notwithstanding this, by the methods and results of setting the balance of pecuniary advantages by the Halifax Commission, the United States paid on the award of that commission (waiving the serious question of its irregularity) \$5,500,000. So strong was the opinion of the United States, even at that time, that this award was wholly unjust in fact that it is understood that steps were taken to invite the British Government to terminate the fisheries clauses of the treaty of 1871 immediately and

before the positive period of ten years had expired, but it could not be accomplished.

From the investigations made by the committee during the last summer and fall, and as the result of the great mass of testimony taken by it and herewith returned, the committee believe it to be clear, beyond all dispute, that the right to fish within 3 miles of the Dominion shores is of no practical advantage whatever to American fishermen. The cod and halibut fishing has been for many years almost entirely carried on at long distances from the shores, in the deep waters, on banks, &c.; and it is believed that were there absolute liberty for Americans to fish, without restriction or regulation of any kind, within 3 miles of the Dominion shores, no such fishermen would ever think of going there for the purpose of catching cod or halibut.

As regards the obtaining of bait for this class of fishing, the testimony taken by the committee in its enquiries clearly demonstrates that there is no necessity whatever for American fishermen to resort to Canadian waters for that purpose. Clam bait is found in immense quantities in our own waters, and there have been instances, so frequent and continuous as to amount to a habit, of the Canadians themselves resorting to American waters or ports for the purpose of obtaining it. The squid bait is found on the very banks where the fishing goes on. So that the instances would be extremely rare when any American fishing-vessel would wish to resort to a Dominion port for the purpose of buying bait for this kind of fishing.

It was also proved before the committee that, with the rarest exception, it would be absolutely injurious to the pecuniary interests of all concerned for American vessels to resort to Dominion ports or waters, except in need or distress, for the time taken in such departures from the cod and halibut grounds, or from direct sailing to and from them, is so great, that with or without the difference of port expenses, time and money are both lost in such visits.

In respect of the mackerel fishery the committee finds, as will be seen from the evidence referred to, that its course and methods have of late years entirely changed. While it used to be carried on by vessels fishing with hook and line, and sometimes near the shores, it is now almost entirely carried on by the use of immense seines, called purse-seines, of great length and descending many fathoms into the water. This gear is very expensive, and a fishing vessel does not usually carry more than one or two. The danger of fishing near the shore with such seines is so great, on account of striking rocks and reefs, that it is regraded as extremely hazardous ever to undertake it. Besides this, the large schools of mackerel, to the taking of which this great apparatus is best adapted, are almost always found more than 3 miles from land, either in great bays and gulfs, or entirely out at sea.

There will be found accompanying this report (see Appendix) statements showing the total catch of mackerel during certain years, and the parts of the seas where they have been taken; and it will also be seen from the evidence that in general the mackerel fisheries by Americans in the Gulf of Saint Lawrence, and in the Bay of Chaleur have not been remunerative.

In view of all these facts, well known to the great body of the citizens of the United States engaged in fisheries, and embracing every variety of interest connected therewith, from the wholesale dealer,

vessel-owner, and outfitter to that portion of the crew who receive the smallest share of the venture, it must be considered as conclusively established that there would be no material value whatever in the grant by the British Government to American fishermen of absolutely free fishing; and in this conclusion it will be seen, by a reference to the testimony, that all these interests fully concur.

It will also be noticed, on reference to the evidence, that it appears to show that when, by force of the treaty of 1871 Canadian
397 fish, both salt and fresh, were admitted to the markets of the United States free of duty, no fall of prices to the consumer took place, and that the abrogation of the duty simply redounded to the advantage of the foreign fishermen or the foreign dealers in fish exporting the same to the United States; and that when, on the 1st July, 1885, the duty on salt fish was revived, no part of this duty was borne by the consumers in the United States, and that the cost of fish in the United States was not at all affected. It would follow that the sums received into the Treasury from these fish duties were paid and borne by the Canadians alone. A parallel instance is also found, on reference to the testimony, in the statements of gentlemen engaged in exporting salt fish from the United States to other countries where duties are imposed, these gentlemen stating that the duty thus imposed upon fish came out of their pockets, and not out of the pockets of the foreign consumers.

As regards commercial and other friendly business intercourse between ports and places in the Dominion and the United States, it is of course, of much importance that regulations affecting the same should be mutually resonable and fairly administered. If an American vessel should happen to have caught a cargo of fish at sea 100 miles distant from some Canadian port, from which there is railway communication to the United States, and should be denied the privilege of landing and shipping its cargo therefrom to the United States, as the Canadians do, it would be, of course, a serious disadvantage, and there is, it is thought, nothing in the treaty of 1818 which would warrant such an exclusion. But the Dominion laws may make such a distinction, and it is understood that, in fact, the privilege of so shipping fish from American vessels has been refused during the last year.

It is also inconvenient and injurious that American vessels of any character, whether engaged in fishing or licensed to touch and trade or purely mercantile vessels should be unable in cases of occasional necessity to resort to Canadian ports for the purpose of buying supplies or any commodities that the ordinary laws of the Dominion allow to be exported at all. Several instances of such injurious and unfriendly action appear to have taken place.

The treaties between the United States and Great Britain on the subject of inter-communication, and the rights of the citizens and subjects of the one in the ports and territories of the other have not included the British dominions of North America (with possibly certain exceptions as to intercourse by land), and such intercourse, strangely enough, still remains the subject of legislation merely in the two countries. Such legislation to be tolerable must be mutually friendly and reciprocal, and laws upon the subject must be administered fairly and generously, and not in a spirit of carping at small matters or in any other wise in an unfriendly way. The committee

is pained to believe that such has not been the course of British legislation or of administrative practice.

In view of all that has taken place, the committee thinks it to be the duty of the United States, in a firm and just way, to protect and defend the just and common rights of the people of the United States, whether fishermen, or traders, or travellers, or all, by all such measures as may be within our power. The measures the committee proposes to this end rest upon a principle universally recognised as right and necessary in the intercourse of nations, and it has often been resorted to in one form or another by many nations.

It is recommended that the President of the United States be invested with the power, and that it be made his duty, whenever he shall be satisfied that unjust, unfair, or unfriendly conduct is practised by the British Government in respect of our citizens and their property within the ports or waters of the British dominions in North America, to deny to the subjects of that Government in British North America and their property, or to any classes of them, such privileges in the waters and ports of the United States as he may think proper to name, and to suspend in respect of such vessels or classes of vessels or such property or classes of property of the subjects of such Government the right of entering or being brought within the waters or ports of the United States, so that he shall be able from time to time, as each emergency may arise, to preserve the intercourse between the United States and that Government in a state of fair equality. The committee, therefore, recommends the passage of the Bill (S. 3173) herewith reported.

The committee also recommends that the papers, documents, and maps herewith returned be printed.

All of which is respectfully submitted.

(Signed)

GEO. F. EDMUNDS.

(For the Committee).

No. 231.—1887, *January 26: Letter from Mr. Phelps to the Marquis of Salisbury (British Foreign Secretary).*

LEGATION OF THE UNITED STATES,

London, January 26, 1887.

MY LORD: Various circumstances have rendered inconvenient an earlier reply to Lord Iddesleigh's note of November 12, on the subject of the North American fisheries, and the termination of the fishing season has postponed the more immediate necessity of the discussion; but it seems now very important that before the commencement

398 of another season a distinct understanding should be reached between the United States Government and that of Her Majesty relative to the course to be pursued by the Canadian authorities towards American vessels.

It is not without surprise that I have read Lord Iddesleigh's remark, in the note above mentioned, referring to the Treaty of 1818, that Her Majesty's Government, "have not as yet been informed in what respect the construction placed upon that instrument by the Government of the United States differs from their own."

Had his Lordship perused more attentively my note to his predecessor in office, Lord Rosebery, under date of June 2, 1886, to which

reference was made in my note to Lord Iddesleigh of September 11, 1886, I think he could not have failed to apprehend distinctly the construction of that Treaty for which the United States Government contends and the reasons and arguments upon which it is founded. I have again respectfully to refer your Lordship to my note to Lord Rosebery of June 2, 1886, for a very full and, I hope, clear exposition of the ground taken by the United States Government on that point. It is unnecessary to repeat it, and I am unable to add to it.

In reply to the observations in my note to Lord Iddesleigh of September 11, 1886, on the point whether such discussion should be suspended in these cases until the result of the judicial proceedings in respect to them should be made known, a proposition to which, as I stated in that note, the United States Government is unable to accede, his Lordship cites in support of it some language of Mr. Fish, when Secretary of State of the United States, addressed to the United States Consul-General at Montreal, in May 1870. From the view then expressed by Mr. Fish the United States Government has neither disposition nor occasion to dissent. But it can not regard it as in any way applicable to the present case.

It is true beyond question that when a private vessel is seized for an alleged infraction of the laws of the country in which the seizure takes place, and the fact of the infraction, or the exact legal construction of the local Statute claimed to be transgressed, is in dispute, and is in process of determination by the proper Tribunal, the Government to which the vessel belongs will not usually interfere in advance of such determination and before acquiring the information on which it depends. And especially when it is not yet informed whether the conduct of the officer making the seizure will not be repudiated by the Government under which he acts, so that interference will be unnecessary. This is all, in effect, that was said by Mr. Fish on that occasion. In language immediately following that quoted by Lord Iddesleigh he remarks as follows (*italics being mine*):

"The present embarrassment is that while we have *reports* of several seizures upon grounds *as stated by the interested parties*, which *seem to be* in contravention of international law and special Treaties relating to the fisheries, these *alleged* causes of seizure are regarded as pretensions of over zealous officers of the British navy and the colonial vessels which will, as we hope and are bound in courtesy to expect, be repudiated by the Courts, before which our vessels are to be brought for adjudication."

But in the present case the facts constituting the alleged infraction by the vessel seized are not in dispute, except some circumstances of alleged aggravation not material to the validity of the seizure. The original ground of the seizure was the purchase by the master of the vessel of a small quantity of bait from an inhabitant of Nova Scotia, to be used in lawful fishing. This purchase is not denied by the owners of the vessel, and the United States Government insists, *first*, that such an act is not in violation of the Treaty of 1818, and *second*, that no then existing Statute in Great Britain or Canada authorised any proceedings against the vessel for such an act, even if it could be regarded as in violation of the terms of the Treaty, and no such Statute has been as yet produced.

In respect to the charge subsequently brought against the *Adams*, and upon which many other vessels have been seized, that of a tech-

nical violation of the Customs Act, in omitting to report at the custom-house, though having no business at the port (and in some instances where the vessel seized was not within several miles of the landing), the United States Government claim, while not admitting that the omission to report was even a technical transgression of the Act, that even if it were, no harm having been done or intended, the proceedings against the vessels for an inadvertence of that sort were in a high degree harsh, unreasonable, and unfriendly, especially as for many years no such effect has been given to the Act in respect to the fishing vessels, and no previous notice of a change in its construction had been promulgated.

It seems apparent, therefore, that the cases in question, as they are to be considered between the two Governments, present no points upon which the decision of the Courts of Nova Scotia need be awaited or would be material.

Nor is it any longer open to the United States Government to anticipate that the acts complained of will (as said by Mr. Fish in the despatch above quoted) be repudiated as "the pretensions of over-zealous officers of the . . . colonial vessels," because they have been so many times repeated as to constitute a regular system of procedure, have been directed and approved by the Canadian Government, and have been in nowise disapproved or restrained by Her Majesty's Government, though repeatedly and earnestly protested against on the part of the United States.

It is therefore to Her Majesty's Government alone that the United States Government can look for consideration and redress. It can not consent to become directly or indirectly a party to the proceedings complained of, nor to await their termination before the questions involved between the two Governments shall be dealt with. Those questions appear to the United States Government to stand upon higher grounds, and to be determined, in large part, at least, upon very different considerations from those upon which the Courts of Nova Scotia must proceed in the pending litigation.

Lord Iddesleigh, in the note above referred to, proceeds to express regret that no reply has yet been received from the United States Government to the arguments on all the points in controversy contained in the Report of the Canadian Minister of Marine and Fisheries, of which Lord Rosebery has sent me a copy.

Inasmuch as Lord Iddesleigh and his predecessor Lord Rosebery, have declined altogether, on the part of Her Majesty's Government, to discuss these questions until the cases in which they
399 arise shall have been judicially decided, and as the very elaborate arguments on the subject previously submitted by the United States Government, remain, therefore without reply, it is not easy to perceive why further discussion of it on the part of the United States should be expected. So soon as Her Majesty's Government consent to enter upon the consideration of the points involved, any suggestions it may advance will receive immediate and respectful attention on the part of the United States. Till then further argument on that side would seem to be neither consistent nor proper.

Still less can the United States Government consent to be drawn, at any time, into a discussion of the subject with the Colonial Government of Canada. The Treaty in question, and all the interna-

tional relations arising out of it, exist only between the Governments of the United States and of Great Britain, and between those Governments only can they be dealt with. If, in entering upon that consideration of the subject which the United States have insisted upon, the arguments contained in the Report of the Canadian Minister should be advanced by Her Majesty's Government, I do not conceive that they will be found difficult to answer.

Two suggestions contained in that Report are, however, specially noticed by Lord Iddesleigh, as being "in reply" to the arguments contained in my note. In quoting the substance of the contention of the Canadian Minister on the particular points referred to, I do not understand his Lordship to depart from the conclusion of Her Majesty's Government he had previously announced, declining to enter upon the discussion of the cases in which the questions arise. He presents the observations of the Report only as those of the Canadian Minister made in the argument of points upon which Her Majesty's Government decline at present to enter. I do not, therefore, feel called upon to make any answer to these suggestions; and more especially as it seems obvious that the subject can not usefully be discussed upon one or two suggestions appertaining to it, and considered by themselves alone. While those mentioned by Lord Iddesleigh have undoubtedly their place in the general argument, it will be seen that they leave quite untouched most of the propositions and reasoning set forth in my note to Lord Rosebery above mentioned. It appears to me that the questions can not be satisfactorily treated aside from the cases in which they arise. And that when discussed the whole subject must be gone into in its entirety.

The United States Government is not able to concur in the favourable view taken by Lord Iddesleigh of the efforts of the Canadian Government "to promote a friendly negotiation." That the conduct of that Government has been directed to obtaining a revision of the existing treaty is not to be doubted; but its efforts have been of such a character as to preclude the prospect of a successful negotiation so long as they continue, and seriously to endanger the friendly relations between the United States and Great Britain.

Aside from the question as to the right of American vessels to purchase bait in Canadian ports, such a construction has been given to the Treaty between the United States and Great Britain as amounts virtually to a declaration of almost complete non-intercourse with American vessels. The usual comity between friendly nations has been refused in their case, and in one instance, at least, the ordinary offices of humanity: The Treaty of Friendship and Amity which, in return for very important concessions by the United States to Great Britain, reserved to the American vessels certain specified privileges has been construed to exclude them from all other intercourse common to civilized life and to universal maritime usage among nations not at war, as well as from the right to touch and trade accorded to all other vessels.

And, quite aside from any question arising upon construction of the Treaty, the provisions of the Customs-house Acts and Regulations have been systematically enforced against American ships for alleged petty and technical violations of legal requirements in a manner so unreasonable, unfriendly, and unjust as to render the privileges accorded by the Treaty practically nugatory.

It is not for a moment contended by the United States Government that American vessels should be exempt from those reasonable port and Custom-house Regulations which are in force in countries which such vessels have occasion to visit. If they choose to violate such requirements, their Government will not attempt to screen them from the just legal consequences.

But what the United States' Government complain of in these cases, is that existing Regulations have been construed with a technical strictness, and enforced with a severity, in cases of inadvertent and accidental violation where no harm was done, which is both unusual and unnecessary, whereby the voyages of vessels have been broken up and heavy penalties incurred. That the liberal and reasonable construction of these laws that had prevailed for many years, and to which the fishermen had become accustomed, was changed without any notice given. And that every opportunity of unnecessary interference with the American fishing vessels, to the prejudice and destruction of their business, has been availed of. Whether in any of these cases, a technical violation of some requirement of law had, upon close and severe construction, taken place, it is not easy to determine. But if such Rules were generally enforced in such a manner in the ports of the world, no vessel could sail in safety without carrying a solicitor versed in the intricacies of revenue and port Regulations.

It is unnecessary to specify the various cases referred to, as the facts in many of them have been already laid before Her Majesty's Government.

Since the receipt of Lord Iddesleigh's note the United States Government has learned with grave regret that Her Majesty's assent has been given to the Act of the Parliament of Canada, passed at its late Session, entitled "An Act further to amend the Act respecting fishing by foreign vessels," which has been the subject of observation in the previous correspondence on the subject between the Governments of the United States and of Great Britain.

By the provisions of this Act any foreign ship, vessel, or boat (whether engaged in fishing or not) found within any harbour in Canada, or within 3 marine miles of "any of the coasts, bays, or creeks of Canada," may be brought into port by any of the officers or persons mentioned in the Act, her cargo searched, and her master examined upon oath touching the cargo and voyage under a heavy penalty if the questions asked are not truly answered; and if such ship has entered such waters "*for any purpose not permitted by*
 400 Treaty or Convention or by law of the United Kingdom or of Canada, for the time being in force, such ship, vessel, or boat and the tackle, rigging, apparel, furniture, stores, and cargo thereof shall be forfeited."

It has been pointed out in my note to Lord Iddesleigh, above mentioned, that the 3-mile limit referred to in this Act is claimed by the Canadian Government to include considerable portions of the high seas, such as the Bay of Fundy, the Bay of Chaleur, and similar waters, by drawing the line from headland to headland, and that American fishermen had been excluded from those waters accordingly.

It has been seen also that the term "any purpose not permitted by Treaty" is held by that Government to comprehend every possible

act of human intercourse, except only the four purposes named in the Treaty—shelter, repairs, wood, and water.

Under the provisions of the recent Act, therefore, and the Canadian interpretation of the Treaty, any American fishing vessel that may venture into a Canadian harbour, or may have occasion to pass through the very extensive waters thus comprehended, may be seized at the discretion of any one of numerous subordinate officers, carried into port, subjected to search and the examination of her master upon oath, her voyage broken up, and the vessel and cargo confiscated, if it shall be determined by the local authorities that she has ever even posted or received a letter or landed a passenger in any part of Her Majesty's dominions in America.

And it is publicly announced in Canada that a larger fleet of cruisers is being prepared by the authorities, and that greater vigilance will be exerted on their part in the next fishing season than in the last.

It is in the Act to which the one above referred to is an amendment that is found the provision to which I drew attention in a note to Lord Iddesleigh of December 2, 1886, by which it is enacted that in case a dispute arises as to whether any seizure has or has not been legally made, the burden of proving the illegality of the seizure shall be upon the owner or claimant.

In his reply to that note of January 11, 1887, his Lordship intimates that this provision is intended only to impose upon a person claiming a licence the burden of proving it. But a reference to the Act shows that such is by no means the restriction of the enactment. It refers in the broadest and clearest terms to *any* seizure that is made under the provisions of the Act, which covers the whole subject of protection against illegal fishing; and it applies not only to the proof of a licence to fish, but to all questions of fact whatever, necessary to a determination as to the legality of a seizure or the authority of the person making it.

It is quite unnecessary to point out what grave embarrassments may arise in the relations between the United States and Great Britain under such administration as is reasonably to be expected of the extraordinary provisions of this Act and its amendment, upon which it is not important at this time further to comment.

It will be for Her Majesty's Government to determine how far its sanction and support will be given to further proceedings, such as the United States Government have now repeatedly complained of and have just ground to apprehend may be continued by the Canadian authorities.

It was with the earnest desire of obviating the impending difficulty and of preventing collisions and dispute until such time as a permanent understanding between the two Governments could be reached, that I suggested, on the part of the United States, in my note to Lord Iddesleigh of September 11, 1886, that an *ad interim* construction of the terms of the Treaty might be agreed on, to be carried out by instructions to be given on both sides without prejudice to the ultimate claims of either, and terminable at the pleasure of either. In an interview I had the honour to have with his Lordship, in which this suggestion was discussed, I derived the impression that he regarded it with favour. An outline of such an arrangement was

therefore subsequently prepared by the United States Government, which, at the request of Lord Iddesleigh, was submitted to him.

But I observe, with some surprise, that in his note of November 30, last, his Lordship refers to that proposal made in my note of 11th September, as a proposition that Her Majesty's Government "should temporarily abandon the exercise of the Treaty rights which they claim and which they conceive to be indisputable."

In view of the very grave questions that exist as to the extent of those rights, in respect to which the views of the United States Government differ so widely from those insisted upon by Her Majesty's Government, it does not seem to me an unreasonable proposal that the two Governments, by a temporary and mutual concession, without prejudice, should endeavour to reach some middle ground of *ad interim* construction, by which existing friendly relations might be preserved, until some permanent Treaty arrangements could be made.

The reasons why a revision of the Treaty of 1818 can not now, in the opinion of the United States Government, be hopefully undertaken, and which are set forth in my note to Lord Iddesleigh of September 11, have increased in force since that note was written.

I again respectfully commend the proposal above mentioned to the consideration of Her Majesty's Government.

I have, etc.,

E. J. PHELPS.

401 No. 232.—1887, *January 28: Letter from Sir L. S. S. West to Mr. Bayard.*

WASHINGTON, *January 28, 1887.*

SIR: With reference to your note of the 20th of May last, I have the honor to transmit to you herewith copy of a report by the minister of justice of the Dominion of Canada upon the seizure of the American fishing vessel *David J. Adams*, which I am instructed by Her Majesty's principal secretary of State for foreign affairs to communicate to the United States Government.

I have, &c.,

L. S. SACKVILLE WEST.

No. 233.—1887, *February 1: Report of a Committee of the Privy Council for Canada, approved by His Excellency the Governor General in Council.*

The Committee of the Privy Council have had under consideration a despatch dated 30th December, 1886, from the Right Honourable the Secretary of State for the Colonies, forwarding, for the information of the Canadian Government, a note received through the Foreign Office from the United States' Minister in London, enclosing a draft of a Memorandum for an arrangement between the British and United States' Governments on the subject of the North American Fisheries, entitled a "proposal for the settlement of the question in dispute in relation to the fisheries on the north-eastern coasts of British North America," accompanied by a despatch dated Washington, 15th November, 1886, from Mr. Bayard, United States' Secretary

of State, containing some observations thereon. Mr. Secretary Stanhope requests your Excellency to obtain, at the earliest possible moment, from your Excellency's advisers their views on Mr. Bayard's proposals and to report them to Her Majesty's Government.

The Minister of Marine and Fisheries, to whom the despatch and enclosures have been referred, reports that Mr. Bayard suggests that as the season for taking mackerel has now closed, "a period of comparative serenity may be expected, of which advantage should be taken in order to adopt measures which will tend to make more harmonious the relations between Canada and the United States as regards the fisheries on the coasts of Canada."

The Minister observes that while any indication of a disposition on the part of the United States' Government to make arrangements which might tend to put the affairs of the two countries on a basis more free from controversy and misunderstanding than at present exists, must be hailed with satisfaction by the Government of Canada, it is to be regretted that the language in which Mr. Bayard refers to what has taken place during the past year indicates a disposition on his part to attribute to unfriendly motives the proceedings of the Canadian Government and a tendency to misapprehend the character and scope of the measures which have been taken by it in order to enforce the terms of the Treaty of 1818, and to ensure respect for the municipal laws of the Dominion.

The Minister submits therefore that he cannot avoid protesting against such expressions in Mr. Bayard's letter as those in which he alludes to the proceedings of the last few months as "the administration of a strained and vexatious construction of the Convention of 1818," as "unjust and unfriendly treatment by the local authorities," as "unwarranted interferences (frequently accompanied by rudeness and unnecessary demonstration of force)" with the rights of the United States' fishermen guaranteed by express treaty stipulations and secured to them by the commercial laws and regulations of the two countries, and which are demanded by the laws of hospitality to which all friendly civilised nations owe allegiance," and as "conduct on the part of the Canadian officials which may endanger the peace of two kindred friendly nations."

The Minister has to observe again what has frequently been stated in the negotiations on this subject that nothing has been done on the part of the Canadian authorities since the termination of the Treaty of Washington in any such spirit as that which Mr. Bayard condemns, and that all that has been done with a view to the protection of the Canadian Fisheries has been simply for the purpose of guarding the rights guaranteed to the people of Canada by the Convention of 1818, and to enforce the Statutes of Great Britain and of Canada in relation to the fisheries.

It has been more than once pointed out, in reports already submitted by the Minister of Marine and Fisheries that such Statutes are clearly within the powers of the respective Parliaments by which they were passed, and are in conformity with the Treaty of 1818, especially in view of that passage of the Treaty which provides that the American fishermen shall be under such restrictions as shall be necessary to prevent them from abusing the privileges thereby reserved to them.

The Minister has further to call the attention of your Excellency to the fact that there is no foundation whatever for the following statement in the concluding part of Mr. Bayard's letter:

402 The numerous seizures made have been of vessels quietly at anchor in established ports of entry, under charges which up to this day have not been particularised sufficiently to allow of intelligent defence. Not one has been condemned after trial and hearing, but many have been fined without hearing or judgment for technical violation of alleged commercial regulations, although all commercial privileges have been simultaneously denied to them.

The Minister observes in relation to this paragraph that the seizures of which Mr. Bayard complains have been made under circumstances which have from time to time been fully reported to your Excellency and communicated to Her Majesty's Government, and upon grounds which have been distinctly and unequivocally stated in every case; that, although the nature of the charges has been invariably specified and duly announced, those charges have not in any case been answered; that ample opportunity has in every case been afforded for a defence to be submitted to the executive authorities, but that no defence has been offered, beyond the mere denial of the right of the Canadian Government; that the courts of the various provinces have been open to the parties said to have been aggrieved, but that not one of them has resorted to these courts for redress. To this it must be added, that the illegal acts which are characterised by Mr. Bayard as "technical violations of alleged commercial regulations," involved breaches, in most of the cases not denied by the persons who had committed them, of established commercial regulations, which, far from being specially directed or enforced against citizens of the United States, are obligatory upon all vessels (including those of Canada herself) which resort to the harbours of the British North American coast.

With regard to the proposal for a settlement which accompanies Mr. Bayard's letter, the minister submits the following observations:

ARTICLE I. The minister observes that, in referring to this article Mr. Bayard states that he is "encouraged in the expectation that the propositions embodied in the memorandum will be acceptable to Her Majesty's Government, because, in the month of April, 1866, Mr. Seward, then Secretary of State, sent forward to Mr. Adams, at that time United States' Minister in London, the draft of a Protocol, which, in substance, coincides with the first article of the proposal," now submitted. In regard to this statement, it is to be remarked that Article 1 of the Memorandum, although, no doubt, to some extent resembling the Protocol submitted, in 1866, by Mr. Adams to Lord Clarendon, contains several most important departures from the terms of that Protocol. These departures consist not only in such comparatively unimportant alterations as the substitution in line 1 of the word "establish" for the word "define," without any apparent necessity for the change, and in other minor alterations in the text, but also in such grave changes as that which is involved in the interpolation in section 1 of the important passage, in which it is stipulated: "that the bays and harbours from which American vessels are in future to be excluded save for the purposes for which entrance into bays and harbours is permitted by said Article, are hereby agreed to be taken to be such bays and harbours as are ten

or less than ten miles in width, and the distance of three marine miles from such bays and harbours shall be measured from a straight line drawn across the bay or harbour in the part nearest the entrance at the first point where the width does not exceed ten miles."

This provision would involve a surrender of fishing rights which have always been regarded as the exclusive property of Canada, and would make common fishing grounds of territorial waters which by the law of nations have been invariably regarded both in Great Britain and the United States as belonging to the adjacent country. In the case, for instance, of the Baie des Chaleurs, a peculiarly well marked and almost landlocked indentation of the Canadian coast, the ten mile line would be drawn from points in the heart of Canadian territory, and almost seventy miles distant from the natural entrance or mouth of the bay. This would be done in spite of the fact that, both by Imperial legislation and by judicial interpretation, this bay has been declared to form a part of the territory of Canada. See Imperial Stat., 14 and 15 Vic., cap. 63, and *Mowat vs. McPhee*, 5 Sup. Court of Canada reports, p. 66.

The Convention with France in 1839 and similar Conventions with other European powers, although cited by Mr. Bayard as sufficient precedents for the adoption of a ten-mile limit, do not, the Minister submits, carry out his reasoning.

Those Conventions were doubtless framed with a view to the geographical peculiarities of the coasts to which they related. They had for their object the definition of boundary lines, which, owing to the configuration of the coast, perhaps could not readily be settled by reference to the law of nations and involve other conditions which are inapplicable to the territorial waters of Canada.

Mr. Bayard contends that the rule which he asks to have set up was adopted by the umpire of the Commission appointed under the Treaty of 1854, in the case of the United States' fishing schooner "Washington," that it was by him applied to the Bay of Fundy and that it is for this reason applicable to other Canadian bays.

The Minister submits, however, that the rule laid down by Mr. Bates with regard to the Bay of Fundy should not be treated as establishing the respective rights of Canada and of the United States as to bays and harbours not included in the terms of the reference, and in relation to which there was no agreement to abide by the decision of the umpire and no decision by him.

It may reasonably be contended that as one of the headlands of the Bay of Fundy is in the territory of the United States any rules of international law applicable to that bay are not therefore equally applicable to other bays, the headlands of which are both within the territory of the same power.

As to the second paragraph of the first article the Minister suggests that before such an article is acceded to, and even if the objections before stated should be removed, the article should be so amended as to incorporate the exact language of the Convention of 1818, in which case several alterations should be made. Thus the words "and for no other purpose whatever" should be inserted after the mention of the purposes for which vessels may enter Canadian waters, and after the words "as may be necessary to prevent" should be inserted "their taking drying or curing fish therein, or in any other manner abusing the privileges reserved &c."

To make the language conform correctly to the Convention of 1818, several other verbal alterations which need not be enumerated here, would be necessary in order to prevent imaginary
 403 distinctions being drawn hereafter between the Convention of 1818 and any agreement of later date which may be arrived at.

The Minister moreover suggests that inasmuch as Mr. Bayard has from time to time denied the force and authority of the customs, harbour shipping and police laws of Canada, it may be well in order to remove the possibility of misunderstanding on the part of his Government, to insert a proviso expressly recognising the validity of such enactments.

The proviso in Article I, in which it is stipulated that any arrangement which may be arrived at by the Commission shall not go into effect until it has been confirmed by Great Britain and the United States should provide for confirmation by the Parliament of Canada.

2. The Minister submits that Article II of the proposed arrangement, is, in his opinion, entirely inadmissible. It would suspend the operations of the Statutes of Great Britain and Canada, and of the Provinces now constituting Canada, not only as to the various offences connected with fishing, but as to customs, harbours, and shipping, and would give to the fishing vessels of the United States privileges in Canadian ports, which are not enjoyed by vessels of any other class, or of any other nation; such vessels would for example, be free from, the duty of reporting at the customs on entering a Canadian harbour, and no safeguard could be adopted to prevent infraction of the custom laws by any vessel asserting the character of a fishing vessel of the United States.

Instead of allowing to such vessels merely the restricted privileges reserved by the Convention of 1818, it would give them greater privileges than are enjoyed at the present time by any vessels in any part of the world.

It must, moreover, be borne in mind that should no "definitive arrangement," such as is looked forward to in the proposal, be arrived at, these extraordinary concessions, although applied for pending such a definitive arrangement, might remain in operation for an indefinite period, and that the article would be taken for all time to come as indicating the true interpretation of the Convention of 1818, although the interpretation placed upon that Convention by the article is as a matter of fact diametrically opposed to the construction which has heretofore been insisted upon by successive Canadian Governments.

The Minister further considers it his duty to point out that the article is beyond the powers of the Imperial Government, which cannot thus suspend or repeal Canadian laws.

3. As to Article III the Minister submits that it is entirely inadmissible. It proposes that Her Majesty's Courts in Canada shall, without any show of reason, be deprived of their jurisdiction, and would vest that jurisdiction in a tribunal not bound by legal principles, but clothed with supreme authority to decide on most important rights of the Canadian people.

It would be a disagreeable novelty to the people of Her Majesty's Canadian Dominions to find that any of their rights or the rights of their country as a whole, were to be submitted to the adjudication of two naval officers, one of them belonging to a foreign country, who,

if they should disagree and be unable to choose an umpire must refer the final decision of the great interests which might be at stake, to some person chosen by lot.

If a vessel charged with infraction of our fishing rights should, by this extraordinary tribunal, be thought worthy of being subjected to a "Judicial Examination" she would be sent to the Vice-Admiralty Court at Halifax, but there would be no redress, no appeal and no reference to any tribunal if the naval officers should think proper to release her.

4. Article IV is also open to grave objection. It proposes to give the United States' fishing vessels the same commercial privileges as those to which other vessels of the United States are entitled, although such privileges are expressly renounced by the Treaty of 1818, on behalf of fishing vessels, which were thereafter to be denied the right of access to Canadian waters except for shelter, repairs and the purchase of wood and water. It has already been pointed out, in previous reports on this subject, that an attempt was made, during the negotiations which preceded the Convention of 1818, to obtain for the fishermen of the United States the right of obtaining bait in Canadian waters, and that this attempt was successfully resisted. Your Excellency will observe that, in spite of this fact, it is proposed, under the article now referred to, to declare that the Convention of 1818 gave that privilege, as well as the privileges of purchasing other supplies, in the harbours of the Dominion.

5. To this novel and unjustified interpretation of the Convention Mr. Bayard proposes to give retrospective effect by the next article of the proposal, in which it is assumed, without discussion, that all United States' fishing vessels which have been seized since the expiration of the Treaty of Washington have been illegally seized, leaving as the only question still open for consideration, the amount of the damages for which the Canadian authorities are liable.

The Minister submits that the serious consideration of such a proposal would imply a disregard of justice as well as of the interests of Canada, and he is unwilling to believe that it will be entertained, either by your Excellency's advisers, or by the Imperial Government.

From the above enumeration of some of the principal objections to which the proposals contained in Mr. Bayard's memorandum, are open, it will be evident to your Excellency that those proposals as a whole will not be acceptable to the Government of Canada. The conditions which Mr. Bayard has sought to attach to the appointment of a mixed Commission involve in every case the assumption that upon the most important points in the controversy which has arisen in regard to the fisheries on the eastern coast of British North America, Canada has been in the wrong and the United States in the right. The reports which have already been submitted to your Excellency and communicated to Her Majesty's Government upon this subject have been sufficient to show that the position which has been taken up by the Canadian Government is one perfectly justifiable, with reference to the rights expressly reserved to British subjects by treaty, and that the legislation, by which it has been, and is now being sought to enforce those rights, is entirely in accordance with treaty stipulations, and is within the competence of the Colonial Legislature.

404 It is not to be expected that after having earnestly insisted upon the necessity of a strict maintenance of these treaty rights, and upon the respect due by foreign vessels, while in Canadian waters, to the municipal legislation by which all vessels resorting to those waters are governed, in the absence moreover of any decision of a legal tribunal, to show that there has been any straining of the law in those cases in which it has been put in operation, the Canadian Government will suddenly and without the justification supplied by any new facts or arguments withdraw from a position taken up deliberately, and by doing so, in effect, plead guilty to the whole of the charges of oppression, inhumanity, and bad faith which, in language wholly unwarranted by the circumstances of the case, have been made against it by the public men of the United States.

Such a surrender on the part of Canada would involve the abandonment of a valuable portion of the national inheritance of the Canadian people, who would certainly visit with just reprobation those who were guilty of so serious a neglect of the trust committed to their charge.

The Minister, while, however, objecting thus strongly to the proposal as it now stands, considers that the fact of such a proposal having been made may be regarded as affording an opportunity which has, up to the present time, not been offered for an amicable comparison of the views entertained by your Excellency's Government and that of the United States, and he desires to point out that Mr. Bayard's proposal, though quite inadmissible, in so far as the conditions attached to it are concerned, appears to be, in itself, one which deserves respectful examination by your Excellency's advisers. The main principle of that proposal is that a mixed Commission should be appointed for the purpose of determining the limits of those territorial waters within which, subject to the stipulations of the Treaty of 1818, the exclusive right of fishing belongs to Great Britain.

The Minister cordially agrees with Mr. Bayard in believing that a determination of those limits would, whatever might be the future commercial relations between Canada and the United States, either in respect of the fishing industry, or in regard to the interchange of other commodities, be extremely desirable, and he believes that your Excellency's Government will be found ready to co-operate with that of the United States in effecting such a settlement.

Holding this view the Minister is of opinion that Mr. Bayard was justified in reverting to the precedent afforded by the negotiations which took place upon this subject between Great Britain and the United States after the expiration of the Reciprocity Treaty of 1854, and he concurs with him in believing that the memorandum communicated by Mr. Adams in 1866 to the Earl of Clarendon affords a valuable indication of the lines upon which a negotiation directed to the same points might now be allowed to proceed.

The Minister has already referred to some of the criticisms which were taken at the time by Lord Clarendon to the terms of the memorandum. Mr. Bayard has himself pointed out that its concluding paragraph, to which Lord Clarendon emphatically objected, is not contained in the memorandum now forwarded by him. Mr. Bayard, appears, however, while taking credit for this omission, to have lost sight of the fact that the remaining articles of the draft memorandum contain stipulations not less open to objection and calculated to affect

even more disadvantageously the permanent interests of the Dominion in the fisheries adjacent to its coasts.

The Minister submits that in his opinion, there can be no objection on the part of the Canadian Government to the appointment of a mixed Commission, whose duty it would be to consider and report on the matters referred to in the first three articles of the memorandum communicated to the Earl of Clarendon by Mr. Adams, in 1866.

Should a Commission instructed to deal with these subjects be appointed at an early date, the Minister is not without hope that the result of its investigations might be reported to the Governments affected without much loss of time. Pending the determination of the questions which it would discuss, it will, in the opinion of the Minister, be indispensable that United States fishing vessels entering Canadian bays and harbours should govern themselves not only according to the terms of the Convention of 1818; but by the regulations to which they in common with other vessels are subject while within such waters.

The Minister has, however, no doubt that every effort will be made to enforce those regulations in such a manner as to cause the smallest amount of inconvenience to fishing vessels entering Canadian ports under stress of weather or for any other legitimate purpose, and he believes that any representation upon this subject will receive the attentive consideration of your Excellency's Government.

The Minister in conclusion would remind your Excellency that your Government has always been willing to remove any obstacles to the most friendly relations between the people of Canada and the United States.

Your Government has not only been disposed from the first to arrive at such an arrangement as that indicated in the Report, with regard to the Fisheries, but likewise to enter into such other arrangements as might extend the commercial relations existing between the two countries.

The Committee concur in the foregoing and they submit the same for your Excellency's approval.

(Sd.)

JOHN J. MCGEE.

Clerk, Privy Council.

405 No. 234.—1887, February 5: Extract from Letter Mr. Daniel Manning, United States Secretary of the Treasury, to Hon. Perry Belmont, Chairman of the Committee on Foreign Affairs.

COMMERCIAL PRIVILEGES.

* * * * *

The treaty of 1818 secured to our fishermen what, up to that time, they did not have as a treaty right, which was admission to Canadian bays or harbours "for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, *and for no other purpose whatever.*" As colonists we had those rights, but as colonists we lost them by just rebellion. They should not be called commercial rights, for they were simply rights of humanity, decency, good neighborhood, and international kindness to one another. To refuse a fishing vessel such hospitality would be an

act of barbarism fit only for savages. It would be as contemptible and odious as for a Government, conducting a naval war to fire, in these days, on a hospital-ship, attested by her colour and flag, and filled exclusively with the sick, wounded, or dying, their surgeons and nurses. Such hospital vessels are now, by the common consent of civilized nations, as I am told, even more perfectly and completely neutralized than are hospitals and tents on land over which floats the yellow flag. It is impossible not to recognize how justly my colleague, Mr. Bayard, has portrayed the inhumanity and brutality with which certain Canadian officials treated defenseless American fishermen during the last summer, even those who had gone out of their way to rescue Canadian sailors, and, having entered a Canadian bay to safely land those they had saved, attempted to procure food to sustain their own lives.

It is true that we complain of and denounce, as in violation of the treaty of 1818, the "restrictions" enforced by Canadian statutes and officials under the pretence of preventing our fishermen from "taking, drying, or curing fish," in the prohibited Canadian bays or harbors, but those "restrictions" are not complained of or denounced because restricting commercial *privileges*. The complaint and denunciation are because the "restrictions" violate the *fishing rights* secured to our fishermen by the treaties.

I am advised, and concede, that up to President Jackson's proclamation of October 5, 1830, set forth on page 817 of the fourth volume of the United States Statutes at Large, this Government had not even commercial privileges for its vessels in Canadian ports. We had such privileges as colonists; we lost them as colonists; we regained them in 1830 by an arrangement of legislation finally concerted with Great Britain, which was the result of an international understanding, that was in effect a treaty, although not technically a treaty negotiated by the President, ratified by the Senate, signed by the parties, and the ratifications formally exchanged by them. That must be so, for British colonial policy, after the treaty of peace in 1783, which secured the independence of the thirteen American States, notoriously excluded all foreign vessels from trading with British colonies on this continent. The treaty of 1794 was careful to declare that it should not, as to commercial privileges, "extend to the admission of vessels of the United States into the sea-ports, harbours, bays, or creeks of His Majesty's said territories" on the continent of America. The events which preceded the war of 1812 and that war, confirmed and enforced the exclusion. After the Treaty of Ghent we endeavored, by retaliatory laws, to counteract and change that policy. The fishery treaty of 1818 was concluded in October of that year, and, in April of the same year, Congress enacted a law which was described in the official documents of the day as enforcing a policy of non-intercourse by *British* vessels between ourselves and ports closed by British laws against our vessels. On May 15, 1820, Congress invigorated that law of 1818 by a new enactment, against every vessel, owned in whole or in part by British subjects, if coming or arriving *by sea* from any place in Lower Canada, or New Brunswick, or Nova Scotia, or the Islands of Newfoundland, St. John's, or Cape Breton, or from any British possession on this Continent. We forbade, under pain of forfeiture, the entry, or attempted entry, of any such vessel into our ports. We interdicted the importation

into the United States from any of the foregoing British dependencies, of any articles not produced therein. We excluded the importation by anybody of all articles excepting the produce of each colony respectively imported by itself.

In 1823 Congress suspended the provisions of the laws of 1818 and 1820 in respect to certain British colonial ports, and authorized importation of colonial produce in certain British vessels coming *directly* therefrom, but only on the one condition that similar produce might be imported in our vessels to our country on equal terms, and that the British vessels thus admitted into our ports be navigated by a master and at least three-fourths of the mariners British subjects. The law of 1818 said not a word about American vessels, or any other vessel excepting British vessels, but, as I have noted, the law of 1820 prohibited the importation of any merchandise from a British colony on this continent unless it was the growth of the colony where laden, and was brought directly to us. Nothing is said therein of *exportation* from us of merchandise in vessels not British.

The reason of the change in 1823 in our policy was that in 1822 England changed her policy, and permitted American-built vessels, lawfully navigated, to import certain goods directly to the West Indies. Hence we declared that the law of 1823 should remain in force so long only as the enumerated British colonial ports were open to our vessels by the British law of June 24, 1822, but if closed

the President was empowered to revive our laws of 1818 and 1820. The British ports were closed to us by an act of Parliament on July 5, 1825, and the President thereupon, on March 17, 1827, proclaimed ours closed as before.

My distinguished predecessor in this Department, Mr. Gallatin, was in that year the American Minister at London, and the following extract from his note to our Department of State, dated September 11, 1827, exhibits the situation as seen by him:

Mr. Huskisson said it was the intention of the British Government to consider the intercourse of the British colonies as being exclusively under its control, and any relaxation from the colonial system as an indulgence, to be granted on such terms as might suit the policy of Great Britain at the time it was granted. I said every question of right had on this occasion been waived on the part of the United States, the only object of the present inquiry being to ascertain whether, as a matter of mutual convenience, the intercourse might not be opened in a manner satisfactory to both countries. He (Mr. H.) said that it had appeared as if America had entertained the opinion that the British West Indies could not exist without her supplies, and that she might, therefore, compel Great Britain to open the intercourse on any terms she pleased. I disclaimed any such belief or intention on the part of the United States. But it appeared to me, and I intimated it, indeed, to Mr. Huskisson, that he was acting rather under the influence of irritated feelings on account of past events, than with a view to the mutual interests of both parties.

The irritation in England appears to have resulted from the insertion in our law of 1823 of the word "*elsewhere*" in the second section, and the incident is so suggestive of watchfulness at present that I add herewith a statement of the history of that legislation made in the Senate by Senator Smith, of Maryland, a few years afterwards:

During the Session of 1822 Congress was informed that an act was pending in Parliament for the opening of the colonial ports to the commerce of the United States. In consequence, an act was passed authorizing the President (then Mr. Monroe), in case the act of Parliament was satisfactory to him, to open the ports of the United States to British vessels by his proclamation. The

act of Parliament was deemed satisfactory, and a proclamation was accordingly issued and the trade commenced. Unfortunately for our commerce, and I think contrary to justice, a Treasury circular issued directing the collectors to charge British vessels entering our ports with the alien tonnage and discriminating duties. This order was remonstrated against by the British minister (I think Mr. Vaughan). The trade, however, went on uninterrupted. Congress met, and a bill was drafted in 1823 by Mr. Adams, then Secretary of State, and passed both Houses, with little, if any, debate. I voted for it, believing that it met, in the spirit of reciprocity, the British act of Parliament. This bill, however, contained one little word, "elsewhere," which completely defeated all our expectations. It was noticed by no one. The effect of that word "elsewhere" was to assume the pretensions alluded to in the instructions to Mr. McLane. The result was that the British Government shut their colonial ports immediately and thenceforward. This act of 1822 gave us a monopoly (virtually) of the West India trade. It admitted free of duty a variety of articles, such as Indian corn, meal, oats, peas, and beans. The British Government thought we entertained a belief that they could not do without our produce, and by their acts of the 27th of June and 5th of July, 1825, they opened their ports to all the world, on terms far less advantageous to the United States than those of the act of 1822.

President Adams alluded to the subject, in his annual message for 1827-'28 in these terms:

At the commencement of the last session of Congress they were informed of the sudden and unexpected exclusion by the British Government of access, in vessels of the United States, to all their colonial ports, except those immediately bordering upon our own territory. In the amicable discussions which have succeeded the adoption of this measure, which, as it affected harshly the interests of the United States, became a subject of expostulation on our part, the principles upon which its jurisdiction has been placed have been of a diversified character. It has at once been ascribed to a mere recurrence to the old long-established principle of colonial monopoly, and at the same time to a feeling of resentment, because the offers of an act of Parliament, opening the colonial ports upon certain conditions, had not been grasped at with sufficient eagerness by an instantaneous conformity to them. At a subsequent period it has been intimated that the new exclusion was in resentment because a prior act of Parliament, of 1822, opening certain colonial ports, under heavy and burdensome restrictions, to vessels of the United States, had not been reciprocated by an admission of British vessels from the colonies, and their cargoes, without any restriction or discrimination whatever. But be the motive of the interdiction what it may, the British Government have manifested no disposition, either by negotiation or by corresponding legislative enactments, to recede from it; and we have been given distinctly to understand that neither of the bills which were under the consideration of Congress at their last session would have been deemed sufficient in their concessions to have been rewarded by any relaxation from the British interdict. The British Government have not only declined negotiation upon the subject, but, by the principle they have assumed with reference to it, have precluded even the means of negotiation. It becomes not the self-respect of the United States either to solicit gratuitous favors or to accept as the grant of a favor that for which an ample equivalent is exacted.

The affair aroused so much emotion in the country that it entered as an element into the Presidential election which came on soon afterward and resulted in the choice of General Jackson. The opponents of the administration of President Adams insisted that the concerted legislation, and the subsequent negotiations attempted at London by that administration, miscarried because an entrance of our vessels into British Colonial ports was demanded as a *right* and not as a *privilege*. It is that distinction which has led me to emphasize the doings of a half century ago.

407 When President Jackson came to power, Mr. Van Buren instructed Mr. McLane, our minister at London, to endeavor to reopen negotiations on the basis of our willingness to accept as a "*privilege*" the entry of our vessels into British colonial ports, and

it was successful. Congress, on May 29, 1830, empowered the President, whenever satisfied that England would open to us her West Indian ports, to proclaim our own ports opened to British vessels, and the repeal or suspension of the laws of 1818, 1820, and 1823. On October 5, 1830, President Jackson issued his proclamation admitting British vessels and their cargoes to an entry into our ports from *all* British colonial ports on or near the American continent. From that beginning came the "privileges" of our vessels in Canadian ports, and it will be observed that the British and the American laws, and President Jackson's proclamation, all used the word "*vessels*" without any qualifying adjective excluding our fishing vessels.

Few of the incidents of our peaceful commercial diplomacy and legislation are more striking, as it has always seemed to me, than the incidents of this successful effort by President Jackson to promote our carrying trade. Near the end of the first term of that great soldier and ruler of men the mission to London was filled, during the recess of the Senate, by the appointment thereto of Mr. Van Buren. When his nomination came before the Senate its confirmation was resisted by the personal and party opponents of President Jackson, on the ground that the instructions to Mr. McLane, personally dictated by the President (as has since been proven), and which accomplished the recovery of our West India trade, had asked of England as a favor what was due to us as a right, had espoused the British side against the American side as theretofore represented by President Adams, and had imported the result of our Presidential struggle into a diplomatic negotiation with a foreign country. Avowedly on that ground the nomination of Mr. Van Buren was rejected in February of 1832, which rejection aided to lead up to his election to be Vice-President in the autumn of that year, and to be President for four years later.

But that is not all. Mr. Gallatin, on September 22, 1826, wrote from London to Mr. Clay, then Secretary of State, that one of the three points on which we were "vulnerable" was:

3. Too long an adherence to the opposition of her (England's) right of laying *protective duties*. This might have been given up as soon as the act of 1825 was passed.

In the debate in the Senate on Mr. Van Buren's confirmation, those (including Mr. Webster and Mr. Clay) who condemned the nomination contended that President Adams was right in rejecting the British offer of 1825, because it only covered the carrying trade, as well as our *vessels*, but left our *products* subject to protective duties levied by England at her West India Ports!

THE TREATY OF 1815.

A full appreciation of political, diplomatic, and party events from the beginning of our history down to President Jackson's beneficent achievement will make it plain why we have not a treaty with Great Britain to regulate commerce with her Colonies on this continent as we have with British ports and territories "*in Europe*." There will be found in our Statute-books some thirty treaties between ourselves and foreign Governments stipulating that the vessels of each and their cargoes, shall have free access to all the ports of

the other which are open to foreign commerce. Our treaty of 1815 with Great Britain declares:

There shall be between the territories of the United States of America and all the territories of his Britannic Majesty in Europe a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports, and rivers in the territories aforesaid to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to have and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, *but subject always to the laws and statutes of the two countries respectively.*

Then, in the second section is this stipulation:

The *intercourse* between the United States and his Britannic Majesty's possessions in the West Indies, and on the continent of North America, shall not be affected by any of the provisions of this article, but each party shall remain in the complete possession of its *rights* with respect to such an intercourse.

I am not aware of any treaty, excepting the fishing clauses of the treaty of 1818, to which I have referred, and the treaty of 1871 (to which I will refer hereafter), or of any rule of international law binding on the United States, which now constrains Great Britain to commercial intercourse with ourselves in her Canadian ports. My previous training, and the line of my studies and occupations in this Department, warn me to speak with caution, and subject to correction from my very able and better instructed colleague, Mr. Bayard, on the subject to which your committee has invited my attention, and on which you have requested my opinion; but were the situation reversed, and were England to demand, as a *right*, commercial access to our ports for Canadian vessels which, for reasons satisfactory to ourselves, we saw fit to exclude, or if Congress were, by legislation conforming to the treaty of 1815, to even exclude British vessels covered by that treaty, I think we should say, and be entitled to say, that such commercial advantages in all our bays, harbors, and ports, from Mount Desert to Cape Cod, and from Cape Cod to Cape Hatteras, belong to us to interpret as strictly, and either to hold exclusively for our own vessels, if we see fit so to do, or to exchange them for equivalents. That question, touching

408 the commercial relation of all our vessels to open Canadian ports, I deem quite apart from the relation of our fishing vessels to taking, drying, or curving fish on Canadian coasts under the treaties of 1783 and 1818, and the relation of those vessels to shelter, repairs, wood and water, under the treaty of 1818 while on those coasts.

THE REAL ISSUE.

This long introduction to clear away irrelevant matter, which the necessity of rapid dictation suggested by your letter prevents me from shortening as I could wish, brings me to say that, from the point of view of this Department, Great Britain can, if she deems it for her interest, or necessary for her safety, retreat from the understandings and agreements of 1830. Whether such retreat therefrom is to be deemed by us an unfriendly act, will depend on its motives and environment. To be sure the arrangement of 1830 was not in

a technical sense a treaty from the engagements of which neither party can withdraw without the consent of the other amicably obtained, but it was to be a rule for two powerful States. It was a pact representing the will and opinions of each. It was a deliberate international act. It was a bargain, in which one Government bought a privilege at the price of an equivalent given to the other. It was a contract, solemnized, and attested, by the law-making, instead of the treaty-making, power of the two nations.

What we are confronted by is the royal assent, given by the Queen in council on November 26, 1886, to the Canadian act, entitled "An act further to amend the act respecting fisheries by foreign vessels." It begins by reciting that it is "expedient for the more effectual protection of the inshore fisheries of Canada against intrusion by foreigners." The offensive significance of that law is in the fact that, by (what I assume is law) the statute establishing the Canadian union, the governor-general must, according to his discretion, but subject to the Queen's instructions, either declare that he assents in the Queen's name to a bill passed by the houses of the Canadian Parliament, or that he withholds the Queen's assent, "or that he reserves the bill for the signification of the Queen's pleasure." The last-named alternative phrase was adopted in dealing with the Canadian law of 1886, which peremptorily closes Canadian ports to our fishing vessels seeking to trade. It empowers any of the therein designated officials to bring to, and *search*, any American vessel being within any Canadian harbor, or "hovering" in British waters. This is a revival in Canada of the theory of the ancient British "hovering act," long ago repealed in the mother country. If the search prescribed and authorized be of a fishing vessel loitering in a prohibited place, and fairly suspected of preparing there to fish in violation of law, such search, if fairly and reasonably made, may be tolerated.

Our own customs law prescribes and authorizes a similar search of foreign vessels even four leagues from our coasts. The third chapter of the thirty-fourth Title of the Revised Statutes empowers a revenue-cutter, having displayed her pennant and ensign, after a signal gun, to fire into, and bring to, any vessel liable to examination that refuses to stop and be visited and searched. But the Canadian act, thus having the royal approval, was intended, as has been openly avowed, to forfeit any American fishing vessel which is found having entered Canadian waters, or the port of Halifax, to buy ice, bait, or other articles, or for any purpose other than shelter, repairs, wood, or water. The plea is that the treaty of 1818 permits and stipulates for such legislation. That we deny, and reply that such legislation is a repeal and annulment by England of the arrangement made in 1830, and to that repeal we are entitled to *respond* by a similar repeal of our own law, and by a refusal hereafter, and while debate or negotiation goes on, to confer hospitality, or any privileges whatever in our ports, on Canadian vessels or boats of any sort. A violation of comity may be looked upon as an unfriendly act, but not a cause for a just war. England may judge for herself of the nature and extent of the comity and courtesy she will show to us. In the present case we do not propose retaliation; we simply respond. We, too, suspend comity and hospitality.

FISHING VESSELS ARE AMERICAN VESSELS.

I learn that Canada attempts to excuse or palliate her act by saying that she has only withdrawn commercial comity and hospitality from our fishing vessels and their catch; but the plea is superficial and invalid. President Jackson's arrangement of 1830 made no classification of American vessels, but included all that were made vessels of the United States by this Department.

Vessels of the United States have always been defined by Congress, and notably in 1793, as those of five tons burden and upwards having licences; those of twenty tons and upwards having enrolments; and those possessed of certificates of registry, provided those documents were legally issued and are in force. Certificates of registry are, as a rule, *required* for vessels engaged in foreign trade, and are *permitted* to vessels engaged in domestic trade. Vessels of twenty tons burden and upward, enrolled in pursuance of law, and having a licence in force, are made vessels of the United States, entitled to the privileges of vessels employed in the coasting trade and fisheries.

The same qualifications and requirements are for registry as for enrolment. If vessels are to be coasters or fishers, they must be *licensed*, and only for one year, and cannot carry on any other business unless another document has been obtained from the Treasury, which is a permit to "touch and trade." A registered vessel cannot be licensed to carry on the North Atlantic fisheries, but she may carry on such fisheries without a license. Enrolled vessels, having a license, may generally go from one of our ports to another without entry or clearance, but registered vessels must enter and clear. A registered vessel, carrying on whale fishery, may enter foreign ports for trade, but a whaler only enrolled and licensed cannot thus enter. No vessel from a foreign port can enter, and unload, excepting at ports designated by Congress; nor can merchandise come in vessels of less burden than thirty tons, and the cargo must be accompanied by a manifest, which must be exhibited to the first boarding officer, and again on entry. If an American vessel, licensed for fishing, shall be

found within three leagues of our coast with *foreign* goods on board of greater value than \$500, she is liable to forfeiture with all her cargo, unless possessed of a permit "to touch and trade" at foreign ports, and then she must regularly enter, surrender her permit, pay duties, and be subject to all regulations for vessels arriving from foreign ports.

One incident will be sufficient to explain that the *law* defined which vessels, "and none others," shall be American vessels. In 1838, Mr. Justice Story had decided that under the statute, no *registered* vessel was then entitled to carry on the whale fisheries as an American vessel, or to the privileges of an American vessel. By the law of April 4, 1840, Congress cured the defect.

We separate American vessels into subdivisions, as by registry, by enrolment and license, by license. Pleasure-yachts make another subdivision. But foreign Governments cannot say that a vessel, regularly documented, is by reason of her class, not an American vessel. The classifications referred in the beginning, and refer now, chiefly to fees, tonnage taxes, entrance and clearance, production of manifests, passenger-lists, oaths, unlading, and similar things, when our vessels are in our own ports. Ferry-boats are American vessels,

but they need not enter nor clear, nor pay entrance or clearance fees. A registered vessel from district to district is, as to clearance and entrance, subject to the same rules as vessels under frontier license and enrolment, and, on the other hand, a licensed and enrolled vessel touching at a foreign port, does not thereby become subject to our tonnage *duty*, nor to clearance and entrance *fees* as if from a foreign port. It is for our own convenience that vessels are classified as fishermen, inasmuch as our laws control by minute regulations the business of fishing in respect to contracts with those so employed. They punish fishermen who desert, and protect fishermen in the divisions of the proceeds of the catch, but none of the laws thus defining and controlling fishing vessels make the vessels any the less American vessels, which within the concerted legislation of 1830, and President Jackson's proclamation of that year, are entitled to commercial privileges in Canadian ports.

WHAT SHALL THE RESPONSE BE?

And now comes the question: what shall be the character and limitations of the response? Shall we only exclude Canadian fish, or such fish and all Canadian vessels, or both of them, and all merchandise coming from Canada by any sort of a vehicle, including the vehicle?

Under what conditions can negotiation go on with the least injury to ourselves—our dignity and self-respect? I cannot believe that the Government at London will persist in its present course unless inspired, for some occult reason, by a purpose to break friendly relations with ourselves, or otherwise under the will and at the mercy of its colony.

I have not had the time or strength, since your letter came, to go through the British statutes in order to ascertain in what respect the British "North American act" of 1867 has been modified, but under that enactment the Canadian Dominion is, in one sense, and in regard to specified subjects, self-governing. The Queen is, to be sure, empowered, by and with the advice and consent of the two Canadian houses, to make laws for Canada, but the following matters are defined as thus within the control of the provincial legislatures:

1. The regulation of trade and commerce.
10. Navigation and shipping.
12. Sea-coast and inland fisheries.

But yet none of those are defined as subjects within the *exclusive* powers of the provincial legislatures, so as to disregard the Queen's assent.

ARTICLE XXIX OF ALABAMA TREATY.

Whether or not Article XXIX of the Alabama Treaty was left standing by the Act of Congress of June 28, 1883, and the President's proclamation thereunder, is an important preliminary question in the solution of the Canadian problem.

Articles XVIII and XIX, dealing with (compensated) reciprocal sea-fishing liberties, and Article XXI dealing with reciprocal fish-oil and fish free markets, and Article XXX, dealing with reciprocal conveyance of merchandise in bond, specified the terms of years they should be in force. So did Article XXIX, dealing with the recip-

rocal privilege of transit, duty free, "of goods, wares and merchandise" arriving at certain American ports and destined for Canada, or arriving at any North American British ports and destined for the United States. Its language is this: "It is agreed that for the term of years mentioned in Article XXXIII," which article defines the specification thus: "In force for the period of ten years from the date at which they may come into operation; and further, until the expiration of two years after either of the high contracting parties shall have given notice to the other of its wish to terminate the same, each of the high contracting parties being at liberty to give such notice to the other at the end of said period, of ten years or at any time afterwards"; which is to say, 10 years plus x years plus 2 years; x being a variable determinable by the wish of either party.

The term of years thus identically specified in all the Articles XVIII, XIX, XXI, (XXVIII dealing with free British navigation of Lake Michigan), XXIX and XXX; thus defined in Article XXXIII, has been interpreted according to its obvious significance, with respect to all but two of those Articles (XXVIII and XXIX) by the initiative and act of the United States, June 28, 1883. Is this Government to be precluded from any other term of years of the XXIXth Article than that thus specified, defined, and interpreted? Or does the "term of years" mentioned in Article XXIX, as prescribing and limiting its life, refer to and include the variable x in Article XXXIII, and contemplate its determination as to Article XXIX, specifically, in order to close its existence?

410 If the stipulations of Article XXIX are now binding on

Great Britain, then it is indisputable that our vessels are entitled by the treaty to enter fish, as merchandise, at the proper custom-house of any Canadian port, for conveyance in bond to the United States. Of necessity, the vessel containing the fish is entitled to enter the port, in order to enter the merchandise at the proper custom-house.

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No. 235.—1887, March 9: *Letter from Lord Lansdowne (Governor-General of Canada) to Sir Henry Holland (British Colonial Secretary).*

[No. 67]

OTTAWA, 9th March, 1887.

SIR,—In consequence of the repeated complaints which have been addressed to Her Majesty's Government, by that of the United States, of the manner in which the Canadian authorities have acted in enforcing against American fishing vessels the provisions of the Convention of 1818 and the Acts of Parliament passed for the purpose of giving effect to that Treaty, I have thought it my duty to invite the special attention of my advisers to the action of the Dominion fisheries police during the last fishing season, and to ask them to consider, upon a general review of the events of that season, and of the different cases in which vessels had been either denied privileges or had been seized or detained within Canadian waters for alleged infractions of the law, or otherwise interfered with by the officials of the Dominion; whether any amendment was called for in the instructions which had been issued by the Fisheries Department to the

officers in its employment, or in the procedure which has been resorted to in dealing with infractions of the Fishery or Customs Laws.

2. With regard to the spirit in which the Government of the Dominion desires to act in regard to these questions, I am glad to refer you again to the printed instructions issued on the 16th March, 1886, to all fishery officers in command of Government steamers and vessels engaged in the protection of the Inshore Fisheries of Canada. These instructions, after carefully defining the circumstances under which foreign fishing vessels may be detained, enjoin upon the officers to whom the instructions are addressed, the duty of performing the services in which they are engaged, with forbearance and discrimination.

It is especially pointed out that "foreign fishing craft may be driven into Canadian waters by violent or contrary winds, by strong tides or through misadventure or some other cause independent of the will of the master and crew." In such cases the fishery officer is desired to take these circumstances into his consideration and to "satisfy himself with regard thereto before taking the extreme step of seizing or detaining any vessels." In another passage special reference is made "to the general conciliatory spirit in which it is desirable that you should carry out these instructions, and the wish of Her Majesty's Government that the rights of exclusion should not be strained."

3. The information given to me by my Ministers affords no reason for believing that during the past season there has been any appreciable departure from the intentions of the framers of the instructions which I have quoted.

4. In almost every case in which complaints of the kind to which I have referred have been forwarded to me by your predecessors, I have been able to supply them with full information which has, I venture to think, been sufficient to show that as a rule, the complaints were founded upon *ex parte* and misleading statements and the action of the Canadian authorities entirely warranted by treaty and law. It is, indeed, I think, a matter for congratulation—considering the fact that my Government had to deal on the one hand with a body of fishermen accustomed to resort without molestation to Canadian waters and likely to resent any interference with the freedom of access which such fishermen had heretofore enjoyed, and on the other with a newly constituted police force of which the members were necessarily without experience in the novel and delicate duties entrusted to them, that no serious mistakes should have so far been committed.

5. I am, however, able to assure you that should there be any particular in respect to which Her Majesty's Government may desire to see the instructions already issued amended so as to prevent the possibility of hardships to vessels *bonâ fide* resorting to Canadian waters for any of the purposes permitted by the Convention of 1818, my Government will take into its favourable consideration the suggestions which you may be disposed to make with this object.

6. In this connection, however, I may point out that in the despatches which have been addressed to Her Majesty's Government by Mr. Bayard, as well as in the reports presented to Congress, with a view to justify legislation upon these subjects, objection has been

taken not only to the interpretation which Canadian authorities have placed upon the law which they were called upon to administer, but apparently to the allowance of any discretion whatever to Canadian officials in dealing with acts of trespass committed by American vessels in Canadian waters. Of this a conspicuous illustration is afforded by the language used in the report recently presented to Congress by Mr. Edmunds, from the Committee on Foreign Relations, which contains the following passage:—

On the 12th May, 1870, the Dominion Act, 33 Vic., chap. 15, was passed, repealing the third section of the last-mentioned Act on the subject of bringing vessels into port, &c., and provided, in lieu thereof, that any of the officers or persons before mentioned might bring any vessel being within any harbour in Canada, or hovering in British waters, within three miles of the coast into port, search her cargo, examine her master on oath, &c., without any previous notice to depart, which had been required by the former Act. So that an American vessel fishing at sea, being driven by stress of weather, want of wood or water, or need of repairing damages, which should run into a Canadian harbour, under the right reserved to it by the Treaty of 1818, the moment her anchor was dropped or she was within the shelter of a headland was, at the discretion of the Canadian official, to be immediately seized and carried into port, which might be, and often would be, many miles from the place where she could have her safe shelter or could obtain her wood and water or repair her damages.

The Committee thinks it is not too much to say that such a provision is in view of the treaty and of the common principles of comity among nations, grossly in violation of rights secured by the treaty and of that friendly conduct of good neighbourhood, that should exist between civilised nations holding relations such as ought to exist between the United States and Her Majesty's Dominions. * * *

From all this it would seem that it is the deliberate purpose of the British Government to leave it to the individual discretion of each one of the numerous subordinate magistrates, fishery officers, and custom officers of the Dominion of Canada to seize and to bring into port any American vessels, whether fishing or other, that he finds within any harbour in Canada, or hovering within Canadian waters,

7. It is, I venture to submit, impossible to contrive any system for enforcing regulations for the protection of the Canadian Fisheries, or for the prevention of smuggling along the Canadian coast, no matter how liberal the spirit in which those regulations might be conceived, under which the initiative to be taken in each case should not be left to "the individual discretion" of Canadian officials. If no such discretion is allowed to these, if every intruding vessel is to be free after committing an act of trespass to depart without hindrance from the place in which that act was committed, subject merely to the chance of her being made liable for subsequent legal proceedings, the protection which it was intended to afford to the interests of the Dominion would become illusory and valueless.

8. The same argument applies to the enforcement against the American fishing vessels of the Canadian Customs Law. The acts of vessels which have been proceeded against under this law are constantly represented, as for instance on page 10 of the Report already quoted to be "merely formal or technical violations of some Canadian Customs Statute or Regulation." The Statute which has been enforced in these cases is, as I have more than once had occasion to point out, one which is consistently put into operation against all vessels resorting to Canadian waters nor it would it be possible to cease enforcing it against a particular class of vessels without giving to them opportunities for systematically, and with complete impunity, evad-

ing the law upon coasts of which the configuration is particularly favourable to the operations of smugglers.

9. For these reasons I cannot hold out the expectation that my Government will abandon the position which I have described, and which may be summed up in the statement that it cannot recognise the right of the United States' fishing vessels to resort to Canadian waters except for the purposes specified in the Convention of 1818, and that it considers that its officials should have the discretion of determining in what cases and to what extent, subject to the ultimate decision of the courts, vessels entering those waters for a lawful purpose should comply with the requirements of the municipal law of the Dominion. With this reservation, my Government desires to afford to all foreign vessels every facility for availing themselves of the privileges to which they are entitled, and to avoid, as far as possible, attaching to the exercise of those privileges any condition of an irritating or vexatious character.

10. If you should be of opinion that any alterations are desirable in the procedure of the local authorities or in the instructions to which I have already referred, I trust that you will favour me with an expression of your views.

I have, &c.,

(Sd.)

LANSDOWNE.

The Right Hon. Sir HENRY HOLLAND, Bart., G.C.M.G.,

&c., &c., &c.

No. 236.—1887, *March 10: Letter from Governor-General of Canada to Sir Henry Holland.*

Confidential.

GOVERNMENT HOUSE,
Ottawa, 10th March, 1887.

SIR, I had the honour of receiving your telegram of the 8th instant, in which you suggested that my Government should accept, subject to certain amendments, the proposal contained in Article III of Mr. Bayard's Memorandum, under which Her Majesty's Government and that of the United States would send two vessels each to cruise during the fishing season in the Gulf of St. Lawrence, and on the coast of Nova Scotia, for the purpose of investigating cases in which fishing vessels of the United States might be seized for violation of the provisions of the Convention of 1818.

My despatch "confidential" of December 28th, 1886, and the Order in Council enclosed in my despatch "secret" of February 1st, contained a reference to some of the objections felt by my
412 Government to the procedure described in this Article. The amendments which are suggested in your telegram would, to some extent, but not entirely, remove those objections.

Under the Article as it would stand after the introduction of your amendments, a vessel seized for contravention of the Convention of 1818 would, except where the commanding officers of the two "national vessels" were unanimous in considering that the charge was not sustained, be sent for trial before the Vice-Admiralty Court at Halifax. While in this respect the Article as amended would be less open to objection than in its original shape, I fear that there are practical difficulties in the way of its adoption which are likely to be insurmountable, in spite of the earnest desire of my advisers to

consider favourably any recommendations made in connection with these matters by Her Majesty's Government.

Owing to the absence from Ottawa of some of my Ministers, it is not probable that I shall be able to obtain a final expression of their views for two or three days. I may, however, in the meantime refer briefly to some of the points which will undoubtedly be raised before the proposal, even in its amended shape, can be entertained.

1. It would appear from the words of the Article, that a jurisdiction in all cases of seizure is to be given to the naval officers in command of the two "national vessels" detailed for this service. One of these officers will presumably belong to the American and the other to the British naval service. My Government will, I have no doubt, object to empowering a tribunal thus constituted, in which no Canadian representative will have a place, to deal with offences committed within Canadian territory, and against Canadian law.

2. Such a tribunal would not be competent to deal in a manner which would inspire public confidence, with intricate questions affecting international rights, such as those which have been raised in connection with the Fisheries dispute.

3. A floating tribunal, such as that which would be constituted under the Article, would have the greatest difficulty in obtaining evidence as to matters of fact. The offences for which vessels have been, or are likely to be seized, are as a rule committed in close proximity to the shore, and the bulk of the evidence relating to the offence is obtained from persons resident on shore, and could not be obtained by an examination merely of the masters and crews of the seized vessel, or of the vessel by which the seizure was made. This would be the case more especially in regard to such violations of the Convention, as might be involved by the purchase of bait or of supplies. In the same way evidence in regard to the precise position of a vessel alleged to have been fishing within the proscribed limits could often not be obtained, except by investigation conducted on shore. Such evidence could, it is submitted, be obtained with greater ease and rapidity by the local authorities, or by the Department of Marine and Fisheries, to which all cases of seizure are at once reported by telegram, and which has great facilities for conducting local enquiries upon the spot, through its officers. In a large number of cases, such evidence has been obtained by the department within a few hours of the seizure, and you will see, on reference to the reports which I have from time to time sent you, that where the facts thus elicited did not appear to point to a deliberate or serious contravention of the law, instructions for the release of the vessel were at once sent from Ottawa by telegram.

4. The most formidable of the objections which are likely to be urged against Mr. Bayard's proposal is, however, that which will be founded upon the belief that it would be impossible for the four national vessels selected as cruisers to cover the whole of the lengthy coast line along which acts of trespass by American fishing vessels are to be anticipated. Two of these vessels would, I apprehend, become responsible for the coast from the mouth of the St. Lawrence to Cape Breton, and two others for the whole of the coast from Cape Breton to the Bay of Fundy. These vessels would, I presume, be instructed to navigate in couples. If this were not done it would be impossible to obtain an examination, such as that contemplated un-

der the wording of the Article, by "the officer in command of one of the said national vessels in conjunction with the officer in command of another of said vessels of the different nationality." The assumption that both vessels will always be available simultaneously when a case of seizure has been reported, supposes a complete agreement between the two Governments as to the instructions under which their respective vessels would act, and also between the two commanding officers as to the directions in which they would cruise. Even, however, if it were to be assumed that the two vessels would be inseparable, it is, I think, obvious that it would repeatedly happen that many days would elapse before the officer of the Canadian police vessel by which the seizure had been made was able to report his seizure to one of the "national vessels," or to obtain a hearing of the case by the officers of both those vessels. The seizure might have taken place shortly after the "national vessels" had passed the spot at which it was made on their way round the coast. It might be impossible to obtain a hearing of the case or even to report it until the trip of the two vessels had been completed. It might again happen that, while the hearing and examination of the case was proceeding in one locality, other seizures might be simultaneously made at different and distant points. In all such cases the vessel by which the seizure had been made would be compelled to detain her prize for an indefinite time thereby occasioning prolonged delay and much hardship and inconvenience to the owners and crew of the seized vessel. In almost every case of seizure or detention which has hitherto occurred the facts have, as I have already pointed out, been reported immediately by telegram to the Department of Marine and Fisheries, which has been able often within the course of a few hours, to deal expeditiously with the matter. The new arrangement suggested by Mr. Bayard would beyond all doubt, in many cases operate to the disadvantage of those whom it is designed to protect, while it is not improbable that in cases where a vessel had been detained under circumstances such as those which I have described, and where the charge was subsequently not sustained, heavy claims for damages would be preferred against the Canadian Government. The force of the above objections becomes more apparent when it is taken into consideration that the length of the coast line along which the "national vessels" would be required to operate, extends to about 3,000 miles, while the

413 police vessels by which the seizures are made, being, with two exceptions, sailing schooners, would be liable to prolonged detention by adverse weather, and would frequently find the utmost difficulty in placing themselves in communication with the "national cruisers." The same difficulty would be experienced in an even greater degree whenever the seizure of the vessel had taken place in port by an officer on shore.

5. In the event of Article III being adopted in any shape it would be necessary in line 2, after the date, "1818," to insert the words "and the laws in force for giving effect to the same." If such words were not to be inserted it is probable that the Government of the United States would refuse, as it has already, to admit the validity of the Acts of Parliament which have at different times been passed both in the United Kingdom and in Canada for the purpose of enforcing the Convention.

6. I observe that under the Article it is laid down that where it is decided that a vessel shall be subjected to a judicial examination she shall be sent for trial before the Vice-Admiralty Court at Halifax. As to this I have to observe that there are Vice-Admiralty Courts at Charlottetown, Prince Edward Island, and St. John, New Brunswick, and at Quebec, and that there appears to be no reason for invoking exclusively the jurisdiction of the Court at Halifax which is possessed in an equal degree by the other Vice-Admiralty Courts mentioned.

7. As it is expressly stated that the Article under consideration is for the purpose of executing Article I of the Convention of 1818 I presume that it is not intended to interfere in any way with the operation of the Customs Law of the Dominion, which, as you are aware, has been repeatedly put in force against fishing vessels neglecting to comply with its requirements. Care should be taken in any arrangement which may be come to with the United States that there should be no misapprehension in regard to this point.

8. I may in conclusion observe that, although it may no doubt be the case, as stated by Mr. Bayard in his letter of November 15th, 1886, that arrangements resembling in some respects that which he has advocated in the draft Article III, have been adopted by European Governments, including that of Her Majesty, for the settlement of fisheries disputes, it is open to question whether the local and political circumstances were in these cases identical with those present in the case of the Canadian fisheries. I would suggest that it would be worth while to enquire in reference to such cases whether the extent of coast line to be protected is as great, whether the points in dispute involve the construction of treaties and the right of resorting to legislation for their enforcement, or whether they are not rather limited to the more trivial disputes which arise wherever fishermen of different nationalities frequent the same fishing grounds.

9. I shall take the earliest opportunity of laying before you a fuller statement of the views of my Government. I have, however, thought it advisable to lose no time in making you aware of the general character of the objections which, in spite of its earnest desire to be guided by your recommendations in regard to these matters, it will probably urge against the adoption in any shape of the Article under consideration.

I have, &c.,

(Signed)

LANSDOWNE.

The Right Hon. Sir HENRY HOLLAND,

&c., &c., &c.

No. 237.—1887, March 24: *Letter from the Marquis of Salisbury to Mr. White (United States Minister at London) enclosing Draft Protocol communicated by Mr. Adams to the Earl of Clarendon in 1866.*

FOREIGN OFFICE, 24th March, 1887.

SIR,—In a note of the 3rd December last, addressed to my predecessor, Mr. Phelps was good enough to transmit a copy of a despatch from Mr. Bayard, dated the 15th of the preceding month, together with an outline of a proposed *ad interim* arrangement “for the settlement of all questions in dispute in relation to the fisheries on the north-eastern coast of British North America.”

Her Majesty's Government have given their most careful consideration to that communication, and it has also received the fullest examination at the hands of the Canadian Government, who entirely share the satisfaction felt by Her Majesty's Government at any indication on the part of that of the United States of a disposition to make arrangements which might tend to put the affairs of the two countries on a basis more free from controversy and misunderstanding than unfortunately exists at present. The Canadian Government, however, deprecate several passages in Mr. Bayard's despatch which attribute unfriendly motives to their proceedings, and in which the character and scope of the measures they have taken to enforce the terms of the Convention of 1818 are, as they believe, entirely misapprehended.

They insist that nothing has been done on the part of the Canadian authorities since the termination of the Treaty of Washington in any such spirit as that which Mr. Bayard condemns, and that all that has been done with a view to the protection of the Canadian fisheries, has been simply for the purpose of guarding the rights guaranteed to the people of Canada by the Convention of 1818, and of enforcing the Statutes of Great Britain and of Canada in relation to the fisheries. They maintain that such Statutes are clearly within the powers of the respective Parliaments by which they were passed, and are in conformity with the Convention of 1818, especially
 414 in view of the passage of the Convention which provides that the American fishermen shall be under such restrictions as shall be necessary to prevent them from abusing the privileges thereby reserved to them.

There is a passage in Mr. Bayard's despatch to which they have particularly called the attention of Her Majesty's Government. It is the following:

The numerous seizures made have been of vessels quietly at anchor in established ports of entry under charges which up to this day have not been particularised sufficiently to allow of intelligent defence; not one has been condemned after trial and hearing, but many have been fined, without hearing or judgment, for technical violation of alleged commercial regulations, although all commercial privileges have been simultaneously denied to them.

In relation to this paragraph the Canadian Government observe that the seizures of which Mr. Bayard complains have been made upon grounds which have been distinctly and unequivocally stated in every case; that, although the nature of the charges has been invariably specified and duly announced, those charges have not in any case been answered; that ample opportunity has in every case been afforded for a defence to be submitted to the Executive authorities, but that no defence has been offered beyond the mere denial of the right of the Canadian Government; that the Courts of the various provinces have been open to the parties said to be [have been] aggrieved, but that not one of them has resorted to those Courts for redress. To this it is added that the illegal acts which are characterised by Mr. Bayard as "technical violations of alleged commercial regulations," involved breaches in most of the cases not denied by the persons who had committed them, of established commercial regulations which, far from being specially directed or enforced against citizens of the United States, are obligatory upon all vessels (includ-

ing those of Canada herself) which resort to the harbours of the British North American coast.

I have thought it right, in justice to the Canadian Government, to embody in this note almost in their own terms their refutation of the charges brought against them by Mr. Bayard; but I would prefer not to dwell on this part of the controversy, but to proceed at once to the consideration of the six Articles of Mr. Bayard's Memorandum in which the proposals of your Government are embodied.

Mr. Bayard states that he is "encouraged in the expectation that the propositions embodied in the Memorandum will be acceptable to Her Majesty's Government, because in the month of April, 1866, Mr. Seward, then Secretary of State, sent forward to Mr. Adams, at that time United States' Minister in London, the draft of a Protocol which, in substance, coincides with the 1st Article of the proposal now submitted."

Article 1 of the Memorandum, no doubt to some extent resembles the draft Protocol submitted in 1866, by Mr. Adams to Lord Clarendon (of which I enclose a copy for convenience of reference), but it contains some important departures from its terms.

Nevertheless, the Article comprises the elements of a possible accord, and if it stood alone I have little doubt that it might be so modelled, with the concurrence of your Government, as to present an acceptable basis of negotiation to both parties. But, unfortunately, it is followed by other Articles, which, in the view of Her Majesty's Government and that of Canada, would give rise to endless and unprofitable discussion, and which if retained, would be fatal to the prospect of any satisfactory arrangement, inasmuch as they appear, as a whole, to be based on the assumption that upon the most important points in the controversy, the views entertained by Her Majesty's Government and that of Canada are wrong, and those of the United States' Government are right, and to imply an admission by Her Majesty's Government and that of Canada that such assumption is well founded.

I should extend the present note to an undue length were I to attempt to discuss in it each of the Articles of Mr. Bayard's Memorandum, and to explain the grounds on which Her Majesty's Government feel compelled to take exception to them. I have, therefore, thought it more convenient to do so in the form of a counter-Memorandum which I have the honour to enclose, and in which will be found in parallel columns, the Articles of Mr. Bayard's Memorandum and the observations of Her Majesty's Government thereon.

Although as you will perceive on a perusal of those observations, the proposal of your Government as it now stands is not one which could be accepted by Her Majesty's Government, still Her Majesty's Government are glad to think that the fact of such a proposal having been made affords an opportunity which, up to the present time, had not been offered for an amicable comparison of the views entertained by the respective Governments.

The main principle of that proposal is that a Mixed Commission should be appointed for the purpose of determining the limits of those territorial waters within which, subject to the stipulations of the Convention of 1818, the exclusive right of fishing belongs to Great Britain.

Her Majesty's Government cordially agree with your Government in believing that a determination of these limits would, whatever may be the future commercial relations between Canada and the United States either in respect of the fishing industry or in regard to the interchange of other commodities, be extremely desirable and they will be found ready to co-operate with your Government in effecting such settlement.

They are of opinion that Mr. Bayard was justified in reverting to the precedent afforded by the negotiations which took place upon this subject between Great Britain and the United States after the expiration of the Reciprocity Treaty of 1854, and they concur with him in believing that the draft Protocol communicated by Mr. Adams in 1866 to the Earl of Clarendon affords a valuable indication of the lines upon which a negotiation directed to the same points might now be allowed to proceed.

Mr. Bayard has himself pointed out that its concluding
415 paragraph, to which Lord Clarendon emphatically objected, is not contained in the 1st Article of the Memorandum now forwarded by him; but he appears to have lost sight of the fact that the remaining Articles of that Memorandum contain stipulations not less open to objection, and calculated to affect even more disadvantageously the permanent interests of the Dominion in the fisheries adjacent to its coasts.

There can be no objection on the part of Her Majesty's Government to the appointment of a Mixed Commission, whose duty it would be to consider and report upon the matters referred to in the three first Articles of the draft Protocol communicated to the Earl of Clarendon by Mr. Adams in 1866.

Should a Commission instructed to deal with these subjects be appointed at an early date, the result of its investigations might be reported to the Governments affected without much loss of time. Pending the termination of the questions which it would discuss, it would be indispensable that United States' fishing vessels entering Canadian bays and harbours should govern themselves not only according to the terms of the Convention of 1818, but by the Regulations to which they, in common with other vessels, are subject while within such waters.

Her Majesty's Government, however, have no doubt that every effort will be made to enforce those Regulations in such a manner as to cause the smallest amount of inconvenience to fishing vessels entering Canadian ports under stress of weather, or for any other legitimate purpose.

But there is another course which Her Majesty's Government are inclined to propose, and which, in their opinion, would afford a temporary solution of the controversy equally creditable to both parties.

Her Majesty's Government have never been informed of the reasons which induced the Government of the United States to denounce the Fishery Articles of the Treaty of Washington, but they have understood that the adoption of that course was in a great degree the result of a feeling of disappointment at the Halifax Award, under which the United States were called upon to pay the sum of £1,100,000, being the estimated value of the benefits which would accrue to them, in excess of those which would be derived by Canada

and Newfoundland, from the operation of the Fishery Articles of the Treaty.

Her Majesty's Government and the Government of Canada, in proof of their earnest desire to treat the question in a spirit of liberality and friendship, are now willing to revert for the coming fishing season, and, if necessary, for a further term, to the condition of things existing under the Treaty of Washington, without any suggestion of pecuniary indemnity.

This is a proposal which, I trust, will commend itself to your Government as being based on that spirit of generosity and goodwill which should animate two great and kindred nations, whose common origin, language, and institutions constitute as many bonds of amity and concord.

I have, &c.,

(Sd.)

SALISBURY.

[Draft Protocol communicated by Mr. Adams to the Earl of Clarendon in 1866, enclosed in above.]

Whereas in the 1st Article of the Convention between the United States and Great Britain concluded and signed in London on the 26th October, 1818, it was declared that—

The United States hereby renounce, for ever, any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America, not included within certain limits heretofore mentioned.

And whereas differences have arisen in regard to the extent of the above-mentioned renunciation the Government of the United States and Her Majesty the Queen of Great Britain, being equally desirous of avoiding further misunderstanding, have agreed to appoint, and do hereby authorise the appointment, of a Mixed Commission for the following purposes, namely:—

1. To agree upon and define, by a series of lines, the limits which shall separate the exclusive from the common right of fishery, on the coasts and in the seas adjacent, of the British North American Colonies, in conformity with the 1st Article of the Convention of 1818. The said lines to be regularly numbered, duly described, and also clearly marked on charts prepared in duplicate for the purpose.

2. To agree upon and establish such regulations as may be necessary and proper to secure to the fishermen of the United States the privilege of entering bays and harbours for the purpose of shelter; and of repairing damages therein, of purchasing wood, and of obtaining water; and to agree upon and establish such restrictions as may be necessary to prevent the abuse of the privilege reserved by said Convention to fishermen of the United States.

3. To agree upon and recommend the penalties to be adjudged, and such proceedings and jurisdiction as may be necessary to secure a speedy trial and judgment with as little expense as possible, for the violation of rights and the transgression of the limits and restrictions which may be hereby adopted.

Provided, however, that the limits, restrictions and regulations which may be agreed upon by the said Commission shall not be final, nor have any effect, until so jointly confirmed and declared by the United States and Her Majesty the Queen of Great Britain, either

by Treaty or by laws mutually acknowledged and accepted by the President of the United States, by and with the consent of the Senate and by Her Majesty the Queen of Great Britain.

416 Pending a definitive arrangement on the subject, the United States' Government engages to give all proper orders to officers in its employment; and Her Britannic Majesty's Government engages to instruct the proper Colonial or other British officers to abstain from hostile acts against British and United States' fishermen respectively."

No. 238.—1887, July 12: Letter from Mr. Bayard to Mr. Phelps, enclosing copy proposed Arrangement with British Observations thereon and reply of United States thereto.

(Extract.)

DEPARTMENT OF STATE,
Washington, July 12, 1887.

SIR: On March 24 last the Marquis of Salisbury made reply to your note to him of December 3, 1886, and communicated the views of the Canadian Government upon the *ad interim* arrangement proposed by the Government of the United States, under date of the 15th of November preceding, for the settlement of the fishery disputes.

This reply of his lordship and the "observations" of the Canadian authorities upon the proposal for an arrangement were conveyed in Mr. White's dispatch of March 30th, and received at this Department April 11 last, when it had my immediate consideration.

An answer was prepared forthwith to the note of his lordship, as well as to the "observations," and I now enclose two copies of the latter, which, for convenience and intelligibility, has been printed as a third parallel column to the original proposal and the Canadian "observations."

I am, etc.,

T. F. BAYARD.

FISHERIES ARRANGEMENT PROPOSED BY UNITED STATES, WITH "OBSERVATIONS" OF BRITISH GOVERNMENT AND REPLY OF GOVERNMENT OF UNITED STATES.

Ad interim Arrangement proposed by the United States' Government.

ARTICLE I.

WHEREAS, in the 1st Article of the Convention between the United States and Great Britain, concluded and signed in London on the 20th October, 1818, it was agreed between the High Contracting Parties "that the inhabitants of the said United States shall have for ever, in common with the subjects of His Britannic Majesty, the lib-

erty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours, and creeks, from Mount Joly on the southern coast of Labrador, to and through the Straits of Belleisle, and thence northwardly indefinitely along the coast, without

prejudice, however, to any of the exclusive rights of the Hudson's Bay Company; and that the American fishermen shall also have liberty for ever to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland, here above described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at

such portions so settled without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground;" and was declared that "the United States hereby renounce for ever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within 3 marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits; provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter, and of repairing damages therein, of purchasing wood, and obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them;" and whereas differences have arisen in regard to the extent of the above-mentioned renunciation, the Government of the United States and Her Majesty the Queen of Great Britain, being equally desirous of avoiding further misunderstanding, agree to appoint a Mixed Commission for the following purposes, namely:

1. To agree upon and establish by a series of lines the limits which shall separate the exclusive from the common right of fishing on the coast and in the adjacent waters of the British North American Colonies, in conformity with the 1st Article of the Convention of 1818, except that the bays and harbours from which American fishermen are in the future to be excluded, save

for the purposes for which entrance into the bays and harbours is permitted by said Article, are hereby agreed to be taken to be such bays and harbours as are 10 or less than 10 miles in width, and the distance of 3 marine miles from such bays and harbours shall be measured from a straight line drawn across the bay or harbour, in the part nearest the entrance, at the first point where the width does not exceed 10 miles, the said lines to be regularly numbered, duly described, and also clearly marked on Charts prepared in duplicate for the purpose.

2. To agree upon and establish such regulations as may be necessary and proper to secure to the fishermen of the United States the privilege of entering bays and harbours for the purpose of shelter and repairing damages therein, of purchasing wood, and of obtaining water, and to agree upon and establish such restrictions as may be necessary to prevent the abuse of the privilege reserved by said Convention to the fishermen of the United States.

3. To agree upon and recommend the penalties to be adjudged, and such proceedings and jurisdiction as may be necessary to secure a speedy trial and judgment, with as little expense as possible, for the violators of rights and the transgressors of the limits and restrictions which may be hereby adopted:

Provided, however, that the limits, restrictions, and regulations which may be agreed upon by the said Commission shall not be final, nor have any effect, until so jointly confirmed and declared by the United States and Her Majesty the Queen of Great Britain, either

by Treaty or by laws mutually acknowledged.

Observations on Mr. Bayard's Memorandum.

THE most important departure in this Article from the Protocol of 1866 is the interpolation of the stipulation, "that the bays and harbours from which American vessels are in future to be excluded, save for the purposes for which entrance into bays and harbours is permitted by said Article, are hereby agreed to be taken to be such harbours as are 10, or less than 10, miles in width, and the distance of 3 marine miles from such bays and harbours shall be measured from a straight line drawn across the bay or harbour in the part nearest the entrance at the first point where the width does not exceed 10 miles."

This provision would involve a surrender of fishing rights which have always been regarded as the exclusive property of Canada, and would make common fishing grounds of the territorial waters which, by the law of nations, have been invariably regarded both in Great Britain and the United States, as belonging to the adjacent country. In the case, for instance, of the *Bale des Chaleurs*, a peculiarly well-marked and almost land-locked indentation of the Canadian coast, the 10-mile line would be drawn from points in the heart of Canadian territory, and almost 70 miles distance from the natural entrance or mouth of the bay. This would be done in spite of the fact that, both by Imperial legislation and by judicial interpretation, this bay has been declared to form a part of the territory of Canada. (See Imperial Statute 14 & 15 Vict., cap.

63; and "Mouat v. McPhee," [Mowat v. McFee] 5 Sup. Court of Canada Reports, p. 66.)

The Convention with France in 1839, and similar Conventions with other European Powers, form no precedents for the adoption of a 10-mile limit. Those Conventions were doubtless, passed with a view to the geographical peculiarities of the coast to which they related. They had for their object the definition of the boundary-lines which, owing to the configuration of the coast, perhaps, could not readily be settled by reference to the law of nations, and involve other conditions which are inapplicable to the territorial waters of Canada.

This is shown by the fact that in the French Convention the whole of the oyster-beds in Granville Bay, otherwise called the Bay of Cancale, the entrance of which exceeds 10 miles in width, were regarded as French, and the enjoyment of them is reserved to the local fishermen.

A reference to the action of the United States' Government, and to the admission made by their statesmen in regard [to] bays on the American coasts, strengthens this view; and the case of the English ship "Grange" shows that the Government of the United States in 1793 claimed Delaware Bay as being within territorial waters.

Mr. Bayard contends that the rule which he asks to have set up was adopted by the Umpire of the Commission appointed under the Convention of 1853 in the case of the United States' fishing-schooner "Washington," that it was by him applied to the Bay of Fundy, and that it is for this reason applicable to other Canadian bays.

It is submitted, however, that as one of the headlands of the bay of Fundy is in the territory of the United States any rules of international law applicable to that bay are not therefore equally applicable to other bays the headlands of which are both within the Territory of the same Power.

The second paragraph of the 1st Article does not incorporate the exact language of the Convention of 1818. For instance, the words "and for no other purpose whatever," should be inserted after the mention of the purposes for which vessels may enter Canadian waters, and after the words "as may be necessary to prevent" should be inserted, "their taking, drying, or curing fish therein, or in any other manner abusing the privileges reserved," &c.

To make the language conform correctly to the Convention of 1818, several other verbal alterations, which need not be enumerated here, would be necessary.

Reply to "Observations" on Proposal.

A prior agreement between the two Governments as to the proper definition of the "bays and harbours" from which American fishermen are hereafter to be excluded, would not only facilitate the labours of the proposed Commission, by materially assisting it in defining such bays and harbours, but would give to its action a finality that could not otherwise be expected. The width of ten miles was proposed not only because it had been followed in Conventions between many other powers, but also because it was deemed reasonable and just in the present

case; this Government recognizing the fact that, while it might have claimed a width of six miles as a basis of settlement, fishing within bays and harbours only slightly wider would be confined to areas so narrow as to render it practically valueless and almost necessarily expose the fishermen to constant danger of carrying their operations into forbidden waters. A width of more than ten miles would give room for safe fishing more than three miles from either shore, and thus prevent the constant disputes which this Government's proposal, following the Conventions above noticed, was designed to avert.

It was not known to involve the surrender of rights "which had always been regarded as the exclusive property of Canada," or to "make common fishing ground of territorial waters, which, by the law of nations, have been invariably regarded, both in Great Britain and the United States, as belonging to the adjacent country."

The case of the Baie des Chaleurs, the only case cited in this relation, does not appear to sustain the "observation" above quoted. From 1854 until 1866 American fishermen were permitted free access to all territorial waters of the provinces under Treaty stipulations. From 1866 until 1870 they enjoyed similar access under special licences issued by the Canadian Government. In 1870 the licence system was discontinued, and under date of May 14 of that year a draft of Special Instructions to officers in command of the marine police, to protect the inshore fisheries, was submitted by Mr. P. Mitchell, Minister of Marine and Fisheries of the

Dominion, to the Privy Council, and on the same day was approved. In that draft the width of ten miles, as now proposed by this Government, was laid down as the definition of the bays and harbours from which American fishermen were to be excluded; and in respect to the Bay des Chaleurs, it was directed that the officers mentioned should not admit American fishermen "inside of a line drawn across at that part of such bay where its width does not exceed ten miles." (*See Sess. Pap., 1870; see also Appendix "A" to this Memorandum.*) It is true that it was stated that these limits were "for the present to be exceptional." But they are irreconcilable with the supposition that the present proposal of this Government "would involve a surrender of fishing rights which have always been regarded as the exclusive property of Canada."

It is, however, to be observed that the instructions above referred to were not enforced, but were, at the request of Her Majesty's Government, amended, by confining the exercise of police jurisdiction to a distance of three miles from the coasts or from bays less than six miles in width. And in respect to the Bay des Chaleurs, it was ordered that American fishermen should not be interfered with unless they were found "within three miles of the shore." (*Sess. Pap., vol. iv, No. 4, 1871; see also Appendix "B."*)

The final instructions of 1870 being thus approved and adopted, were reiterated by their reissue in 1871. Such was the condition of things from the discontinuance of the Canadian licence system in 1870, until, by the

Treaty of Washington, American fishermen again had access to the inshore fisheries.

As to the Statute cited (14 and 15 Vic., cap. 63, August 7, 1851), it is only necessary to say that it can have no relevance to the present discussion, because it related exclusively to the settlement of disputed boundaries between the two British provinces of Canada and New Brunswick, and had no international aspect whatever; and the same may be said of the case cited, which was wholly domestic in its nature.

Excepting the Bay des Chaleurs, no case is adduced to show why the limit adopted in the Conventions regulating the fisheries in the British Channel and in the North Sea would not be equally applicable to the provinces. The coasts bordering on those waters contain numerous "bays" more than 10 miles wide; and no other condition has been suggested to make the limit established by Great Britain and other Powers as to those coasts "inapplicable" to the coasts of Canada.

The exception referred to (of the oyster beds in Granville Bay) from the 10-mile rule in the Conventions of 1839 and 1843, between Great Britain and France, is found, upon examination of the latter Convention, to be "established upon special principles;" and it is believed that the area of waters so excepted is scarcely 12 by 19 miles. In this relation it may be instructive to note the terms of the Memorandum proposed for the Foreign Office in 1870, with reference to a Commission to settle the fishing limits on the coast of British North America. (*Sess. Pap., 1871; see also Appendix "C."*)

419 The Bay des Chaleurs is 16½ miles wide at the mouth, measured from Birch Point to Point Macquereau; contains within its limits several other well-defined bays, distinguished by their respective names, and, according to the "observations," a distance of almost seventy miles inward may be traversed before reaching the ten mile line.

The Delaware Bay is 11½ miles wide at the mouth, 32 miles from which it narrows into the river of that name, and has always been held to be territorial waters, before and since the case of the "Grange"—an international case,—in 1793, down to the present time.

In delivering Judgment in the case of the "Washington," the Umpire considered the headland theory and pronounced it "new doctrine." He noted among other facts that one of the headlands of the Bay of Fundy was in the United States, but did not place his decision on that ground. And immediately in the next case, that of the "Argus," heard by him and decided on the same day, he wholly discarded the headland theory and made an award in favour of the owners. The "Argus" was seized, not in the Bay of Fundy, but because (although more than three miles from land) she was found fishing within a line drawn from headland to headland, from Cow Bay to Cape North, on the north-east side of Cape Breton Island.

The language of the Convention of 1818 was not fully incorporated in the second paragraph of the 1st Article of the proposal, because that paragraph relates to Regulations for the secure enjoyment of certain privileges expressly

reserved. The words "and for no other purpose whatever" would in this relation be surplusage. The restrictions to prevent the abuse of the privileges referred to would necessarily be such as to prevent the "taking, drying, and curing" of fish. For these reasons the words referred to were not inserted, nor is the usefulness of their insertion apparent.

Ad interim Arrangement proposed by the United States' Government.

ARTICLE II.

Pending a definitive arrangement on the subject, Her Britannic Majesty's Government agree 420 to instruct the proper Colonial and other British officers to abstain from seizing or molesting fishing vessels of the United States unless they are found within 3 marine miles of any of the coasts, bays, creeks, and harbours of Her Britannic Majesty's dominions in America, there fishing, or to have been fishing, or preparing to fish within those limits, not included within the limits within which, under the Treaty of 1818, the fishermen of the United States continue to retain a common right of fishery with Her Britannic Majesty's subjects.

Ad interim Arrangement proposed by the United States' Government.

ARTICLE III.

For the purpose of executing Article I of the Convention of 1818, the Government of the United States and the Government of Her Britannic Majesty hereby agree to send each to the Gulf of St. Lawrence a national vessel, and also one each to cruise during the fish-

ing season on the southern coasts of Nova Scotia. Whenever a fishing vessel of the United States shall be seized for violating the provisions of the aforesaid Convention by fishing or preparing to fish within 3 marine miles of any of the coasts, bays, creeks, and harbours of Her Britannic Majesty's dominions included within the limits within which fishing is by the terms of the said Convention renounced, such vessel shall forthwith be reported to the officer in command of one of the said national vessels, who, in conjunction with the officer in command of another of said vessels of different nationality, shall hear and examine into the facts of the case. Should the said Commanding Officers be of opinion that the charge is not sustained, the vessel shall be released. But if they should be of opinion that the vessel should be subjected to a judicial examination, she shall forthwith be 421 sent for trial before the Vice-Admiralty Court at Halifax. If, however, the said Commanding Officers should differ in opinion, they shall name some third person to act as Umpire between them, and should they be unable to agree upon the name of such third person, they shall each name a person, and it shall be determined by lot which of the two persons so named shall be the Umpire.

Ad interim Arrangement proposed by the United States' Government.

ARTICLE IV.

The fishing-vessels of the United States shall have in the established ports of entry of Her Britannic Majesty's do-

minions in America the same commercial privileges as other vessels of the United States, including the purchase of bait and other supplies; and such privileges shall be exercised subject to the same Rules and Regulations and payment of the same port charges as are prescribed for other vessels of the United States.

Observations on Mr. Bayard's Memorandum.

This Article would suspend the operation of the Statutes of Great Britain and of Canada, and of the provinces now constituting Canada, not only as to the various offenses connected with fishing, but as to Customs, harbours, and shipping, and would give to the fishing-vessels of the United States privileges in Canadian ports which are not enjoyed by vessels of any other class, or of any other nation. Such vessels would, for example, be free from the duty of reporting at the Customs on entering a Canadian harbour, and no safeguard could be adopted to prevent infraction of the Customs Laws by any vessel asserting the character of a fishing vessel of the United States.

Instead of allowing to such vessels merely the restricted privileges reserved by the Convention of 1818, it would give them greater privileges than are enjoyed at the present time by any vessels in any part of the world.

Observations on Mr. Bayard's Memorandum.

This Article would deprive the Courts in Canada of their jurisdiction, and would vest that jurisdiction in a tribunal not bound by legal principles,

but clothed with supreme authority to decide on most important rights of the Canadian people.

It would submit such rights to the adjudication of two naval officers, one of them belonging to a foreign country, who, if they should disagree and be unable to choose an Umpire, must refer the final decision of the great interests which might be at stake to some person chosen by lot.

If a vessel charged with infraction of Canadian fishing rights should be thought worthy of being subjected to a "judicial examination," she would be sent to the Vice-Admiralty Court at Halifax, but there would be no redress, no appeal, and no reference to any tribunal if the naval officers should think proper to release her.

It should, however, be observed that the limitation in the second sentence of this Article of the violations of the Convention which are to render a vessel liable to seizure could not be accepted by Her Majesty's Government.

For these reasons, the Article in the form proposed is inadmissible, but Her Majesty's Government are not indisposed to agree to the principle of a joint enquiry by the naval officers of the two countries in the first instance, the vessel to be sent for trial at Halifax if the naval officers do not agree that she should be released.

They fear, however, that there would be serious practical difficulties in giving effect to this arrangement, owing to the great length of coast, and the delays, which must in consequence be frequent, in securing the presence at the same time and place of the naval officers of both powers.

Observations on Mr. Bayard's Memorandum.

This Article is also open to grave objection. It proposes to give the United States fishing vessels the same commercial privileges as those to which other vessels of the United States are entitled, although such privileges are expressly renounced by the Convention of 1818 on behalf of fishing vessels, which were thereafter to be denied the right of access to Canadian waters for any purpose whatever, except those of shelter, repairs, and the purchase of wood and water. It has frequently been pointed out that an attempt was made, during the negotiations which preceded the Convention of 1818, to obtain for the fishermen of the United States the right of obtaining bait in Canadian waters, and that this attempt was successfully resisted. In spite of this fact, it is proposed, under this Article, to declare that the Convention of 1818 gave that privilege, as well as the privilege of purchasing other supplies in the harbours of the Dominion.

Reply to "Observations" on Proposal.

ARTICLE II.

The objections to this Article will, it is believed, be removed by a reference to Article VI, in which "the United States agrees to admonish its fishermen to comply" with Canadian Customs Regulations and to cooperate in securing their enforcement. Obedience by American fishing vessels to Canadian laws was believed, and certainly was intended to be secured by this Article. By the consolidation, however, of Arti-

cles II and VI the criticism would be fully met.

Reply to "Observations" on Proposal.

ARTICLE III.

As the chief object of this Article is not unacceptable to Her Majesty's Government—i.e., the establishment of a joint system of enquiry by naval officers of the two countries in the first instance—it is believed that the objections suggested may be removed by an enlargement of the list of enumerated offenses so as to include infractions of the Regulations which may be established by the Commission. And the treatment to be awarded to such infractions should also be considered by the same body.

Reply to "Observations" on Proposal.

ARTICLE IV.

The Treaty of 1818 related solely to fisheries. It was not a Commercial Convention, and no commercial privileges were renounced by it. It contains no reference to "ports," of which, it is believed, the only ones then existing were Halifax, in Nova Scotia, and possibly one or two more in the other provinces; and these ports were not until long afterwards opened by reciprocal commercial regulations to vessels of the United States engaged in trading.

The right to "obtain" (i. e., take, or fish for) bait, was not insisted upon by the American negotiators, and was doubtless omitted from the Treaty because, as it would have permitted fishing for that purpose, it was a partial reassertion of the right to fish within the limits as to

which the right to take fish had already been expressly renounced.

The purchase of bait and other supplies by the American fishermen in the established ports of entry of Canada, as proposed in Article IV, is not regarded as inconsistent with any of the provisions of the Treaty of 1818; and in this relation it is pertinent to note the declaration of the Earl of Kimberley, in his letter of the 16 February, 1871, to Lord Lisgar, that "the exclusion of American fishermen from resorting to Canadian ports, except for the purpose of shelter, and of repairing damages therein, purchasing wood, and obtaining water, might be warranted by the letter of the Treaty of 1818, and by the

"terms of the Imperial Act 59 Geo. III, chap. 38, but Her Majesty's Government feel bound to state that it seems to them an extreme measure inconsistent with the general policy of the Empire, and that they were disposed to concede this point to the United States Government under such restrictions as may be necessary to prevent smuggling, and to guard against any substantial invasion of the exclusive rights of fishing which may be reserved to British subjects."

It is not contended that the right to purchase bait and supplies, or any other privilege of trade, was given by the Treaty of 1818. Neither was any such right or privilege stipulated for or given

by the Treaty of 1854, nor by the Treaty of Washington; and the Halifax Commission decided in 1877, that it was not "competent" for that Tribunal "to award compensation for commercial intercourse between the two countries, nor for purchasing bait, ice, supplies, &c., nor for permission to transship cargoes in British waters." And yet this Government is not aware that, during the existence of the Treaty of 1854, or the Treaty of Washington, question was ever made of the right of American fishermen to purchase bait and other supplies in Canadian ports, or that such privileges were ever denied them.

An interim Arrangement proposed by the United States' Government.

ARTICLE V.

The Government of Her Britannic Majesty agree to release all United States' fishing vessels now under seizure for failing to report at custom-houses when seeking shelter, repairs, or supplies, and to refund all fines exacted for such failure to report. And the High Contracting Parties agree to appoint a Joint Commission to ascertain the amount of damage caused to American fishermen during the year 1886 by seizure and detention in violation of the Treaty of 1818, said Commission to make awards therefor to the parties injured.

Observations on Mr. Bayard's Memorandum.

By this Article, it is proposed to give retrospective effect to the unjustified interpretation sought to be placed on the Convention by the last preceding Article.

It is assumed, without discussion, that all United States' fishing vessels which have been seized since the expiration of the Treaty of Washington have been illegally seized, leaving, as the only question still open for consideration, the amount of the damages for which the Canadian authorities are liable.

Such a proposal appears to Her Majesty's Government quite inadmissible.

Reply to "Observations" on Proposal.

ARTICLE V.

This Government is not disposed to insist on the precise form of this Article, but is ready to substitute therefor a submission to arbitration in more general terms.

- 423 *Ad interim Arrangement proposed by the United States Government.* *Observations on Mr. Bayard's Memorandum.*

ARTICLE VI.

The Government of the United States and the Government of Her Britannic Majesty agree to give concurrent notification and warning of Canadian Customs Regulations, and the United States agrees to admonish its fishermen to comply with them and cooperate in securing their enforcement.

This Article calls for no remark.

No. 239.—1888, *February 20: Message from the President of the United States transmitting a treaty^a between the United States and Great Britain concerning the interpretation of the convention of October 20, 1818, signed at Washington, February 15, 1888.*

February 20, 1888.—Read, treaty read the first time, referred to the Committee on Foreign Relations, and, together with the message and the accompanying documents, ordered to be printed in confidence for the use of the Senate.

To the Senate of the United States:

In my annual message transmitted to the Congress in December, 1886, it was stated that negotiations were then pending for the settlement of the questions growing out of the rights claimed by American fishermen in British North American waters.

As a result of such negotiations a treaty has been agreed upon between Her Britannic Majesty and the United States, concluded and signed in this capital, under my direction and authority, on the 15th of February instant, and which I now have the honor to submit to the Senate, with the recommendation that it shall receive the consent of that body, as provided in the Constitution, in order that the ratifications thereof may be duly exchanged and the treaty be carried into effect.

Shortly after Congress had adjourned in March last, and in continuation of my efforts to arrive at such an agreement between the Governments of Great Britain and the United States as would secure to the citizens of the respective countries the unmolested enjoyment of their just rights under existing treaties and international comity in the territorial waters of Canada and of Newfoundland, I availed myself of opportune occurrences indicative of a desire to make without delay an amicable and final settlement of a long-standing controversy—productive of much irritation and misunderstanding between the two nations—to send through our minister in London proposals that a conference should take place on the subject at this capital.

^a Printed Appendix, Part I, p. 43.

The experience of the past two years had demonstrated the dilatory and unsatisfactory consequences of our indirect transaction of business through the foreign office in London, in which the views and wishes of the Government of the Dominion of Canada were practically predominant, but were only to find expression at second hand.

To obviate this inconvenience and obstruction to prompt and well-defined settlement, it was considered advisable that the negotiations should be conducted in this city, and that the interests of Canada and Newfoundland should be directly represented therein.

The terms of reference having been duly agreed upon between the two Governments, and the conference arranged to be held here, by virtue of the power in me vested by the Constitution, I duly authorized Thomas F. Bayard, the Secretary of State of the United States, William L. Putnam, a citizen of the State of Maine, and James B. Angell, a citizen of the State of Michigan, for and in the name of the United States, to meet and confer with the plenipotentiaries representing the Government of Her Britannic Majesty, for the purpose of considering and adjusting in a friendly spirit all or any questions relating to rights of fishery in the seas adjacent to British North America and Newfoundland which were in dispute between the Governments of the United States, and that of Her Britannic Majesty, and jointly and severally to conclude and sign any treaty or treaties touching the premises; and I herewith transmit for your information full copies of the power so given by me.

In execution of the powers so conveyed, the said Thomas F. Bayard, William L. Putnam, and James B. Angell, in the month of November last, met in this city the plenipotentiaries of Her Britannic Majesty, and proceeded in the negotiation of a treaty as above authorized. After many conferences and protracted efforts an agreement has at length been arrived at, which is embodied in the treaty which I now lay before you.

424 The treaty meets my approval, because I believe that it supplies a satisfactory, practical, and final adjustment, upon a basis honorable and just to both parties, of the difficult and vexed question to which it relates.

A review of the history of this question will show that all former attempts to arrive at a common interpretation, satisfactory to both parties, of the first article of the treaty of October 20, 1818, have been unsuccessful; and with the lapse of time the difficulty and obscurity have only increased.

The negotiations in 1854, and again in 1871, ended in both cases in temporary reciprocal arrangements of the tariffs of Canada and Newfoundland and of the United States, and the payment of a money award by the United States, under which the real questions in difference remain unsettled, in abeyance, and ready to present themselves anew just so soon as the conventional arrangements were abrogated.

The situation, therefore, remained unimproved by the results of the treaty of 1871, and a grave condition of affairs, presenting almost identically the same features and causes of complaint by the United States against Canadian action and British default in its correction, confronted us in May, 1886, and has continued until the present time.

The greater part of the correspondence which has taken place between the two Governments has heretofore been communicated to

Congress, and at as early a day as possible I shall transmit the remaining portion to this date, accompanying it with the joint protocols of the conferences which resulted in the conclusion of the treaty now submitted to you.

You will thus be fully possessed of the record and history of the case since the termination, on June 30, 1885, of the fishery articles of the Treaty of Washington of 1871, whereby we were relegated to the provisions of the treaty of October 20, 1818.

As the documents and papers referred to will supply full information of the positions taken under my administration by the representatives of the United States, as well as those occupied by the representatives of the Government of Great Britain, it is not considered necessary or expedient to repeat them in this message. But I believe the treaty will be found to contain a just, honourable, and, therefore, satisfactory solution of the difficulties which have clouded our relations with our neighbors on our northern border.

Especially satisfactory do I believe the proposed arrangement will be found by those of our citizens who are engaged in the open sea fisheries, adjacent to the Canadian coast, and resorting to those ports and harbors under treaty provisions and rules of international law.

The proposed delimitation of the lines of the exclusive fisheries from the common fisheries will give certainty and security as to the area of their legitimate field; the headland theory of imaginary lines is abandoned by Great Britain, and the specification in the treaty of certain named bays especially provided for gives satisfaction to the inhabitants of the shores, without subtracting materially from the value or convenience of the fishery rights of Americans.

The uninterrupted navigation of the Strait of Canso is expressly and for the first time affirmed, and the four purposes for which our fishermen under the treaty of 1818 were allowed to enter the bays and harbors of Canada and Newfoundland within the belt of 3 marine miles are placed under a fair and liberal construction, and their enjoyment secured without such conditions and restrictions as in the past have embarrassed and obstructed them so seriously.

The enforcement of penalties for unlawfully fishing or preparing to fish within the inshore and exclusive waters of Canada and Newfoundland is to be accomplished under safe-guards against oppressive or arbitrary action, thus protecting the defendant fishermen from punishment in advance of trial, delays, and inconvenience and unnecessary expense.

The history of events in the last two years shows that no feature of Canadian administration was more harassing and injurious than the compulsion upon our fishing vessels to make formal entry and clearance on every occasion of temporarily seeking shelter in Canadian ports and harbors.

Such inconvenience is provided against in the proposed treaty, and this most frequent and just cause of complaint is removed.

The articles permitting our fishermen to obtain provisions and the ordinary supplies of trading vessels on their homeward voyages, and under which they are accorded the further and even more important privilege on all occasions of purchasing such casual or needful provisions and supplies as are ordinarily granted to trading vessels, are of great importance and value.

The licences which are to be granted without charge and on application, in order to enable our fishermen to enjoy these privileges,

are reasonable and proper checks in the hands of the local authorities to identify the recipients and prevent abuse, and can form no impediment to those who intend to use them fairly.

The hospitality secured for our vessels in all cases of actual distress, with liberty to unload and sell and transship their cargoes, is full and liberal.

These provisions will secure the substantial enjoyment of the treaty rights for our fishermen under the treaty of 1818, for which contention has been steadily made in the correspondence of the Department of State, and our minister at London, and by the American negotiators of the present treaty.

The right of our fishermen under the treaty of 1818 did not extend to the procurement of distinctive fishery supplies in Canadian ports and harbors; and one item supposed to be essential, to wit, bait, was plainly denied them by the explicit and definite words of the treaty of 1818, emphasized by the course of the negotiation and express decisions which preceded the conclusion of that treaty.

The treaty now submitted contains no provision affecting tariff duties, and, independently of the position assumed upon the part of the United States, that no alteration in our tariff or other domestic legislation could be made as the price or consideration of obtaining the rights of our citizens secured by treaty, it was considered more expedient to allow any change in the revenue laws of the United States to be made by the ordinary exercise of legislative will, and in promotion of the public interests. Therefore, the addition to the free list of fish, fish-oil, whale and seal oil, etc., recited in the last article of the treaty, is wholly left to the action of Congress; and in connection therewith the Canadian and Newfoundland right to regulate sales of bait and other fishing supplies within their own jurisdiction is recognized, and the right of our fishermen to freely purchase these things is made contingent, by the treaty, upon the action of Congress in the modification of our tariff laws.

Our social and commercial intercourse with those populations who have been placed upon our borders and made forever our neighbors is made apparent by a list of United States common carriers, marine and inland, connecting their lines with Canada, which was returned by the Secretary of the Treasury to the Senate on the 7th day of February, 1888, in answer to a resolution of that body; and this is instructive as to the great volume of mutually profitable interchanges which has come into existence during the last half century.

This intercourse is still but partially developed, and if the amicable enterprise and wholesale rivalry between the two populations be not obstructed, the promise of the future is full of the fruits of an unbounded prosperity on both sides of the border.

The treaty now submitted to you has been framed in a spirit of liberal equity and reciprocal benefits, in the conviction that mutual advantage and convenience are the only permanent foundation of peace and friendship between States, and that with the adoption of the agreement now placed before the Senate, a beneficial and satisfactory intercourse between the two countries will be established so as to secure perpetual peace and harmony.

In connection with the treaty herewith submitted I deem it also my duty to transmit to the Senate a written offer or arrangement, in the nature of a *modus vivendi*, tendered after the conclusion of

the treaty on the part of the British plenipotentiaries, to secure kindly and peaceful relations during the period that may be required for the consideration of the treaty by the respective Governments and for the enactment of the necessary legislation to carry its provisions into effect if approved.

This paper, freely and on their own motion, signed by the British conferees, not only extends advantages to our fishermen, pending the ratification of the treaty, but appears to have been dictated by a friendly and amicable spirit.

I am given to understand that the other governments concerned in this treaty will, within a few days, in accordance with their methods of conducting public business, submit said treaty to their respective legislatures, when it will be at once published to the world. In view of such action it appears to be advisable that, by publication here, early and full knowledge of all that has been done in the premises should be afforded to our people.

It would also seem to be useful to inform the popular mind concerning the history of the long continued disputes growing out of the subject embraced in the treaty and to satisfy the public interests touching the same, as well as to acquaint our people with the present status of the questions involved, and to give them the exact terms of the proposed adjustment in place of the exaggerated and imaginative statements which will otherwise reach them.

I therefore beg leave respectfully to suggest that said treaty and all such correspondence, messages, and documents relating to the same as may be deemed important to accomplish these purposes be at once made public by the order of your honorable body.

GROVER CLEVELAND.

EXECUTIVE MANSION, *February 20, 1888.*

Protocols transmitted by President in above Message to United States' Senate.

I. PROTOCOL OF FISHERIES CONFERENCE.

WASHINGTON, *November 22, 1887.*

The Fisheries Conference having formerly met, the Full Powers of the Plenipotentiaries were exhibited and found to be in good and due form, as follows:

Grover Cleveland, *President of the United States of America.*
To all to whom these presents shall come, Greeting:

Know ye that, reposing special trust and confidence in the integrity and ability of Thomas F. Bayard, Secretary of State; William L. Putnam, of Maine; and James B. Angell, of Michigan; I hereby invest them with full power jointly and severally, for and in the name of the United States, to meet and confer with Plenipotentiaries representing the Government of Her Britannic Majesty, for the purpose of considering and adjusting in a friendly spirit all or

any questions relating to rights of fishery in the seas adjacent to British North America and Newfoundland which are in dispute between the Government of the United States and that of Her Britannic Majesty, and any other questions which may arise and which they may be authorized by their respective governments to consider and adjust; and I also fully empower and authorize the said Thomas F. Bayard, William L. Putnam, and James B. Angell, jointly and severally, to conclude and sign any treaty or treaties touching the premises, for the final ratification of the President of the United States, by and with the advice and consent of the Senate, if such advice and consent be given.

In testimony whereof, I have caused the seal of the United States to be hereunto affixed.

Given under my hand at the City of Washington this eighteenth day of November, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States, the one hundredth and twelfth.

[SEAL.]

GROVER CLEVELAND.

By the President:

T. F. BAYARD,

Secretary of State.

VICTORIA R. & I. *Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, Empress of India, &c., &c., &c., To all and Singular to whom these Presents shall come, Greeting:—*

Whereas for the purpose of considering and adjusting in a friendly spirit with Plenipotentiaries to be appointed on the part of Our Good Friends The United States of America all or any questions relating to rights of Fishery in the seas adjacent to British North America and Newfoundland which are in dispute between Our Government and that of Our said Good Friends, and any other questions which may arise which the respective Plenipotentiaries may be authorized by their Governments to consider and adjust, We have judged it expedient to invest fit persons with Full Power to conduct on Our part the discussions in this behalf. Know Ye therefore that We, reposing especial trust and confidence in the wisdom, loyalty, diligence, and circumspection of Our Right Trusty and Well beloved Councillor Joseph Chamberlain, a Member of Our Most Honorable Privy Council, and a Member of Parliament, &c., &c.; of Our Trusty and Well beloved The Honorable Sir Lionel Sackville Sackville West, Knight Commander of Our Most Distinguished Order of St. Michael and St. George, Our Envoy Extraordinary and Minister Plenipotentiary to Our said Good Friends the United States of America, &c., &c., and of Our Trusty and Well beloved Sir Charles Tupper, Knight Grand Cross of Our Most Distinguished Order of St. Michael and St. George, Companion of Our Most Honorable Order of the Bath, Minister of Finance of the Dominion of Canada, &c., &c., have named, made, constituted, and appointed, as We do

by these Presents name, make, constitute and appoint them Our undoubted Plenipotentiaries: Giving to them, or to any two of them, all manner of power and authority to treat, adjust, and conclude, with such plenipotentiaries as may be vested with similar power and authority on the part of Our Good Friends the United States of America, any Treaties, Conventions, or Agreements that may tend to the attainment of the above-mentioned end, and to sign for Us and in Our Name, everything so agreed upon and concluded, and to do and transact all such other matters as may appertain to the finishing of the aforesaid work in as ample manner and form, and with equal force and efficiency as We Ourselves could do if Personally present: Engaging and promising upon Our Royal Word that whatever things shall be so transacted and concluded by Our said Plenipotentiaries shall be agreed to, acknowledged, and accepted by Us in the fullest manner, and that We will never suffer, either in the whole or in part, any person whatsoever to infringe the same, or act contrary thereto, as far as it lies in Our Power. In witness whereof We have caused the Great Seal of Our United Kingdom of Great Britain and Ireland to be affixed to these Presents which We have signed with Our Royal Hand. Given at Our Court at Balmoral the twenty-fourth day of October in the year of Our Lord one thousand eight hundred and eighty-seven, and in the fifty-first year of Our Reign.

The British Plenipotentiaries proposed that Mr. Bayard, Secretary of State of the United States, should preside.

Mr. Bayard, while expressing appreciation of the proposal, stated the opinion, in which the other United States Plenipotentiaries concurred, that it was not necessary that any one should preside; and the proposal was permitted to rest.

Mr. John B. Moore, Third Assistant Secretary of State of the United States, acting as Secretary to the United States Plenipotentiaries, and Mr. J. H. G. Bergne, C. M. G., Superintendent of the Treaty Department of the British Foreign Office, acting as secretary to the British Plenipotentiaries, were requested to make the Protocols of the Conference.

After some discussion of questions before the Conference, it was adjourned to 12 o'clock m. of the 28th of November.

PROTOCOL.

The treaty having been signed by the British Plenipotentiaries desire to state that they have been considering the position which will be created by the immediate commencement of the fishing season before the Treaty can possibly be ratified by the Senate of the United States, by the Parliament of Canada, and the Legislature of Newfoundland.

In the absence of such ratification the old conditions which have given rise to so much friction and irritation might be revived, and might interfere with the unprejudiced consideration of the Treaty by the legislative bodies concerned.

427 Under these circumstances, and with the further object of affording evidence of their anxious desire to promote good

feeling and to remove all possible subjects of controversy, the British Plenipotentiaries are ready to make the following temporary arrangement for a period not exceeding two years, in order to afford a "*modus vivendi*" pending the ratification of the Treaty.

1. For a period not exceeding two years from the present date, the privilege of entering the bays and harbors of the Atlantic coasts of Canada and Newfoundland shall be granted to United States fishing vessels by annual Licenses at a fee of \$1½ per ton—for the following purposes:

The purchase of bait, ice, seines, lines, and all other supplies and outfits.

Transshipment of catch and shipping of crews.

2. If during the continuance of this arrangement, the United States should remove the duties on fish, fish-oil, whale and seal oil (and their coverings, packages, &c.), the said Licenses shall be issued free of charge.

3. United States fishing vessels entering the bays and harbors of the Atlantic coasts of Canada or of Newfoundland for any of the four purposes mentioned in Article I. of the Convention of October 20, 1818, and not remaining therein more than twenty-four hours, shall not be required to enter or clear at the custom house, providing that they do not communicate with the shore.

4. Forfeiture to be exacted only for the offences of fishing or preparing to fish in territorial waters.

5. This arrangement to take effect as soon as the necessary measures can be completed by the Colonial Authorities.

J. CHAMBERLAIN.

L. S. SACKVILLE WEST.

CHARLES TUPPER.

WASHINGTON, *February 15, 1888.*

PROTOCOL.

The American Plenipotentiaries having received the communication of the British Plenipotentiaries of this date conveying their plan for the administration to be observed by the Governments of Canada and Newfoundland in respect of the Fisheries during the period which may be requisite for the consideration by the Senate of the Treaty this day signed, and the enactment of the legislation by the respective Governments therein proposed, desire to express their satisfaction with this manifestation of an intention on the part of the British Plenipotentiaries, by the means referred to, to maintain the relations of good neighborhood between the British Possessions in North America and the United States; and they will convey the communication of the British Plenipotentiaries to the President of the United States, with a recommendation that the same may be by him made known to the Senate for its information, together with the Treaty, when the latter is submitted to that body for ratification.

T. F. BAYARD.

WILLIAM L. PUTNAM.

JAMES B. ANGELL.

WASHINGTON, *February 15, 1888.*

No. 240.—1888, April 16: Mr. W. L. Putman's Review of "*The Fisheries Negotiations—Historical and Explanatory.*" Printed as Appendix E to the Report of the Minority of the Committee of the United States Senate on Foreign Relations.^a

THE PENDING TREATY.

Review of the Fisheries Negotiations by W. L. Putnam—Historical and Explanatory—from the beginning of the Controversy to the present time—What the Treaty undertakes to do—Hostile Criticism met.

We give below a valuable review of "*The Fisheries Negotiations—Historical and Explanatory,*" by the Hon. William L. Putnam, of the commissioners who framed the pending treaty. The paper was prepared for the Portland Fraternity Club and read at a recent meeting. It is an important contribution to the present discussion, and meets adverse criticisms which have been made upon the work of the commission.

Concerning the provisions of the convention of 1818, that our fishermen may enter the bays or harbors of Her Majesty's dominions in Newfoundland and eastern Canada "for the purposes of shelter and of repairing damages therein, of purchasing wood and of obtaining water, and for no other purposes whatever," and are liable to "such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges" reserved to them, confusion has arisen in Canada and also in the United States—on the Canadian side by converting this limitation of a guaranteed privilege into a universal one, and on our side by overlooking the indubitable fact that the practice of nations recognizes a broad line between fishing vessels and ordinary merchant vessels, granting to each class privileges not possessed by the other. From a time at least as early as A. D. 1836 to the present claim of Nova Scotia, and afterwards of Canada, has been inflexible, that a fishing vessel is *sui generis*, and, if foreign, has no privileges within British bays and harbors, except those specifically authorised by some law of Great Britain or of her dominions, or by treaty, or by the strictest rules of humanity; though at times this claim has lain dormant in part, and Great Britain herself has not quite countenanced its practical exercise to its full extent. During all this period this construction, although often complained of by the United States, never has been practically overthrown by us in any particular.

Very soon after the ratification of the convention of 1818 the British Parliament passed the statute, chapter 38, George III, which condemned to forfeiture vessels of the United States, and of all other nations foreign to Great Britain, fishing or "preparing to fish" within the prohibited waters. These words "preparing to fish" found in this early act have been the cause of many troubles, and are susceptible of a variety of construction. They have been found in every provincial and Dominion statute relating to this matter passed at different periods, four or five in all; and they have received the

sanction of long practical acquiescence on the part of the United States, and, we may also add, the full and cordial approval of so distinguished an American law writer as Professor Pomeroy. On the 12th of March, 1836, nearly one year before President Jackson went out of office, there was passed the Act of Nova Scotia, the model of all the legislation since enacted, at which is aimed the thirteenth article of the treaty just negotiated. This act was specially validated by royal orders in council, and provided that local officers might seize and bring into port vessels hovering on the coasts of Nova Scotia, and repeated the penalty of forfeiture for those fishing or "preparing to fish" within the prescribed waters. It also provided that no person should be admitted to claim the vessel seized without first giving security for costs not exceeding 60 pounds. It also threw on the owner the burden of proof in any suit touching the illegality of seizure. It so hampered the right of action for unjustifiable arrests of vessels as to render it substantially worthless; and it was so extreme in its provisions that the vessel could not be bailed without the consent of the person seizing her. All these provisions have been continued in every statute of the Dominion from that time to the present.

In A. D. 1838, 1839, and 1840, during the administration of Mr. Van Buren, and while John Forsyth was Secretary of State and Levi Woodbury Secretary of the Treasury, sixteen of our vessels were proceeded against at Halifax and all confiscated except one. During the first year of the next administration, and while Webster was Secretary of State, seven were seized and proceeded against, only two of which were restored. These prosecutions were under this statute of 1836. It is not certain that Mr. Forsyth knew of its existence until near the close of his term of office, which he made an earnest remonstrance against it. The records also fail to show that Webster in any way took notice of it; although after Webster retired from the Cabinet, Mr. Everett, while minister at London, under instructions from Mr. Upshur, then Secretary of State, reiterated the complaints of Mr. Forsyth. When Webster again became Secretary of State, and not long before he died, he made the famous speech at Marshfield, in which he said:

It is not to be expected the United States would submit their rights to be adjudicated in the petty tribunals of the provinces, or that we shall allow our own vessels to be seized by constables or other petty officials, and condemned by the municipal courts of Quebec, Newfoundland, New Brunswick, or Canada.

Notwithstanding this, from the time the statute was enacted in A. D. 1836 till the present negotiations, not only was its repeal or modification not secured by the United States, and not only contrary to the phrases of Webster did the United States submit the rights of their vessels to be adjudicated in the tribunals of the provinces and allow them to be seized by provincial constables and other provincial petty officers, but in A. D. 1868, and afterwards in A. D. 1870, the Dominion, without protest from us, re-enacted and intensified the law of 1836 by statutes ever since in force.

The disputes covering this first period from A. D. 1836 to A. D. 1854 were confined mainly to four questions:

(1) Whether great bays, like those of Chaleur and Fundy, were bays of the British dominions.

(2) Whether—and this was a broader question, though not perhaps wholly distinct—Great Britain could lawfully run a line from headland to headland, so as to shut in great bends like that of Prince Edward Island and that on the east coast of Cape Breton.

(3) Whether the provincial officers could drive out our vessels from provincial bays and harbors when, in the judgment of the authorities, they did not in fact need shelter or repairs; and

(4) The legislation already referred to.

These questions were not in all respects analogous to those which arose between A. D. 1866 and A. D. 1870, and which have again arisen in the last two years; but whatever they were, none
429 of them were settled and all were postponed, and for the time being submerged in the reciprocity treaty of 1854. In A. D. 1866, at the expiration by notice from the United States of the treaty of 1854, the difficulties touching the fisheries were renewed, and they continued until suspended by the treaty of Washington of 1871.

During this period substantially every question arose which has been in dispute within the last two years; yet not one of them was permanently settled by Congress, the Executive of the United States, or by the Treaty of Washington. The Consular correspondence in the summer of A. D. 1870 shows that our vessels were then forbidden obtaining bait and all other supplies in Canada, and were excluded from Dominion ports except when putting in for the purposes expressly named in the Convention of 1818. Numerous seizures were made at that time, followed by forfeitures, one of which was the well known case of the *J. H. Nickerson*, a vessel proceeded against at Halifax for purchasing bait, while the United States took no action whatever concerning her and made no reclamation, so that she became a total loss to her owners. This period ended in the treaty of 1871, as did that which closed in A. D. 1854, without the United States securing favorable interpretation of any right in dispute.

The references to the treaties of 1854 and 1871 are merely for the necessary purpose of showing their bearing on the present status. Those negotiations were on a much broader scale, and may be said to have involved larger questions than those now under consideration; although everything which endangers in the least the harmony of nations must be regarded as touching the possibilities of great consequences. The nation would not brook that the high motives and great skill and experience of the gentlemen concerned in the formation of those treaties should not be at all times declared. The treaty of 1854 was a beneficent production of broad statesmanship, a blessing to the country, and its good results have come down to this date in the enlargement of commercial relations with Canada, which is among its legitimate issue, and has already long survived its own existence.

The negotiations of 1871, as well as the consequent proceedings at Geneva, were in the hands of practiced statesmen and jurists, led by a Secretary of State eminent alike for his private and public virtues. These citizens had been honored by the people with many trusts; but for their diplomatic accomplishments at Washington and the verdict at Geneva they will also be honored by history. While the purely accidental result of the Halifax commission must, in comparison, be regarded as the spluttering and flickering of a farthing candle, the exact cost of which is known but will soon be forgotten, the moral

spectacles of the grander arbitration between the United States and Great Britain, and of the treaty which led to it, have given out a light which will shine on and on for the illumining of civilization so long as the English tongue shall be spoken. Considering all the great interests which those negotiators had in hand, it was not surprising that it was deemed by them sufficient to give the fisheries a temporary peace, which also they had reason to expect would become permanent. It is in no sense, therefore, in a depreciatory spirit that we refer to these events; but only because dry truth requires that their incidental effect on the issues with which we now have to deal should be clearly stated. The protocol of the conference of the commissioners held May 4, A. D. 1871, is as follows:

The British commissioners stated that they were prepared to discuss the question of the fisheries, either in detail or generally, either to enter into an examination of the respective rights of the two countries under the treaty of 1818 and the general law of nations, or to approach at once the settlement of the question on a comprehensive basis.

Our commissioners selected the latter. The result was no issues in controversy concerning the fisheries were decided, and all were postponed; and a rule of negotiation was adopted for that topic, which has since, justly or unjustly, given great dissatisfaction to the interests involved.

It thus appears that this controversy commenced more than a half century since, and during that period nothing has been determined. After questions have continued so long unsettled and have been twice formally postponed, it necessarily remains that it is difficult for either party to press its full rights to a complete conclusion in all particulars. Traditions become fixed on one side or the other, systems of legislation accumulate which become inextricably involved with the general mass and the cotemporary facts and understandings are lost or assume new phases. Claims made by Great Britain, or by Nova Scotia or Canada in her name, have stood so long without definitive reversal that they gained such strength as to be in some particulars quite as difficult of disturbance as though originally based on sound principles and correct rules of construction.

This was the status of these questions when the present negotiations commenced; yet former administrations had not failed to give some indications of the suitable methods of meeting them. In the dispatch of Mr. Seward, then Secretary of State, to Mr. Adams, then our minister at London, of April 10, A. D. 1866, Mr. Seward suggested a mixed commission for the following purposes:

(1) To agree upon and define by a series of lines the limits which shall separate the exclusive from the common right of fishing on the coasts, and in the seas adjacent, of the British North American colonies, in conformity with the first article of the convention of 1818; the said lines to be regularly numbered, duly described, and also clearly marked on charts prepared in duplicate for the purpose.

(2) To agree upon and establish such regulations as may be necessary and proper to secure to the fishermen of the United States the privilege of entering bays and harbors for the purpose of shelter and of repairing damages
430 therein, of purchasing wood and of obtaining water, and to agree upon and establish such restrictions as may be necessary to prevent the abuse of the privilege reserved by said convention to the fishermen of the United States.

(3) To agree upon and recommend the penalties to be adjudged, and such proceedings and jurisdiction as may be necessary to secure a speedy trial and judgment with as little expense as possible for the violators of rights and the transgressors of the limits and restrictions which may be hereby adopted.

The "memorandum" prepared by the Department of State for the information of the commissioners who, on the part of the United States, assisted in negotiating the treaty of Washington of 1871, contained suggestions for adjustment in the following language:

(1) By agreeing upon the terms upon which the whole of the reserved fishing-grounds may be thrown open to American fishermen, which might be accompanied with a repeal of the obnoxious laws and the abrogation of the disputed reservation as to ports, harbors, etc.; or, failing that,

(2) By agreeing upon the construction of the disputed renunciation, upon the principles upon which a line should be run by a joint commission to exhibit the territory from which the American fisherman are to be excluded, and by repealing the obnoxious laws, and agreeing upon the measures to be taken for enforcing the colonial rights, the penalties to be inflicted for a forfeiture of the same, and a mixed tribunal to enforce the same. It may also be well to consider whether it should be further agreed that the fish taken in the waters open to both nations shall be admitted free of duty into the United States and the British North American colonies.

It will be observed that the suggestions of Mr. Seward were substantially repeated in the instructions of A. D. 1871, and were also embraced almost in terms in the proposals accompanying the dispatch of Mr. Bayard to Mr. Phelps of November 15, 1886; and the treaty just negotiated, it is believed, accomplishes all which was contemplated by them.

The words of delimitation of the convention of 1818 are as follows: "On or within 3 marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America." The prohibition of 1818 covered in terms not only the coasts, but also the bays of the British dominion; so that a fair construction of the language could not be met by running a line which at all points followed the windings of the shore. Such was apparently the theory of Edward Bates, the umpire, in his opinion given in the case of the *Washington*, decided under the convention of 1853, wherein he used the following language: "The conclusion is therefore irresistible that the Bay of Fundy is not a British bay within the meaning of the word as used in the treaties of 1783 and 1818." So also Mr. Everett in his note of May 25, A. D. 1844, said "The vessels of the United States have a general right to approach all the bays in Her Majesty's colonial dominions within any distance not less than 3 miles." It is not, however, to be understood by this suggestion that the "headland" theory is at all accepted. That assumed to run a line shutting in all sinuosities of the coast, without considering whether or not particular headlands marked jurisdictional bays, or, in other words, bays which were properly parts of the British dominions, and it is now approved.

That there may be no misunderstanding, let us follow this distinction a little further. The *Washington* was seized in the Bay of Fundy in A. D. 1843, and that raised a question of the "bays," that is, whether the whole of Fundy was a part of the British dominions. The *Argus* was seized at nearly the same time in the great bend of Cape Breton. As the affidavits on file at Halifax show, she was captured less than 2 miles within a line from Cape North to Cow Bay; and that capture marked the "headland" disputes.

The opinion of the law officers of the Crown of 1841, in answer to the second and third queries, said, erroneously, of course: "The term 'headland' is used in the treaty to express the part of land we have before mentioned, including the interior of the bays and the

indents of the coast." It may here be said that the same opinion in answer to the fourth query denied the free right of navigating the Gut of Canso. Mr. Stephenson, our minister at London, recognized the distinction in his note to Lord Palmerston of March 27, A. D. 1839, where he said: "The provincial authorities assume a right to exclude the vessels of the United States from all their bays, including those of Fundy and Chaleur, and likewise to prohibit their approach within 3 miles of a line drawn from headland to headland," &c. So Mr. Everett, in his note to Earl Aberdeen of May 25, A. D. 1844, admitted that it was "the intent of the treaty, as it is in itself reasonable, to have regard to the general line of the coast, and to consider its bays, creeks, and harbours, that is, the indentations usually so accounted, as included within that line."

Now, the present treaty apparently holds to the rule stated by Mr. Everett, except that it defines what has heretofore been undefined. This, of course, is subject to the qualification that, except in special cases, in A. D. 1818 jurisdiction bays were limited to those not exceeding 6 miles in width between their headlands, or even to narrower ones; while the present treaty has adopted the more modern rule of the 10 miles opening as a practical and not injurious solution of this whole dispute concerning bays and headlands.

Therefore, under the convention of 1818 the question arises in every case: What is a jurisdictional bay, that is, a British bay, or, in other words, a bay which was then a part "of His Britannic Majesty's dominions in America?" This having been ascertained, another question arises, whether any bay which was not jurisdictional in A. D. 1818 has since become so inclosed by the growth of population that, on the principles by which we claim as our exclusive waters Chesapeake and Delaware bays and Long Island Sound, we may properly concede it to Great Britain according to its existing circumstances, as an inducement to a suitable and just arrange-

431 ment of all questions of delimitation? With reference to this question, and indeed with reference to all this branch of the case, the United States, with its extensive coasts, its numerous bays, its rapidly increasing population and commercial interests can not wisely permit a narrow precedent.

The bay of Chaleur, the shores of which in A. D. 1818 were uninhabited, has by the advance of population become a part of the adjacent territory for all jurisdictional purposes; and it has ceased to be of special value to our vessels except for shelter or supplies. The same observations apply with greater force to the bay of Miramichi. The bays of Egmont and St. Ann's are hardly more than mere sinuosities of the coast; but they and the excluded parts of the Newfoundland bays are of no value to our vessels for fishing. It is not unreasonable to grant the release of all of them, in view of the fact that as to all other water we remove long standing disputes. It is not to be overlooked that all these bays have long been claimed by Great Britain as of right.

At the mouths of all the bays designated in the treaty by name, the fourth article makes special lines of delimitation. There seems to be an impression with some that the exclusion is 3 miles seaward therefrom; but this is plainly erroneous. Each of these lines is run from one powerful light to another, except one terminus at Cape Smoke, which is a promontory over 700 feet in height. The external

peripheries of visibility of these lights overlap each other very considerably on each of these lines, so that for our vessels danger is not where the bays have been specifically released. This will be found at the 3-mile limit from the open shore, where it always has been. There is, however, confusion about this, and some debit the treaty just negotiated with the inevitable hazards consequential on the principles of that of 1818. If the commission of delimitation is appointed as the treaty provides, this commission, of course, will, as Mr. Seward and Mr. Fish foresaw, diminish the danger on the open coast, by giving on the charts which it prepares bearing lights and other marked points: so that vessels by the aid of these bearings will be able to protect themselves in some degree. Nevertheless, there are the nights and thick weather, but the consequences of these are inherent in the principles of the convention of 1818, and will be diminished and not enlarged by the practical workings of the present treaty.

In the case of the *Washington* Mr. Bates referred to the treaty between France and Great Britain of 1839, excluding from the common right of fishing all bays, the mouths of which did not exceed 10 miles in width, and indorsed this as a proper limit. In the treaty between France and Great Britain of 1867 the same limit was adopted; and it was approved by the common judgment of Great Britain, the German Empire, Belgium, Denmark, France, and the Netherlands, in the treaty concerning the North Sea fisheries, signed at The Hague May 6, A. D. 1882. With the weight of international consensus in its favor, and in view of the interest of the United States to aid precedents which will enable us to afford proper protection to our extensive coasts, and admitting the necessity of finding some practical method of delimitation, this rule seems on the whole convenient, wise, and not unjust. Moreover, considering the inability of our mackerel vessels, substantially all of which use the purse seine to fish in shallow waters along the coast, and that very few American fishermen, perhaps none, in the pursuit of halibut or cod desire to fish there, it is impossible to believe that this rule surrenders anything of essential value to us.

It is fair to add that the ten-mile rule was apparently not congenial to Canada. In the proposals made to Great Britain in the autumn of A. D. 1886, Mr. Bayard, after reciting substantially the suggestions made by Mr. Seward, and elaborating them, offered this rule; but the Marquis of Salisbury, in his reply of March 24, 1887, commented that this "would involve a surrender of fishing rights, which have always been regarded as the exclusive property of Canada."

The specific delimitations at several smaller bays will, on examination, be found to be in harmony with the views of the United States as to the proper results of the general rules of 1818. On the whole, by this part of the treaty a long and troublesome dispute affords promise of being ended without either party giving up anything of value.

Next, the treaty touches the matters which have involved our fishing vessels in their most serious troubles, fully covering reports to custom-houses, fees, and other charges, cases of disaster and distress, and incidental supplies such as merchant vessels buy. It is of course impossible to anticipate all the questions which may arise as between coterminous peoples, even with the most careful phraseology; and

there are some matters which can not be confined within fixed terms without limiting the rights of one party or the other to an extent to which neither could be expected to submit. Among these is that discretion which must be exercised on the one side by the "skipper" who runs in for shelter in deciding whether or not it is prudent to put to sea, and on the other side by the revenue authorities in determining whether or not the vessel is hovering or loitering unlawfully within the waters of Canada. Such matters must in the main be disposed of satisfactorily by the practical operation of what is expressed and by the limitation imposed in the article which will immediately be considered.

The treaty next seeks to alleviate the hardships of the legal proceedings which various statutes of the province and the Dominion have imposed on foreign vessels. These statutes extended to fishing vessels systems of procedure which are with less injustice applied to merchantmen. The latter come voluntarily into port, and are ordinarily furnished either with credit or cash through their consignees, enabling them to protect themselves in case of litigation. Fishing vessels, however, especially those putting into strange waters merely for shelter, have no such aids and frequently have with them very little cash; and the result has been that the forms of proceedings, which might not be burdensome for merchantmen, have, with reference to fishing vessels, obstructed the course of justice. Through the intervention of counsel employed by the Secretary of State for observing the trials of the *David J. Adams* and the *Ella M. Doughty*, there have

432 been received practical lessons in the difficulties surrounding fishing vessels under the statutes and proceedings of the courts of the Dominion. As already explained, these had been allowed to thrive so long without any successful effort on the part of the United States to prevent their growth, that they had become too deeply rooted in the general mass of Canadian legislation to permit their being entirely drawn out. It is believed, however, that so far as this article may fail to remove all these difficulties detail by detail, its limitation of penalties, except for illegal fishing or preparation therefor, will do very much to prevent injustice under any circumstances; while as to vessels poaching, it is for the interest of each Government that they shall be restrained by severe punishments.

To follow out the matter more in detail: A fishing vessel is seized in the Bay of St. Ann's, or up in the Gulf of St. Lawrence. Under existing statutes, first of all, and before she can claim a trial or take testimony or other steps towards a trial, she is required to furnish security for costs not exceeding \$240. The practical experience is that fishing vessels taken into strange ports are rarely provided with funds or credit, and therefore they are compelled to communicate with their owners for assistance, and by reason of the consequent delay are unable to take even the preliminary steps before the sharesmen scatter and the witnesses are lost; because sharesmen, not being ordinarily on wages, can not be held to a vessel moored to a pier. This provision of the Canadian law is not singular; in our own admiralty courts no person can ordinarily claim a fishing vessel, or whatever vessel she may be, without furnishing like security. Under the treaty this disappears; and in practice this relief will be found to be of great benefit to our fishermen.

Next, the courts into which all the cases of these fishing vessels have been brought are not provincial, but are Imperial vice-admiralty courts, established and governed by the uniform rules of the Imperial statute, although presided over by a local judge designated for that purpose. As a consequence, all the paraphernalia and fees of Imperial courts are met, and the progress of the trial requires the early disbursement of large sums of money common in all of them, but unknown in our own and in the provincial courts. These are necessarily so large that our consular correspondence shows the burden of securing the costs and advancing fees was alone sufficient in some instances to compel owners to abandon the defense of vessels of moderate value. The statutes to which we have already referred, moreover, stipulated that no vessel should be released on bail without the consent of the seizing officer; and, although it must be admitted that in practice this has not been found to create difficulty, it is annulled by the treaty. While it is impossible to anticipate or prevent all causes of legal delays and expenditures, yet there is no reasonable ground for denying that this thirteenth article will essentially moderate these enumerated rigors.

The punishment for illegally fishing in the prohibited waters has always been forfeiture of the vessel and the cargo aboard at the time of seizure. It was not possible, nor was it for the interests of either country, to demand that the penalty imposed on actual poachers should not be severe; but this article provides that only the cargo aboard at the time of the offense can be forfeited, and the provincials can not lie back until a vessel has taken a full cargo, and then sweep in the earnings of the entire trip for an offense committed perhaps at its inception. Moreover, the article provides the penalty shall not be enforced until reviewed by the governor-general in council, giving space for the passing away of temporary excitement and for a calm consideration of all mitigating circumstances. Also, from the passage of the statute of 1819 the penalty for illegally "preparing to fish" has been forfeiture. This has at times been construed to extend not only to preparing to fish illegally, but also to a preparation within the Dominion waters for fishing elsewhere. The *J. H. Nickerson* already referred to, was forfeited in A. D. 1870 on this principle, without any specific protest from the United States or any subsequent reclamation.

If the plenipotentiaries had been working new ground, in view of the indefiniteness of the words and of the fact that preparation is ordinarily accepted as of lower grade than actual accomplishment, it may be that the penalty of forfeiture under any circumstances for this offense would have been surrendered; but a statute which has stood for nearly seventy years without successful objection can not easily be wholly overthrown. The treaty, however, clearly eliminates every principle on which were based the forfeiture of the *J. H. Nickerson* and the proceedings against the *Adams* and the *Doughty*; and also, taking into consideration the other elements already referred to, it makes forfeiture the extreme penalty, but directs that the punishment shall be fixed by the court not exceeding the maximum, so that, if circumstances justify in any case, it may be reduced to a minimum. In lieu of all the other penalties rising to forfeiture, imposed by the Dominion statutes concerning the fisheries for technical offenses and offenses known and unknown, the maximum for

all such will be \$3 for every ton of the boat or vessel concerned. Under the provisions of this treaty the *Ella M. Doughty*, caught in the ice, would have gone free, and the *David J. Adams*, which ran across from Eastport into Digby basin for bait, if she had found herself snarled in the intricacies of foreign statutes and legal proceedings, had the option to pay \$3 per ton, or less than \$200—in other words, less than the amounts heretofore required as security for costs and to pay expenses of defense in the vice-admiralty court and go free—or she could have demanded a summary and inexpensive trial at the place of detention.

It should be borne in mind that the statutes of Canada which we have been discussing are not aimed particularly at vessels of the United States, but include all foreign fishing vessels. While in all respects, even with the modifications which the thirteenth article imposes on them, they are not our statutes, and therefore not what we would make them, yet several of these modifications are concessions from principles and provisions which are found in our own statutes, and concessions which we ourselves would not willingly make in behalf of foreign vessels. On the whole, a careful examination of this section, taken in the light of the ordinary methods of

433 criminal proceedings wherever the common law exists, will show a present desire on the part of Great Britain and Canada to remove just cause of offense, and to cultivate the friendship of the United States; and to take it by and large, the net result must be a modicum of those evils and misfortunes, through legal proceedings, which inevitably await strange vessels in foreign ports.

Concerning the fifteenth article, further reference to the protocol of May 4, 1871, of the joint commissioners who negotiated the treaty of Washington will show, as already explained, that the American commissioners preferred a settlement of the fishery questions "on a comprehensive basis." After setting out other propositions, pro and con, which were not agreed to, the protocol proceeds as follows:

The subject of the fisheries was further discussed at the conferences held on the 20th, 22d, and 25th of March. The American commissioners stated that, if the value of the inshore fisheries could be ascertained, the United States might prefer to purchase for a sum of money the right to enjoy in perpetuity the use of those inshore fisheries in common with British fishermen.

Our commissioners afterwards named \$1,000,000 as the sum they were prepared to offer. The British commissioners replied that this offer was inadequate, and made some other objections to it. Subsequently our commissioners proposed as an equivalent for the inshore fisheries that coal, salt, and fish should be reciprocally admitted free at once, and lumber after the 1st of July, A. D. 1874. On the 17th of April the British commissioners replied that they regarded this latter offer as inadequate. Thereupon our commissioners withdrew it, and the equivalents were finally negotiated, as found in the treaty.

In framing the present convention this principle of negotiation seems to have been held by the United States not admissible, but it ought not be denied, if to purchase bait and in other ways make the shores of Canada and Newfoundland the base of our fishing operations have a pecuniary or property value to the United States, an equivalent therefor may justly be demanded by Great Britain. In any bargaining for the same, however, all the parties concerned should stand free and on equal footing. Great Britain in this article

freely states what she is willing to accept, and if the convention is ratified, Congress may freely adopt its terms if it deems it for the interest of the country so to do.

The objections that the treaty does not secure privileges for bait, shipping men and transshipping fish are not considered here, as they have been fully discussed elsewhere. Also discussion of the other ill-founded objection that the treaty gives us nothing worth purchasing is omitted, because it makes no attempt to purchase anything. It gives no consideration whatever for the benefits which we receive under it.

Much has been said by the opponents of the treaty concerning the reciprocal arrangement of A. D. 1830; and indeed some of them apparently suppose a treaty with Great Britain was then made. The most convenient way of understanding that arrangement is to turn to Jackson's proclamation of May 29, A. D. 1830, by which it was brought to its completion; and its entire practical effect is made clear from the circular of the Secretary of the Treasury to the collectors of customs of October 6, A. D. 1830, and by the order in council of November 5 of the same year.

While this marked a long step forward in reciprocal arrangements with the neighboring provinces, so that it afforded the Secretary of State, Mr. Bayard, very just and persuasive arguments in favor of the most liberal treatment by Canada of our fishing vessels, yet its very letter, as well as its spirit, related exclusively to vessels engaged in commerce and to merchandise carried from the ports of one country to the ports of another. Not only did it not contemplate the purchase of fishing supplies to be used on the ocean and other facilities for fishing vessels, but its phraseology clearly excluded any such purpose. Are we any more entitled to demand under it as a right reciprocity in matters of this sort than Great Britain or Canada can demand under it reciprocity in the coasting trade or in the registering of vessels? And is there anything either in this reciprocal arrangement or in any other between the United States and Great Britain or Canada which renders the refusal to our fishermen of the special benefits of the near locality of Nova Scotia to the fishing grounds more unfriendly, in that sense which justifies retaliation, than our refusal to permit British, including Canadian, vessels to enter our coasting trade, while ours freely engaged in the larger coasting trade of the British Empire; or than the refusal to permit the sale by the British, including the Canadians, of their vessels to our citizens with registration, while we may freely sell and register our vessels in any part of the British possessions? There is a wide gulf between this class of privileges which nations grant or refuse in accordance with their own broad or narrow views of their own interests and that class which affects the comfort of strangers and their property in foreign ports. All the latter the treaty just negotiated secures and perpetuates.

In the official pamphlet of the National Fishery Association of March 1, 1888, there is given on the twelfth page the following alternative for this treaty:

It may be asked how shall we deal with this matter? What can be done to settle the fishery question between the British North American provinces and the United States? This can be done, and it has the sanction of the Forty-ninth Congress. Wipe out all legislative commercial arrangements and let us

go back where we were, so far as commercial intercourse with the British provinces is concerned, when the treaty of 1818 was made. In other words, declare non-intercourse! Put Canada in the same relation to the United States as she was seventy years ago! Then our fishermen would have the same rights they have now under the treaty of 1818, and we should then be in a position to say to her: "Are you willing this should continue, or do you prefer to deal with us on a fair basis and give to all our vessels, as we are willing to give to yours, full commercial rights in your ports?"

It is not proposed here to dwell on this alternative nor to discuss the propriety of the assumption of a representative character by the National Fishery Association. But in the event the treaty is rejected, if the President heeds this demand, as perhaps under the law he may, neither the association, nor whomsoever it represents, if anybody, nor, more particularly, that part of the community which now fails to rise up against its pretensions, can justly complain.

The fishing interests of New England welcomed with great expectations the expiration of the treaty of 1871, which came about in June, A. D. 1885; but the result has shown how little the prosperity of these interests can rely on political events. The seasons of 1886 and 1887, so far as the mackerel catch was concerned, were disastrous through natural causes, both for our own fleets and for those of Nova Scotia, though less for the latter than for the former. Although the catch for these two seasons was only one-third of the catch for 1882 and 1883, yet the prices made no corresponding advance; so that the money aggregate for the two latter seasons, including all grades of mackerel, could not have been much in excess of one-third of that for the two earlier seasons named. With reference to cod and other ground fish, there was a considerable diminution in the catch for the seasons of 1886 and 1887, with an extremely low market in 1886 and a somewhat improved market in 1887, the net money yield for each being comparatively small. In neither branch of the fisheries, however, were these evils caused by Canadian complications. This is well understood with reference to mackerel, and becomes entirely plain as to cod when the fact is considered that in A. D. 1883, A. D. 1884, and A. D. 1885, the catch on the New England shores and George's Banks exceeded that on the Grand and Western Banks, while the reverse occurred in A. D. 1886 and A. D. 1887. Before the Senate Committee on Foreign Relations in A. D. 1886, Sylvester Cunningham, of Gloucester testified that—

The price of fish is so low now that, if we should allow Canadian fish to come in free, our vessels would not sail. The price is very low.

Mr. O. B. Whitten, vice-president of the Fishery Union, also testified before the same committee, October 6, 1886, as follows:

Q. Have you ever noticed that the duty has increased or that the absence of duty has decreased the price of fish to the consumer during the last fifteen years?

A. I do not know that the duty has anything to do with it whatever. *In fact it is strange that salt fish were never so low as they are at the present time with the duty on.*

Mr. L. R. Campbell, deputy commissioner of labour for the State of Maine, in an interview with a reporter of the *Kennebec Journal*, on the 17th day of November last, said:

The fishermen are in a worse condition to-day than they have been for a number of years, for the reason that they had two bad seasons in succession.

Indeed, the depressed condition of the fisheries for the last two years is too notorious to need evidencing, though the above explanation of its causes seem necessary.

In this state of financial losses and anxiety the fishing interests are, of course, not prone to welcome anything which will not, in their opinion, give them immediate financial relief; yet the writer speaks from a considerable personal knowledge when he says that whosoever may have part in advancing the wholesome and beneficent treaty just negotiated can without trepidation trust himself in the hands of the fishermen of Maine, those who actually man our fleet, and to the sober second-thought of those who own the vessels.

It is to be hoped the present season will be one of prosperity for the cod and mackerel catchers on each side of the line. Our fishermen need it sorely; and the good humour which would flow therefrom would quickly flood out the recollections of the past ill-will and its consequent mischiefs.

WILLIAM L. PUTNAM.

PORTLAND, ME., *April 16, 1888.*

485 No. 241.—1888, *May 7: Report of the Committee on Foreign Relations of the United States Senate, and the Report of a Minority of that Committee.*

[50th Congress, 1st Session. IN THE SENATE OF THE UNITED STATES, Mis. Doc. No. 109.]

[MAY 10, 1888.—Injunction of secrecy removed and ordered to be printed.]

MAY 7, 1888.

Mr. EDMUNDS, from the Committee on Foreign Relations, submitted the following report (Executive No. 3)

On the Treaty (Ex. M.) between the United States and Great Britain, concerning the Interpretation of the Convention of October 20, 1818, signed at Washington February 15, 1888; which, together with the Views of the Minority on the same subject, submitted by Mr. Morgan, was ordered to be printed in confidence for the use of the Senate.

The Committee on Foreign Relations, to which was referred the message of the President of the United States of the 20th February last, transmitting a proposed treaty between the United States and Great Britain concerning the interpretation of the convention of the 20th October, 1818, signed at Washington February 15, 1888, respectfully reports:

That it has had the said proposed treaty under careful and deliberate consideration and that it returns herewith a resolution in the

ordinary form for its ratification, with the expression of its opinion that said resolution ought not to be adopted.

As preliminary to a consideration of the text of the treaty itself in its various aspects, the committee thinks it proper to give a brief résumé of the history of the fisheries question and other matters relating to the intercourse between the United States and the British dominions of North America having more or less relation thereto.

Before the revolution the inhabitants of all the British colonies in North America possessed, as a common right, the right of fishing on all the coasts of British North America, and these rights were, in a broad sense, prescriptive and accustomed rights of property. At the end of the revolution and by the treaty of peace of 1783, which adjusted the boundaries between the dominions of the two Powers, it was (article III)—

Agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank and on all the other banks of Newfoundland; also in the Gulf of St. Lawrence, and at all other places in the sea where the inhabitants of both countries used at any time heretofore to fish, and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island), and also on the coasts, bays, and creeks of all other of His Britannic Majesty's dominions in America.

This was a grant or recognition of a property right agreed upon on a consideration, viz, the adjustment of the boundaries and the other engagements into which the United States by that treaty entered. As to the open-sea fishing, it was merely a recognition of a right common to all nations, and as to the fishing within the municipal dominion of His Majesty on his coasts, bays, and creeks, it was an agreement that these rights theretofore existing in all British subjects should of right belong to those British subjects who, by force of the revolution, had become the citizens of an independent nation; and thus it was, in the partition of the territory, a reservation in favour of the people of the United States of a right which they, as British subjects, had theretofore lawfully enjoyed.

From 1783 until the war of 1812 between the two countries citizens of the United States continued to enjoy the ancient rights belonging to them as subjects of Great Britain before the revolution and reserved to them as citizens of the United States after it, with the full freedom secured by the article last referred to. During this period of time other subjects of difference and negotiation arose between the two countries, which were disposed of by the treaties of 1794, with its explanatory articles, and of 1802; but the fishery provision of 1783 continued to exist unquestioned and apparently as having been, as it plainly purported to be, a treaty disposing of and adjusting property rights which had become by force of its own operation an executed contract.

436 The treaty of peace concluded on December 24, 1814, at the close of the war of 1812, provided:

First, for a restoration to each party of all countries, territories, etc., taken by either party during the war, without delay, saving some questions of islands in the Bay of Passamaquoddy.

Secondly, it provided for disposition of prizes and prisoners of war.

Thirdly, it provided for questions of boundary and dominion regarding certain islands and for the settlement of the northeastern boundary, and also for the northwestern boundary, etc. It made no reference whatever to any question touching the fisheries mentioned in the treaty of 1783.

The commercial treaty concluded on the 3d of July, 1815, between the two countries provided for reciprocal liberty of commerce between all the territories of Great Britain *in Europe* and the territories of the United States, but left without any new treaty stipulation or obligation commercial intercourse between British dominions in North America and the United States remaining under the exclusive control of each.

But after the conclusion of the treaties following the war of 1812, there being then no treaty obligations or reciprocal laws in force between or in either of the countries respecting commercial intercourse, the British Government set up the pretension that the fishing rights recognised and secured to citizens of the United States by the treaty of 1783 had become abrogated in consequence of the war of 1812, which, on the principle of the war annulling all unexecuted engagements between the two belligerents, it was contended, annulled the fishing rights described in the treaty of 1783, and that the citizens of the United States had, therefore, no longer the right to fish in any of the British North American waters. This pretension led to the conclusion of the treaty of the 20th October, 1818, the fisheries article of which provided that (article I)—

Whereas differences have arisen respecting the liberty, claimed by the United States, for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbours, and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties that the inhabitants of the said United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands; on the western and northern coast of Newfoundland from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours, and creeks, from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson Bay Company: and that the American fishermen shall also have liberty forever to dry and cure fish in any of the unsettled bays, harbours, and creeks, of the southern part of the coast of Newfoundland, above described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce for ever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits: *Provided, however*, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

This arrangement divided, and limited in territorial extent, the fishing rights of the people of the United States, that had existed while they were British subjects and had been recognised and existed under the treaty of peace of 1783 until the war of 1812, and it provided for a continuance of the ancient rights of fishing on certain

named parts of the coasts of British North America, and its islands, and in their bays, harbours, and creeks, etc. It also provided for a renunciation by the United States of pre-existing rights to take fish, etc., "within 3 marine miles of any of the coasts, bays, creeks, or harbours" of His Majesty's dominions in British North America, not included within the previously-mentioned limits, but with a proviso, as a reservation upon the renunciation of the right to fish, that the—

American fishermen shall be admitted to enter such bays or harbours for the purposes of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purposes whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

It will be observed that the ancient right continued in all its force in every bay, harbour, and creek of a described territory, and that the renunciation of the right to fish on other coasts, bays, harbours, and creeks is in the same language, and is perfectly correlative to the first, and that the line of British municipal dominion was recognised and stated to be a line 3 marine miles from these British coasts, bays,

437 creeks, and harbours, and that this renunciation was, both in substance and form, a renunciation only of a right to *fish* and to exercise the incidents of the fishing, as drying, etc., and that the proviso to that renunciation admitted the American fishermen to enter such waters, bays, and harbours for the specific purposes necessary to them in their character as fishermen only, and not having the slightest reference, either expressly or by implication, to any *fishing* or *other* vessel of the United States and sailing under their flag, entering any port of His Majesty's dominions anywhere for any commercial or trading purpose. And these entries into exclusively British fishing waters fishing vessels (the only ones entitled to be there at all) were to be under such restrictions, and such only, as should be necessary to prevent their exercising the fishing rights that had been renounced and abusing the privileges of such entry so reserved; that is, by doing the renounced thing, viz, the taking and curing of fish, or violating the British laws excluding all American trading vessels.

It is to be kept clearly in view that at the time of the conclusion of this treaty of 1818, and for twelve years afterward, no American vessel had any right to enter any port of British North America, with the few exceptions named in the mutual arrangements of 1820 and 1823, hereinafter stated. The treaty of 1815 and the British laws and policy reserved the whole trade and intercourse with the ports of these colonies to her own vessels, and, reciprocally, there was no law or treaty of the United States which authorised the entry into ports (with the exceptions stated) of the United States of British vessels from British North American ports.

Thus it was that the treaty of 1818 omitted to make any mention of the ports in the British provinces in connection with the arrival or departure of American vessels, either fishing or other, and so it was a clear and necessary construction of the treaty of 1818 that the arrangements, conditions, and renunciations therein provided had no relation, one way or the other, to the exercise of what may be called commercial rights by the American fishing or other vessels in the

waters or ports of British North America, for the *status* of things was such, that it could not be done in the case of *any* American vessel without regard to her character as a vessel engaged in fishing upon the high seas or in the British territorial waters, wherein, as was provided, she might continue to fish, or to her commercial character.

The right (except in the cases before stated) of the British to exclude such vessels and all others of the United States from her ports in British North America, as the matter stood until 1830, is fully conceded, and it is also conceded that during that time the only right of any vessel of the United States to enter the waters of British North America depended upon the treaty of 1818 alone, and in order to obtain the benefit of that treaty for such purposes, the American vessel *must* have been a fishing vessel, and must have resorted to those particular waters for some one of the purposes mentioned in the treaty, and no others.

The foregoing statement is, of course, subject to the limitation implied in whatever rights might have existed by the general law of nations in respect of vessels under circumstances requiring the exercise of humanity, etc. It must be also remarked that at the time of the conclusion of the treaty of 1818 the ports of British North America were very few and far between, and that there could be very little motive for American vessels either fishing or other, to resort to such ports for the purposes of trade until the British colonial policy should have been abandoned or very largely modified.

The matter, then, under the treaty of 1818 was a very simple one and can be restated thus:

(1) No American vessel had any right to resort to British North American ports for any commercial or other purpose, and no British North American vessel had any right to resort to any port of the United States for such purposes.

(2) But American fishing vessels had a right to resort to certain of the coasts, bays, harbours, and creeks of that part of British North America described in the treaty of 1818 for all purposes of fishing which they had anciently enjoyed.

(3) But American fishing vessels, and fishing vessels *only*, had also a right to resort to all other British North American waters for the special purposes named in the treaty.

(4) The general result of this was, as to American fishing vessels, that they had, on all the British North American coasts and in all her bays and harbours, the right to shelter, to repair damages, and to obtain wood and water, but on certain named parts of the same coasts, etc., they had not the right to take or cure fish; and

(5) As a consequence of the situation embraced in the British laws and in that treaty, the matter of resorting to British North American ports either by American fishing or other vessels was entirely outside of and unaffected either way by that treaty.

From 1818 forward, until after the reciprocal arrangements of 1830 concerning commerce, it is not known that any serious difficulties occurred in respect of the rights of American fishermen pursuing their calling in those regions of the sea.

Two or three instances only of seizure appear to have occurred until after 1830 and none of those touched or raised the bay or headlands question. In 1835 the British Government brought to the notice of our own the complaints of the Canadian authorities concerning alleged infractions of the treaty of 1818 by our fishermen. These complaints did not involve the bay or headlands question or any commercial question, and the complaints were imme-

diately attended to by our Government to the satisfaction of that of Great Britain (Ex. Doc. 100, Thirty-sixth Congress, first session, pp. 56 and 58).

In 1838-'39 there were a few more seizures, but none of them appear to have raised the bay or headlands question. One was seized at the Gut of Canso but released; and none of these seizures appear to have involved any commercial or trade question excepting the *Shetland*, which, being driven inshore by a storm, anchored, and the master was enticed into selling a boy who came on board, a pair of trousers and a little tea and tobacco, for which the vessel
438 was immediately seized, it being evident that the boy had been sent by the authorities to entrap the master (Ex. Doc. 100, Thirty-sixth Congress, first session, pp. 65 and 66); and excepting the *Magnolia* which purchased a barrel of herring for bait; and excepting the *Hart*, which, running into Tusket Harbour in heavy weather, and while the master was on shore procuring wood and water, a British subject asked some of the crew to help him clear his nets. Some of the crew accordingly went on board the British vessel and assisted in clearing the nets, for which the British owner gave two barrels of fresh herring and excepting the *Eliza*, which, being at anchor in a gale, carried away one of her larboard chains, and ran into Bevet Harbour, and got it repaired by a British subject, and was accordingly seized.

These instances are specially referred to to show that the bay and headlands question almost never practically arose, and that the offenses, if offenses they were, of the seized vessels, were of the most trivial and unimportant character, scarcely worthy the notice of a Government.

In 1818 (and before the treaty of that year) Congress passed an Act closing our ports against British vessels coming from colonial ports which were closed against vessels owned by citizens of the United States (Stats., vol. iii, p. 432); and in 1820 Congress passed a supplementary Act upon the same subject and upon the same principle of mutuality, applied particularly to British North American ports and certain West Indian ones (Stats., vol. iii, p. 602); and in 1823 Congress passed an Act suspending the former Acts so far as they applied to sundry ports named—the Canadian ones being St. John and St. Andrew's New Brunswick; Halifax, Nova Scotia; Quebec, Canada; and St. John's, Newfoundland.

But this Act was passed with the condition that the enumerated British colonial ports should be open for the admission of the vessels of the United States, and provided that, if trade and intercourse should be interrupted by the British authority in those ports, similar action should be taken by the President in respect of our own.

The Act of Congress of May 29, 1830, provided for opening of all American ports to certain British colonial vessels on a mutual opening of British colonial ports to American vessels. Section 2 of that Act declared that—

Whenever the ports of the United States shall have been opened, under the authority given in the first section of this Act, British vessels and their cargoes shall be admitted to an entry in the ports of the United States from the islands, provinces, or colonies of Great Britain, on or near the North American continent, and north or east of the United States (Stats., v. iv, p. 420).

Pursuant to this Act, President Jackson, on the 5th of October, 1830, in accordance with a mutual understanding upon the subject with the Government of Great Britain, issued his proclamation, putting this Act of 1830 into effect (Stats., v. 4, p. 817). And on the 18th of November, 1830, a British Order in Council was issued, declaring among other things—

That the ships of, and belonging to, the United States of America may import from the United States aforesaid into the British possessions abroad goods with produce of those States, and may export goods from the British possessions abroad to be carried to any foreign country whatever (British Foreign and State Papers, v. 17, p. 894.)

It is clear that under this Act of Congress all British vessels, without regard to their occupation, whether fishing or other, coming from British North America, were entitled to admission into our ports for all purposes of trade and commerce. Canadian fishing vessels had the same rights as any other, for they fell within the general description stated in the statute. So, too, reciprocally, our fishing vessels fell within the general description of "ships of and belonging to the United States." Before this time *all* American vessels were excluded from British North American ports with the then recent exception before stated; then, under this arrangement *all* ships of the United States were to be admitted into British North American ports. The former almost universal exclusion was abolished without reserve. If any literal reading of this British Order in Council can be suggested as of a narrower construction, it would destroy the mutuality of the action of the two Governments and be unworthy of a Government.

Surely no nation not in a state of vassalage would consent that its citizens or subjects should for a moment be treated in or by another nation in a less favourable way than it treated the citizens and subjects of the same class and occupation of such other nation.

From the conclusion of the treaty of 1818 down to nearly 1840, as we have seen, the incidents of collision or difficulty in respect of the rights of the purely American fishing vessels under that treaty were comparatively few; and, so far as the committee is advised, such incidents of difficulty as occurred did not arise under any bay or headland pretension of Great Britain, but came out of a few American vessels, from time to time having come within 3 miles of the British North American shores, being seized upon one accusation or another.

In the year 1836 the province of Nova Scotia passed laws of a more stringent and unjust character than any that had existed before, and in the year 1838 that province complained, in an address to the Queen, of American aggressions and asking for a naval force to prevent them. It appears that a British force was accordingly placed on the British North American coast and the seizures of American vessels became much more numerous. (See reports and papers on the subject, Senate Ex. Doc. 100, thirty-second Congress, first session.)

It appears from these papers that most of the cases of British seizure were for alleged violations of the customs laws. That others of them were for violations of the privileges secured by the treaty of 1818, by coming within 3 miles of the shore; and so far as it is known, it was not until the 10th May, 1843, that any American vessel was

seized for fishing more than 3 miles from the shore in a bay indenting the British North American coast.

439 But in the diplomatic correspondence of that period the pretension was asserted by the British Government that bays more than 6 miles wide, and of indefinite width, if bays indenting British shores, were within the exclusion of the treaty of 1818, and under this pretension the American fishing vessel *The Washington* was seized for fishing in the Bay of Fundy, but more than 3 miles from the shore. This pretension of the British Government was denied by our own, but no agreement upon the subject was come to.

This state of things, with more or less of collision and harassment to our fishing vessels, continued, but without very serious difficulty, until, in 1852, an attempt was made by the British Government to induce the United States to conclude a reciprocity treaty, which failing, the British Government sent a strong force of war steamers and sailing vessels to these waters for the alleged purpose of enforcing the provisions of the treaty of 1818, but, as was believed by the people and Government of the United States, intended not only for that, but as an overawing enterprise, which should frighten the American fishermen from resorting to British waters for any of the purposes mentioned in the treaty, and to so much disturb American fishing interests as to seriously cripple or destroy them, and thus lead the United States to enter into reciprocity with British North American provinces.

Documentary papers and discussions in the Senate at the time will show how fully this matter was understood, and how it was regarded by the people and Government of the United States. Mr. Webster, then Secretary of State, thereupon issued a circular notice to American fishermen in which he states what the rigid and strict construction of the treaty of 1818 would be, as claimed by the British, as it respected the entrance of fishing vessels into the bays or harbours indenting the British provinces. He stated the British pretension in respect of drawing lines from headland to headland and their asserted pretension of a right to capture all American fishermen who should follow their pursuits in bays inside of such lines. But he distinctly also stated, in the same circular, that he did not agree to the construction thus put by the British upon the treaty, or that it was conformable to the intention of the contracting parties; but he informed the public of the British pretension, "to the end that those concerned in American fisheries may perceive how the case at present stands and be on their guard." (H. R. Mis. Doc. No. 32, Forty-second Congress, second session.)

This circular of Mr. Webster was of July, 1852, and on the 23d August of the same year, twenty-two years after the laws of 1830, the provincial secretary of Nova Scotia issued a notice that "no American fishing vessels are entitled to commercial privileges in provincial ports," etc. (Memorandum respecting North American fisheries, prepared for the information of the American commissioners who negotiated the treaty of 1871.)

Following these operations, the Claims Convention of the 8th of February, 1853, between the United States and Great Britain, was concluded, and under that convention the case of the *Washington* seized for fishing in the Bay of Fundy, as before mentioned, was

heard, and the umpire decided that the true meaning of the treaty of 1818 made it lawful for the *Washington* to fish more than three miles from the shore in the Bay of Fundy, and in respect of the headland pretension he says:

That the Bay of Fundy is not a British bay, nor a bay within the meaning of the word as used in the treaties of 1783 and 1818.

He refers to the convention of 1839 between France and Great Britain in respect of reciprocal fishing by the subjects of each country along the shores of the other, providing that their conventional arrangements shall exclude the fishermen of each from bays which do not exceed 10 miles in width within the shores of the other as a proper limit of the doctrine of headlands.

But upon this point (immaterial to the question before him) it is to be observed that the 10-mile headland arrangement between France and Great Britain was a mutual one, applying to the shores and bays of both countries along which the fishermen of each were accustomed to ply their calling, and if, therefore, that convention had agreed upon a distance of 10 miles from shore, and 20 miles for the width of the waters between the headlands, it would have furnished no argument in respect of the principle of public law applicable to such questions or in respect of the ancient rights of the citizens of the United States in regard to the fisheries in northeastern waters, for the fishermen of each country were put upon a precisely equal footing in respect of the waters and ports of the other, which, on the British theory, strangely enough, has not existed between British and American fishermen since the Act of Congress of 1830, and will not exist if the treaty under consideration should go into effect.

In 1854, however, the objects of British and Canadian desire were at last accomplished by the conclusion of the treaty of the 5th of June of that year, by which an extensive reciprocity, so called, of trade was agreed upon, and the right granted to the Americans to fish within the limits prohibited by the treaty of 1818 under a variety of restrictions and limitations, and a similar right granted to British fishermen in the waters of the United States north of latitude 36°.

In the same treaty were various other provisions respecting navigation of the St. Lawrence, American and Canadian canals, etc., and the treaty was terminable on notice after the expiration of ten years. The experience of the United States and their citizens under that treaty led Congress to terminate it in the winter of 1864-'65 by a vote of nearly 2 to 1 in the House of Representatives and by a vote of nearly 5 to 1 in the Senate.

The Canadian Government then for a few years resorted to a system of licensing American fishermen to fish in the waters from
440 which they were excluded for fishing purposes by the treaty of 1818. For the first year the number of licenses is reported to have been 354, at 50 cents per ton. The next year, 1867, the license fee was made \$1 per ton; the number of licenses is reported to have been 281. The next year, 1868-'69, the license fee was again doubled—\$2 per ton—and in 1868 only 56 licenses were taken out, and in 1869 only 25.

In 1868 the Dominion Government proceeded to enact the most harsh and stringent laws on the subject of American fishermen calculated and, it is thought, undoubtedly designed to so harass Ameri-

can fishermen in the exercise of the rights reserved to them by the treaty of 1818 as to cripple and destroy their operations. Analogous legislation by Newfoundland in 1836 had led the United States to remonstrate against it as a "violation of the well-established principles of the common law of England and of the principles of all just powers and of all civilized nations, and seemed to be expressly designed to enable Her Majesty's authorities, with perfect impunity, to seize and confiscate American vessels and embezzle almost indiscriminately the property of our citizens employed in the fisheries on the coasts of the British possessions." (Ex. Doc. 100, Thirty-second Congress, first session.)

In 1870 the British Government informed our own that the Canadian Government would issue no more licences to American fishermen; and, notwithstanding the decision of the umpire in the case of the *Washington* in 1853, announced the British claim to the exclusion of the American fishing vessels from coming within British headlands, without regard to the width of the bay between. (See Report on Foreign Relations, 1870).

Then came the treaty of 1871, devoted primarily to the Alabama claims, but which provided that for the period of ten years fishermen of the United States should have, in addition to their rights under the treaty of 1818, the right of British North American in-shore fishing under certain limitations, etc.; and the United States agreed to the free admission of British North American fishery products into our country, and it was also provided that the British fishermen might fish in certain American waters, and that the balance of alleged advantage to the United States in these respects should be settled by a commission.

This commission, as is well known, by the vote of the British commissioner and the Belgian umpire, and against the vote of the American commissioner, fixed the sum to be paid by the United States at \$5,500,000. The gross injustice of this, as believed by the United States, led the Senate, on the 27th February, 1879, six years before the fisheries provision could expire by the terms of the treaty, to unanimously pass a resolution declaring that steps ought to be taken to provide for the earliest possible termination of these fishery arrangements by negotiations with the British Government to that end. It is understood that the President of the United States, in pursuance of this recommendation, endeavoured to obtain the agreement of Great Britain to an immediate termination of these clauses in the treaty, but without success.

In February, 1883, however, as the period was approaching when these provisions could be terminated on notice, both Houses of Congress unanimously (or certainly without any division) passed resolutions terminating articles XVII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXX, and XXXII of said treaty, which articles covered the whole fishery subject as well as certain matters of navigation, etc. This termination took effect on July 1, 1885.

By the twenty-ninth article of the same treaty, which is still in force, the United States engaged that all goods, wares, and merchandise arriving at certain ports named and destined for the British possessions in North America, should have entry and transit without the payment of duty, and it was reciprocally agreed on the part of Great Britain that all goods, wares, and merchandise arriving at any

of the ports of British North America and destined for the United States, should also have the right of free entry and transit to the United States, etc.

That the foregoing mentioned article of the treaty of 1871 covered and included the transmission of fish from American fishing vessels as well as other goods is evident, not only from the plain and comprehensive language of the article, but from the statements of the formal British Case laid before the Halifax Commission in 1877, wherein the right of the transhipment of fish from Canadian ports to the United States free of duty, covered by that article, was made the ground of claim for compensation.

But it will be seen on inspection of the treaty of 1871 that the fisheries articles of that treaty contained no provision either in respect of any commercial rights in Canadian ports or in respect of transshipments, and that the reciprocal transhipment article of the treaty was entirely separate and distinct from any question of fisheries or fish as such; but the proceedings before that commission distinctly demonstrated that under article 29 the right to tranship fish was understood by the British to be included and without any conditions depending upon the force of any other of the articles of the treaty, and it is also to be observed that the fisheries articles, in respect of their duration and termination, are treated of separately and by themselves in article 33, which provided that they, as a group by themselves, might be terminated after ten years, on two years' notice, while the reciprocal transhipment article 29 was left to stand independently by itself.

It inevitably follows:

(1) That the right of American fishing vessels to tranship their fish from Canadian ports to those of the United States was not derived from the fisheries articles and did not depend upon them.

(2) That such right clearly existed by force of article 29 and did not depend upon any other article, and

(3) That article 29, not having been terminated, the right of American fishing vessels to enter Canadian ports for the purpose of transhipping their cargoes is as clear and unquestionable as that of any other American vessels.

441 Under the treaty of 1871, with all the privileges granted to Americans in respect of fishing in British waters, the practical result was the diminution of American fishing interests and a corresponding large increase of the Canadian fishing interests, owing to the superior facilities of the Canadians in fishing near their own homes and their right guaranteed by that treaty to dispose of their fish in American ports free from all duties and impositions. It was this, doubtless, that led the British Government to refuse to terminate the fisheries article of 1871 when it had already obtained \$5,500,000 as the established recompense for the superior (alleged) advantages obtained by American fishermen under that treaty.

After the final termination of the fisheries articles of the treaty of 1871, it being apparent that the United States could not be persuaded or beguiled into a renewal of the so-called reciprocity with Canada, the former methods of unfriendly coercion and harassment were again resorted to and with great exaggeration. New Canadian laws, sanctioned by the Home Government, were enacted, calculated and evidently designed to effectually frustrate and destroy all the substantial rights that American fishermen were entitled to enjoy

under the treaty of 1818, and to destroy the mutuality of the Act of 1830 and the benefits of article 29 of the treaty of 1871.

Our Government remonstrated, at first mildly, and later on with something of the vigour that should belong to those entrusted with the defence of clear American rights. But these remonstrances, unaccompanied or followed by any further steps, were unavailing.

The President, in his annual message of December, 1885, in view of these circumstances, recommended to Congress the making provision for a commission to adjust and settle the difficulties and disputes thus arisen, but Congress did not see fit to do it, and the Senate, on the 13th of April, 1886, adopted a resolution by a majority of 25 declaring that, in its judgment, no such commission ought to be established; and by a resolution of the 24th of July, 1886, proceeded to order an investigation by its committee on foreign relations into the fishery question and into the unjust treatment of our fishermen and the circumstances connected therewith, with a view, as it may be presumed, to taking such measures on the report of its committee as the interests and honour of the United States should require.

That committee made an exhaustive investigation, and without any dissent from any of its members reported to the Senate, on the 19th of January, 1887, upon the subject, stating the history of these difficulties and the clear rights that it was thought belonged to the United States and to their citizens, and recommended the enactment of a law for the protection of American rights.

Such a law was enacted, the Bill passing the Senate by a vote of 46 in the affirmative to 1 in the negative, and passing the House of Representatives with an enlarging amendment by a vote of 256 in the affirmative to 1 in the negative.

On the passage of this law the only difference between the two Houses was that concerning the extent to which these defensive measures should go. This Act of Congress was approved by the President on the 3d of March, 1887, and is in the following words:

AN ACT To authorize the President of the United States to Protect and defend the Rights of American Fishing vessels, American fishermen, American Trading and other Vessels, in certain cases, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the President of the United States shall be satisfied that American fishing vessels or American fishermen, visiting or being in the waters or at any ports or places of the British dominions of North America, are or then lately have been denied or abridged in the enjoyment of any rights secured to them by treaty or law, or are then or lately have [been] unjustly vexed or harassed in the enjoyment of such rights, or subjected to unreasonable restrictions, regulations, or requirements in respect of such rights; or otherwise unjustly vexed or harassed in said waters, ports or places; or whenever the President of the United States shall be satisfied that any such fishing vessels or fishermen, having a permit under the laws of the United States to touch and trade at any port or ports, place or places, in the British dominions of North America, are or then lately have been denied the privilege of entering such port or ports, place or places, in the same manner and under the same regulations as may exist therein applicable to trading vessels of the most favoured nation, or shall be unjustly vexed or harassed in respect thereof, or otherwise be unjustly vexed or harassed therein, or shall be prevented from purchasing such supplies as may there be lawfully sold to trading vessels of the most favoured nation; or whenever the President of the United States shall be satisfied that any other vessels of the United States, their masters or crews, so arriving at or being in such British waters or ports or places of the British dominions of North America, are or then lately have been denied any of the privileges therein accorded to the vessels, their masters

or crews, of the most favoured nation, or unjustly vexed or harassed in respect of the same, or unjustly vexed or harassed therein by the authorities thereof, then, and in either or all of such cases, it shall be lawful, and it shall be the duty of the President of the United States, in his discretion, by proclamation to that effect, to deny vessels, their masters and crews, of the British dominions of North America, any entrance into the waters, ports, or places of, or within the United States, (with such exceptions in regard to vessels in distress, stress of weather, or needing supplies as to the President shall seem proper), whether such vessels shall have come directly from said dominions on such destined voyage or by way of some port or place in such destined voyage else-
 442 where; and also, to deny entry into any port or place of the United States of fresh fish or salt fish or any other product of said dominions, or other goods coming from said dominions to the United States. The President may, in his discretion, apply such proclamation to any part or to all of the foregoing-named subjects, and may revoke, qualify, limit, and renew such proclamation from time to time as he may deem necessary to the full and just execution of the purposes of this Act. Every violation of any such proclamation, or any part thereof, is hereby declared illegal, and all vessels and goods so coming or being within the waters, ports or places of the United States contrary to such proclamation shall be forfeited to the United States; and such forfeiture shall be enforced and proceeded upon in the same manner and with the same effect as in the case of vessels or goods whose importation or coming to or being in the waters or ports of the United States contrary to law may now be enforced and proceeded upon. Every person who shall violate any of the provisions of this Act, or such proclamation of the President made in pursuance hereof, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding two years, or by both said punishments, in the discretion of the court.

Approved, March 3, 1887.

So far as is known to the committee, no step whatever was taken by the President to put this law into execution, but negotiations were initiated and continued, to the apparent end of accomplishing, what Congress had thought it unfit to undertake in such way, an adjustment of these difficulties by the diplomatic course of securing a part of American rights at the expense of yielding other and the most fundamental and important of them.

These negotiations culminated in the appointment by the President, during the recess of the Senate, on the 22d of November, 1887, only ten days before the meeting of Congress, of three "plenipotentiaries," to consider, with like plenipotentiaries appointed by Her Majesty, the whole subject, with a view of coming to a solution thereof.

These plenipotentiaries, thus created, began their real work at Washington while both Houses of Congress were sitting, and without any communication by the President in his annual message on the meeting of Congress, or otherwise, of the fact that such important and extraordinary operations were in progress, or that very grave interests of the United States had been placed in the custody of gentlemen whose names had not even been communicated to it.

These "plenipotentiaries" came to a conclusion of their labours on the 15th of February, 1888, and the offices of "plenipotentiaries" terminated, and the result was reached without the advice and consent of the Senate having been asked or taken concerning the selection of these public Ministers, and without any communication to either House of Congress concerning this most important subject.

It is not difficult to see that, in evil times, when the President of the United States may be under influence of foreign and adverse interests, such a course of procedure might result in great disaster to the interests and even the safety of our Government and people.

It is no answer to this suggestion to say that an arrangement thus concluded can not be valid or effectual without the advice and consent of the Senate, for the rights and interests of the people of the United States might be so neglected, misunderstood, abandoned, or sold by President's "plenipotentiaries" as to greatly embarrass, if not defeat, their ultimate re-assertion in better times and under better administrations, though it is hoped that such will not be the case in respect of these negotiations.

The document submitted to the Senate by the President as the outcome of these negotiations may, it is thought, well illustrate the dangers of such methods.

But holding in reserve, for the time being, these grave questions touching usurpations of unconstitutional powers, or the abuse of those that may be thought to exist on the part of the executive, the committee thinks it sufficient for the present occasion to deal with the document itself.

The subject with which, according to the message of the President transmitting it, this document professes to deal, is "the settlement of the questions growing out of the rights claimed by American fishermen in British North American waters." And the document opens with the statement that it has to deal with "differences * * * concerning the interpretation of article I of the convention of October 20, 1818." The article referred to appears in an earlier part of this report.

The language of this article is, as has often been stated in long discussions upon the subject, perfectly clear. And as it respects the territorial limits wherein American fishermen should no longer have their ancient right of fishing, there has not been and can not be any question capable of discussion, other than that which may arise from the use of the words "bays," etc., of Her Majesty's dominions.

The article itself, in clear and unmistakable language, recognised and adopted 3 miles from the shore as the extreme limit of municipal dominion and exclusion, but it also used the words "bays," etc.—British bays—as included within the prohibited territory.

For many years after the conclusion of this treaty of 1818 there does not appear to have been any difficulty in respect of the exercise of the rights of American fishermen in bays along the British North American coast that were more than 6 miles wide at their entrance, thus following the description embraced in the 3-mile designation of municipal boundary.

443 But when the Canadians found that they could not have the same advantages enjoyed by American citizens, fishermen, in introducing their fish and other products into the United States on the same terms as our own citizens, a system of restrictive claim was adopted, and the pretension was set up that *any* bay, no matter how wide, indenting British North America, was a British bay, and that the American fishermen were by the treaty of 1818 forbidden to fish therein, and in 1843 the first seizure under that claim occurred. The American fishing vessel *Washington* was the vessel. What was decided and settled in her case has already been stated.

From that day to this no instance has been brought to the attention of the committee (among all the various and very numerous seizures of American fishing vessels by the British authorities under

the claim of violations of the treaty of 1818) of any seizure of any American fishing vessel for the act of fishing in any bay indenting the British North American coast more than 3 miles from the shore.

It is curious to note that in the opening British case before the Halifax Commission, no mention is made of the headlands question that had from time to time been a subject of theoretical discussion between the two Governments. But after the case had been presented the question was referred to, but it appears to have been dropped in view of the fact that fishing in such bays did not appear to be of any substantial value at that time. Thus the bay and headland matter stood when these last negotiations began.

The first article of the treaty now under consideration provides for the appointment of a mixed commission, to delimitate "the British waters, bays, creeks, and harbours of the coasts of Canada and of Newfoundland, as to which the United States, by article I of the convention of October 20, 1818, between the United States and Great Britain, renounced forever any liberty to take, dry, or cure fish."

Certainly a delimitation of 3 miles from the shore could not possibly be made more clear than it was by the treaty of 1818. Monuments can not be set up in the sea which shall separate the waters of Her Majesty's dominions from the waters belonging to the fishermen and all other people of the United States in common with the rest of mankind.

The only possible point must be to describe what were British bays, etc., and if this article had only been devoted to naming the bays, etc., that were less than 6 miles wide, there might have been some theoretic ground for such an operation. But the treaty easily dismisses all such as a part of the coast line, and proceeds to show that the 3-mile limit mentioned in the treaty of 1818 is not the one that is to define the rights of citizens of the United States, but that a new and different principle, entirely favourable to Great Britain, is to be adopted. To this end the third article of the treaty provides that the 3 marine miles mentioned in the treaty of 1818—

shall be measured seaward from low-water mark; but at every bay, creek, or harbour not otherwise specially provided for in this treaty, such 3 marine miles shall [be] measured seaward from a straight line drawn across the bay, creek, or harbour, in the part nearest the entrance at the first point where the width does not exceed *ten* marine miles.

By this simple British process the 3 miles mentioned in the treaty of 1818 is nearly doubled and extended to 5 miles from either shore at the entrance or along the bays indenting the coast. It needs no comment to show that this provision is not an execution of the treaty of 1818, but is making, by an assumed construction or otherwise, a new one of entirely different dimensions and entirely in the interest of Her Majesty's Government.

But this is not all. The "plenipotentiaries" went still further (not stopping at nearly doubling the area of British municipal dominion measured by the treaty of 1818), and agreed that many of (and perhaps all the valuable) great bays, much more than 10 miles in width, should be forevermore included in British municipal dominion, and that forevermore no American fisherman should have the right to drop a line or cast a seine therein.

These great bodies of water, thus given up to the British, are named in the treaty as follows: (1) the Baie des Chaleurs; (2) Bay

of Miramichi; (3) Egmont Bay; (4) St. Ann's Bay; (5) Fortune Bay; (6) Sir Charles Hamilton Sound; (7) Barrington Bay; (8) Chedabucto Bay; (9) Mira Bay; (10) Placentia Bay; (11) St. Mary's Bay.

These agreements contained in article 4 of the treaty, as has been said, really cede (so far as the United States are concerned) to Great Britain forever the complete dominion over these numerous and, for fishing purposes, the most valuable of the bays along the coasts of British North America, and exclude forever all the American fishing vessels therefrom, except for the limited and narrow purposes mentioned in the treaty of 1818, and recognise that by force of the treaty of 1818 these are and always have been British waters, while it is thought by the committee that by the public law of nations these same waters will be open to the vessels of all other countries than our own, unless they, too, shall, from generosity or fear, or for some consideration, renounce their right to use the same.

The principle on which this article is formed is a recognition by the United States of the municipal and territorial sovereignty of Great Britain in and over all the other bays, etc., on the British North American coast, however large, in which, by this treaty, our citizens are to be admitted to fish, exterior to a line 3 miles from shore.

The article in terms professes to delimit the *British bays mentioned in the treaty of 1818*, and as it mentions eleven such bays even more than 10 miles wide, and some of which are 20 or more miles wide, it follows that the British contention of municipal dominion over all bays without regard to width, is acted upon, and that the right of Americans to fish in the few other wide bays not mentioned is a grant by the British Government.

If the Baie de Chaleurs is a now British bay, so also must be the Bay of Fundy and all the rest. But if it be suggested that the "plenipotentiaries" renounced the right of fishing in these bays as public waters (for which no hint appears in the treaty) in consideration of supposed advantages gained to the United States by other provisions of the treaty, it is, the committee thinks, equally objectionable; and this entirely without regard to any present practical value or want of value of the fisheries therein. It is not thought by the committee to be suitable to the dignity or interests of the United States to renounce the right of its citizens to pursue business in any part of the public waters of the world. Such rights, the committee thinks, should neither be the subjects of purchase, sale, barter, nor gift.

The question of the extent of territorial dominion, as it respects the exercise of fishing rights in bays more than 6 miles wide indenting the shores of a country, must of course be determined by the law and practice of nations as they existed in the year 1818, at which time, as the committee thinks, the 3-miles limit from shores was recognized without regard to large indenting bays, except under very peculiar circumstances, such as the prescriptive exercise of dominion, etc. Whether, in view of recent inventions in the implements of warfare, it may not be politic for maritime nations to agree upon an enlargement of the boundaries of their territorial dominion seaward is a question well worthy of consideration, but it has no place in respect of the matters now in hand.

The supposed precedent for such agreements as are set up in this treaty, of the convention of 1882 (Ex. Doc. 113, p. 18), between Great Britain, Germany, Belgium, Denmark, France, and the Netherlands, is very far indeed from being such. That was for the *police regulation* of the fisheries in the North Sea, and on the coasts of all the contracting parties. It was limited to five years, and not perpetual, as this treaty is. It neither granted nor renounced any right. The freedom of navigation, etc., inside the 3-mile limit was reserved. The naval vessels of the respective powers were to enforce the regulation. For serious infractions not settled at sea the offending vessel was to be taken to a port of her own country for trial.

Such regulations as these just cited might well have formed a precedent for composing the differences between the United States and Great Britain; for, first, they did not admit territorial dominion as existing over bays more than 6 miles wide, but conferred it for the time being and for a limited purpose; second, they recognised the rights of fishing vessels to be considered as vessels entitled to the rights of all other vessels bearing the flag of their country, without regard to their occupation, so far as it respected every thing else than fishing; third, they placed the administration of these fishing affairs in the commanders of national vessels; and, fourth, they provided that an accused vessel should be taken to her own country for trial.

The contrast between this North Sea fisheries treaty, to which Great Britain was a party, and the one now before the Senate is vivid. They are substantially the opposites of each other in nearly every particular.

Nor does the treaty now before the Senate bear any material resemblance to the protocol proposed by Mr. Seward in 1866 (Ex. Doc. 113, p. 17), nor to the scheme sent by Mr. Bayard to Mr. Phelps in November, 1886 (Ex. Doc. 113, Fiftieth Congress, first session, p. 17).

The fifth article of the treaty, declaring that the treaty shall not be construed to include within common waters any interior portions of bays, etc., that "can not be reached from the sea without passing within the 3 marine miles mentioned in article I of the convention of October 20, 1818," is very sweeping, and may cover a great deal more than the mere reading of it would imply to one uninstructed in the nature of the northeastern lands and waters, with their deep indenting bays, their many islands and islets, and their tremendous tides, the rise and fall of which, in many places, change the aspects of nature to an astonishing degree. But it is purely language making the test the capacity of *passing* within 3 miles of the shore, and plainly indicates that no matter how large may be the bay, no matter how wide apart may be its headlands, no matter how deep may be the waters between such headlands at high tide, if the ship-channel to it at low tide be within 3 miles of land it is an excluded bay.

Having now seen what the proposed treaty accomplishes in respect of "delimitation," we proceed to examine its provisions in respect of what American vessels engaged in fishing on the high seas may and may not do in British North American waters ascertained, enlarged, and defined as before stated, and in the ports on those coasts.

In order to understand more clearly the disastrous nature of what the "plenipotentiaries" have agreed to, it is valuable to consider

and again state the situation of affairs existing in 1818, and to which the treaty of that year applies.

Before and at that time and down to 1830 no American vessel of any kind was as of right admitted to any British North American port, and no rights of commerce or trade existed (with the few exceptions before stated); and, reciprocally, no British North American vessel of any kind, fishing or other, was admitted to ports of the United States otherwise than as an act of mutuality in the cases stated. The treaties of 1794 and 1815 purposely left all these ports and all trade between British North America and the United States to be regulated according to the particular policy of each nation. Such is still the condition of things so far as any treaty obligation is concerned, excepting article 29 of the treaty of 1871.

In 1818, then, no American fishing vessel or any other American vessel could enter a port on any of the coasts of British North America, even where the full right of fishing in-shore existed. And the treaty of 1818, formed on that basis, was not intended to, and it did not in any way, touch the question of any trade or commercial right whatever, and of course made no distinction in these respects between fishing and other American vessels. It looked and spoke only in regard to the fact of the renunciation by the United States of their fishing rights in that part of the territorial waters of British North America named in the treaty, and, as an *incident* of that renunciation and as an incident only, it provided that American fishing vessels might enter those renounced waters, not to fish, but only for "the purpose of shelter and of repairing damages therein, of purchasing wood, and obtaining water;" and this right was
445 to be exercised under such restrictions as should be necessary to prevent their fishing, etc., therein, or in any other manner abusing the privileges so reserved to them.

These words, "in any manner abusing the privilege of entry," clearly referred to the then existing state of British law which prevented all trade intercourse by foreign vessels with the provinces, and were intended to authorize such action on the part of Great Britain as should be justly necessary to prevent violations of British navigation and commercial laws.

But in the course of years, when after these mutual arrangements of a legislative character were made, the business and trade between the United States and British North America developed, the British North Americans, like their fellows in England, began to see that the American system of customs laws operated to the advantage of American citizens and industries and unfavourably to Canadian and British interests. They then commenced, and have since steadily continued (except during the intervals of so-called reciprocity, under the treaties of 1854 and 1871), a systematic and persistent course or hostile legislation and administration under the pretext of enforcing the restrictions of the treaty of 1818, well calculated and designed, as the committee thinks is clear, to so embarrass and harass the citizens of the United States, engaged in the legal pursuit of fishing on the high seas as well as in the British North American waters reserved to them by the treaties of 1783 and 1818, as to drive them out of the business, and so to leave it all in British hands, or else to induce the United States, by such a course of unfriendly and even outrageous

conduct, to allow the free entry of Canadian fish and other products into our markets as the price of their fair treatment of our fishermen.

Yet, during the last two or three years of this course of studied injustice and of outrage, while no American fishing vessel, even bearing a full commercial character under the laws of the United States and with the flag of the United States at the fore, could enter a port of British North America for any purpose without being exposed to seizure and forfeiture, or enter a British North American harbour for shelter or to repair damages or obtain wood and water without being subjected to this unjust and even outrageous treatment, the fishing vessels of British North America could lawfully and without molestation enter any harbour or port of the United States, sell or tranship their cargoes, and do every kind of trade, and depart in peace.

This condition of things became so intolerable that, at last, the remonstrances of the executive became vigorous and urgent, and on the 8th December, 1886, the President sent to Congress the following message of the subject:

To the Senate and House of Representatives of the United States:

I transmit herewith a letter from the Secretary of State, which is accompanied by the correspondence in relation to the rights of American fishermen in the British North American waters, and commend to your favourable consideration the suggestion that a commission be authorised by law to take perpetuating proofs of the losses sustained during the past year by American fishermen, owing to their unfriendly and unwarranted treatment by the local authorities of the maritime provinces of the Dominion of Canada.

I may have occasion hereafter to make further recommendations during the present session for such remedial legislation as may become necessary for the protection of the rights of our citizens engaged in the open-sea fisheries of the North Atlantic waters.

GROVER CLEVELAND.

EXECUTIVE MANSION, Washington, December 8, 1886.

Justly influenced, doubtless, by this message and by the state of affairs shown in the documents accompanying it and by the evidence taken by, and the report of the Senate Committee on Foreign Relations on the same subject made on the 19th of January, 1887 (Rep. No. 1683, 49th Cong., 2d sess.), Congress came to the conclusion that the period of negotiation and unavailing remonstrance had passed, and with almost absolute unanimity and without any party division enacted the Act of March 3, 1887, hereinbefore mentioned, by which the duty was imposed upon the President of withdrawing from British North American vessels, etc., those liberties and advantages which by the pre-existing laws they were enjoying in the harbours and ports of the United States, whenever and as often as it should appear to him that similar rights and liberties were denied the United States fishing vessels, etc., in the ports, etc., of British North America, or whenever it should appear to him that American fishing vessels should have been subjected to outrageous or unjust treatment in the exercise of the rights secured to them by the treaty of 1818.

All that remained unprovided for according to the sense of self-respect and of just policy on the part of the United States was to obtain indemnity from the British Government for the injuries that had thus far been committed.

In view of this state of affairs, thus briefly mentioned, we come to consider what the proposed treaty undertakes to provide in regard to American vessels engaged in fishing.

The first clause of article X provides that American fishing vessels entering the bays or harbours referred to in article I shall conform to harbour regulations common to them and Canadian fishing vessels. This, by necessary implication, concedes the right on the part of the Canadians to subject United States fishing vessels resorting to a British North American bay for shelter from a tempest, to the municipal laws of Canada, no matter how far different those regulations may be from the provision in the treaty of 1818 giving to the British the right only to make such restrictions as should be *necessary to prevent an abuse of the privilege* of entry for the purpose stated.

This clause adopts the principle of the British contention in the Fortune Bay affair, which contention was that American vessels in

Canadian waters, under either the treaty of 1818 or 1871,
446 were subjected to all of the municipal laws of that country.

This British contention was successfully resisted by Mr. Evarts, then our Secretary of State, and the British Government paid an indemnity for an interference with our fishing vessels in respect of their being engaged in fishing in those waters contrary to the municipal statutes of Newfoundland.

This clause, then, gives away important American rights, and adopts the principle that under the treaty of 1818 American fishing vessels are subject to the full force of foreign municipal law. But this clause is, in part only, qualified by the next, which excuses them from reporting, entering, or clearing when putting into such bays for shelter or repairing damages, and when putting into the same *outside the limits of established ports of entry*, for the purpose of purchasing wood or obtaining water, with certain exceptions even in respect of that excuse. But we think it may be safely assumed to be true that there are very few, if any, British North American bays or harbours that are not within the limits of established ports of entry, for doubtless (which is the case in the United States) the Dominion customs laws bring every part of the seashore and all its bays and harbours, within the customs limits of some port of entry.

This modification, then, of the sweeping requirement of the first clause really amounts to nothing, and, indeed, can (if it does not already) by a simple legislative or administrative act of the Dominion Government bring every bay and harbour and every part of the coast within the limits of established ports of entry, and thus again completely surrender the fishing vessels of the United States to every commercial regulation of the Dominion Government which operates against them, while it gives them almost none of the benefits of commercial intercourse.

The next clause, also, further provides that American fishing vessels, when in these bays and harbours for shelter, etc., under the treaty of 1818, shall not be liable for harbour dues, etc. This is a mere statement of what results from the treaty of 1818, for it has no application to these vessels other than in their purely fishing character, and in that character they were not subjected by the treaty of 1818 to any such imposition, and could not be, for none of them were necessary to prevent their fishing or to prevent their smuggling.

Article X, then, taken as a whole, is a diminution instead of an enlargement of the rights of American fishing vessels under the treaty of 1818, and its modifying and limiting clauses would be only

valuable in any case as a renunciation by Great Britain of a totally unfounded pretension.

Article XI provides, first, that American fishing vessels entering the ports, etc., of British North America under stress of weather or other *casualty* may unload, reload, tranship, or sell, subject to customs laws, all fish on board, when such unloading, transhipment, or sale is made *necessary as incidental to repairs*, and may replenish outfits, provisions, or supplies damaged or lost by disaster, and in case of death or sickness, shall be allowed all needful facilities, including the shipping of a crew.

The most of these provisions are already clearly covered by the treaty of 1818, and all of them are covered by the real substance and spirit of the arrangement of 1830; and in respect of transhipment, by article 29 of the treaty of 1871. They are much more than covered by article 29 of the treaty of 1871, and are, in fact and effect, a voluntary abandonment on the part of the United States of the rights secured in respect of the transhipment of all American goods and merchandise arriving at any British North American port. That article uses language of the most comprehensive character, and it can not be doubted that under it a Canadian fishing vessel bringing a cargo of fish from the fishing-grounds to the south of Nantucket, or from any other place on the high seas or any British waters, to the ports of New York, Boston, or Portland, would be entitled to land them and tranship them to Canada without the payment of any duty, and it is, of course, equally clear that a cargo of fish on board a fishing vessel of the United States, when brought from the fishing-grounds of the high seas or elsewhere to any British North American port, may, in like manner, be entered and transhipped to the United States without the payment of duty.

It would seem, then, that in respect of the clause of Article XI, now under consideration, as well as with respect of the clauses hereinbefore considered, that the executive in negotiating this treaty had failed to remember, or had left out of view, what the present rights of citizens of the United States already clearly are under treaties now in force, and had proceeded upon the idea that every right that the United States is to obtain by force of this treaty is a new one, and is granted by Her Majesty's Government in consideration of the renunciation to her of the great bodies of water mentioned in the earlier articles of this treaty and of all commercial rights not mentioned in this treaty.

The next paragraph of article XI provides that *licences* in British North American ports shall be granted to United States fishing vessels on the *homeward* voyage only, to purchase such provisions and supplies as are ordinarily sold to trading vessels, but such provisions shall not be obtained by barter nor purchased for resale or traffic. A Canadian fishing vessel, on whatever voyage, either outward or inward, may now lawfully purchase anything in a port of the United States that any citizen of the United States can purchase, and on the same terms, without any licence whatever, and may dispose of any such purchase without any restriction. How does it happen that the United States are to buy, or to accept as an act of generosity, the privilege for our fishing vessels only when they are on the way home, sufficient food to preserve them from starvation, and under

the restriction that, being without money, they must not obtain it by the exchange either of fish-hooks or wearing apparel?

If all vessels of the United States, including those engaged in the occupation of catching fish on the high seas, are now, under the arrangements of 1830, entitled as of right to trade in British North American ports, this clause of article XI surrenders nearly the whole of such right; but if, under the arrangements of 1830 or otherwise, American vessels engaged in fishing on the high seas have no right of entry into British North American ports and no right to
447 trade therein, and their enjoyment of such privileges depends upon the legislative policy of the British Dominion Government, can the United States, with the least sentiment of self-respect or with the least regard to American honour, accept such a privilege, so limited, without on the other hand limiting the privileges of similar Dominion vessels in the ports of the United States?

The United States is under no treaty obligation whatever in respect of Dominion fishing or any other vessels, other than those contained in the treaty of 1871 and all those, whatever they may be, are strictly mutual. The committee thinks that such an arrangement as is here proposed, and which necessarily implies that there can be no other or greater rights of American vessels than those here described, is utterly inadmissible unless it be conceded that the business of American citizens carried on on the high seas, hundreds of miles, in many instances, from British North American coasts, is and ought to be subjected in British North American ports to the free will and pleasure of the government of that country and they are to have few of the rights that, by the common intercourse of nations, are accorded to the vessels of all countries as acts of hospitality and humanity, and which by treaty or legislative arrangements of nearly all nations are accorded to the citizens of each in the ports of the other upon perfectly mutual and equal terms, and never otherwise. If we are to buy hospitality why should we not sell it? If we are to submit to British regulations of any occupation on the high seas why should not British subjects in like manner submit to a similar control or exclusion of their vessels by the United States?

The last paragraph of article XI appears to be thought by the President in his message communicating the treaty to give to our fishing vessels, whether on the homeward voyage or not, the right of purchasing provisions and supplies that ordinarily belongs to trading vessels. In this the committee thinks the President is much mistaken. The first clause of the paragraph provides for licences to purchase supplies for "the homeward voyage." It then says that such vessels, having obtained the required licences, shall also be accorded upon all occasions such *facilities* for the purchase of casual or needful supplies as are ordinarily accorded to trading vessels.

If these last-mentioned words have the meaning imputed to them by the President, the words immediately preceding are absolutely useless and can have no meaning whatever; for the privilege, if expressed, is included within those afterwards used, and as the two phrases stand in immediate connection with each other, the absurdity of their insertion in such a case could not possibly have been overlooked by any intelligent person. And if such a really broad provision as is supposed was intended to be inserted in the treaty—one

which was intended to completely reverse the whole British pretension upon the subject, and put our fishing vessels, for all purposes of provisions and supplies, upon the same footing that British fishing vessels occupy in the United States and that American trading vessels do in the British provinces—it certainly should, and probably would, have been stated in language incapable of sincere misunderstanding.

What the committee thinks it means is that an American fishing vessel, having obtained a licence to purchase provisions on and for the homeward voyage, which is all that the first clause says or describes, viz, the mere act of obtaining the licence upon application, such vessel, having obtained such licence, shall, upon all occasions to which the licence, viz, upon all occasions of the homeward voyage, be accorded facilities for doing what the licence says she may. This, the committee thinks, is the literal and grammatical construction of the paragraph, and all that can be extracted from it by the ordinary principles of construction.

The whole of this article, then, as it appears to the committee, is one that would be totally derogatory to the honour and interests of the United States to agree to. The committee can never recommend or agree that any American vessel or citizen shall receive less free and favourable treatment in any foreign port whatever than is accorded to the vessels or subjects of such foreign country by the laws and policy of the United States.

The subject of commercial rights, viewed in another aspect, compels the inquiry whether it is not entirely absurd to consider that if a British port existed on the southwestern or western coast of Newfoundland, or on the coast of Labrador, in respect of which, by the treaty of 1818, there is no exclusion of American vessels from territorial waters, such American vessel could, so far as the treaty of 1818 is concerned, enter such port for all and the same purposes that any other American vessel could, and that, under the same treaty, 50 miles to the eastward on the southern coast of Newfoundland, the very same American vessel should not now have any right of entry for the same purpose?

The twelfth article of the treaty under consideration provides that—

Fishing vessels of Canada and Newfoundland shall have on the Atlantic coast of the United States all the privileges reserved and secured by this treaty to United States fishing vessels in the aforesaid waters of Canada and Newfoundland.

If this article was intended to put Canadian fishing vessels upon the same footing only in American ports and waters that American vessels are put in Canadian ports and waters, there would be mutuality and equality, however narrow, in it. But this, evidently, was not the purpose of the article, for it is evident to the committee that Great Britain would not have consented to any such great diminution of the rights of her fishing vessels as they now exist in the ports and waters of the United States. The article itself, it will be seen, while somewhat obscure, is still drawn in such a way as only to be affirmative, and measures privileges, reserved and secured, and says nothing of conditions and limitations and nothing of ports, etc. But, however this may be, the committee does not think that it comports with the dignity or hospitality of the United States to deny to Brit-

ish North American fishing vessels or those of any other country the ordinary commercial rights, hospitalities, and humanities 448 that are now supposed to be nearly universal among nations calling themselves civilised, unless, unhappily, they should be compelled to do so in order to induce just and hospitable treatment to the vessels of our own country.

The thirteenth article provides that the Secretary of the Treasury of the United States shall make regulations for the conspicuous exhibition by every United States fishing vessel of its official number on its bows, and that no vessel shall be entitled to the licences provided in the treaty which shall fail to comply with such regulations. This provision on its face and taken literally applies to every fishing vessel of the United States, whether it is ever to enter Canadian waters or not, and it is a law to the Secretary of the Treasury of perpetual application.

But assuming, however mistaken the language may have been for this purpose, that it is only to apply to United States fishing vessels entering Canadian ports or waters, it is bad enough, for it proceeds upon the idea that vessels of the United States engaged in the occupation of fishing are to be put under a ban of specific apparel and appearance that is not imposed upon any other vessel.

By the article next preceding, and already commented upon, all Canadian fishing vessels are entitled in our waters to all the privileges that American fishing vessels are entitled to have in Canadian waters so far as it regards fishing, at least; but they are not required to be thus numbered and marked. A hundred Canadian fishing vessels may anchor in the harbour of Gloucester, the great fishing port of the United States, and be entitled to every right and every hospitality only upon the evidence of their papers, which show their nationality and that they are not pirates; but if a single American fishing vessel appears in the harbour of Halifax, and under the guns of Her Majesty's forts, she can not obtain any supplies, and her crew may starve at anchor unless upon each bow there is the number affixed by order of the Secretary of the Treasury of the United States. Certainly, American fishermen and, we should hope, every other American citizen would not be proud of such a distinction.

The fourteenth article of the treaty deals with the subject of penalties for fishing contrary to the treaty of 1818 and the first article of this treaty, and thereby the United States are to agree that such penalty may extend to forfeiture, etc. This is a singular provision (and probably unique) to be found in a treaty between two civilized nations, the general tenor of whose laws and the general social nature of whose institutions are very nearly homogeneous.

The article also provides for a limitation or an exception, as the case may be, of the legal penalties for other violations of fishery rights, three dollars a ton.

It also provides that the proceedings shall be summary and as inexpensive as practicable and that the trial shall be at the place of detention—the place of detention being left to the discretion of the seizing authorities, for without special provision the seized vessel could be taken to any port in the Dominion.

It then provided that security for costs shall not be required of the defense except when bail is offered; that is to say, that when a vessel, with all its furniture, tackle, apparel, and cargo, and its captain and

all its crew are seized and arrested and taken to a place of detention, security for costs shall not be required until the arrested citizens of the United States shall desire to release his vessel or get out of prison.

This certainly must be only what every just Government would provide of itself. The same may be said of all the other provisions of this article. They are all identical with or analogous to the practice of civilised Governments, and rest upon common principles of good administration of justice. Surely they should need no treaty contract to bring them into practice.

The fifteenth article of the treaty is open and conditional, and provides that when the United States shall admit British North American fish oil, whale oil, seal oil, and fish of all kinds except fish preserved in oil, free of customs duties, the like products of the United States shall be admitted free into British North America, and it is also provided that in that case United States fishing vessels may be entitled—not to fish in-shore as the treaty of 1871 provided but—to annual licenses for the following purposes in British North America:

- (1) The purchase of provisions, bait, ice, seines, supplies, etc.
- (2) The transshipment of catch.
- (3) The shipping of crews, but that supplies shall not be obtained by barter.
- (4) And that the like privileges shall be continued or given to fishing vessels of British North America on the Atlantic coast of the United States.

This is a much worse "reciprocity" than existed under the treaty of 1871, for while the treaty of 1871 was silent in respect of commercial rights in either country and left the matter of the commercial rights standing upon mutual legislative regulations of the two countries, this treaty limits the rights of the fishing vessels to certain specified forms and descriptions of commercial privileges, though it does seem to recognise the truth that would otherwise appear to have been forgotten in the negotiations, that Canadian fishing vessels now have commercial rights and privileges in the ports of the United States.

The impolicy of the general provisions of article 15 have already been twice fully demonstrated, and, on the last occasion of the kind, were unanimously abrogated by Congress. It is thought needless to now go into a discussion of that subject.

We have thus briefly reviewed all the substantial articles of the treaty of positive obligation excepting article IX, which declares that nothing in the treaty shall affect the free navigation of the Strait of Canso. This article was evidently inserted on account of the renunciation by the United States of its rights in Chedabucto Bay—this bay being at the southern entrance of that strait.

It is almost unnecessary to say that the committee is fully
 449 sensible that in many matters of fair difference and of doubtful consideration between two Governments, in order to arrive at an amicable composition thereof there must be mutual concessions, and that the same is true in respect of entering into new engagements for commercial and other intercourse between nations, in order that, in the last-named case, perfect mutuality of right and privilege may

be had in respect of the same matters; but the committee does not think that the proposed treaty can be justified in this way.

This idea of concession was doubtless the ground and guide upon which the treaty of 1818 was founded. At the time of that treaty the United States claimed (and justly as the committee thinks) that the fishing rights recognised by the treaty of 1783 on all the shores of British North America were property rights and that they were not lost by the war of 1812, and that after the treaty of peace of 1814, which made no mention of the subject, those rights existed with all their original force.

The British Government insisted upon the contrary and that the right of citizens of the United States to fish in any British North American waters had been entirely lost. This led to a partition of the disputed territory—whether wise or unwise is immaterial to the present question—but in making this settlement the contracting parties had evidently in view the then understood law of nations, that territorial waters only extended to three miles from the shore; and they also had in view the then existing state of treaty and legal relations between Great Britain and the United States in respect of intercourse between the British North American provinces and this country, and the treaty provided in clear terms where, in British waters, United States fishermen might fish and where they might not.

The only possible question that could fairly arise under the treaty of 1818 was the question what was a British bay. But the question, as a practical one, has been in all the sixty-nine years since the making of that treaty of little or no account; for, so far as is known, the only seizure of an American vessel by the British authorities for fishing more than 3 miles from the shore in a bay more than 6 miles wide was the seizure of the *Washington*, in 1843, and in that case, as has been before stated, the international umpire decided the seizure to have been an illegal and unjust one.

What American fishermen standing in all other respects on the footing of other Americans engaged in business on the sea, might do in their character as *fishermen* in the territorial waters and harbours of British North America was clearly stated, and in language that would seem to have been incapable of sincere misunderstanding.

The whole of the substance of the present state of the difficulty and discord has arisen from the course of the British and Canadian legislation and administration, directed against the vessels and fishermen of the United States in respect of their coming into British North American ports or harbours or within three miles of their shores, either under treaty rights or commercial rights.

In view of the plain history of these transactions and of the matters hereinbefore stated, it does not seem to the committee that the existing matters of difficulty are subjects for treaty negotiation; and such appears to have been the opinion of the Senate by its action and by the remarks of many of its members of both political parties and by the action of the House of Representatives upon and in the passage of the Act of March 3, 1887, and its approval by the President.

No new event or situation of affairs has arisen since that time, and the only real questions subsisting between the two countries in respect of the subject were those of reclamations by the United States for outrages upon its citizens, for which this treaty makes no provision,

and the question of whether the mutual arrangements of 1830 and the mutual rights of transit under the treaty of 1871 shall continue.

This treaty makes no provision for an indemnity. It does make provision for establishing forever the full measure and limit of rights and privileges to be enjoyed by fishing vessels of the United States, whatever other character they may also have and appear in, in the ports and waters of British North America, and it thus surrenders rights and privileges that the committee thinks are clearly and fully established under the arrangements of 1830, and the treaty of 1871, or, if such rights and privileges can be claimed not to exist in these respects, that it provides, as of original and perpetual engagement, for the exclusion of the American vessels engaged in a particular occupation on the high seas from the ordinary humanities and hospitalities and equalities enjoyed in the British North American ports by all other vessels of the United States, and, so far as is known, all the vessels of every character of every other country, while at the same time British North American vessels engaged in the same occupation and in the same seas have, without restraint, every right and facility of commerce, hospitality, and immunity in all the ports of the United States. To enter into such an engagement, finally and perpetually, as this, the committee thinks contrary to the dignity and just interests of the United States.

The committee regrets that these conclusions do not meet the approval of all its members. It had hoped, as has been the case generally hitherto, that no influences or divisions of a nature coincident with the lines of political parties would enter into a matter of this character, and that, as was the case only a little more than a year ago, all senators of all political parties would unite in standing firmly in the attitude taken in the winter of 1886-'87 and culminating in the act of March 3, 1887, and in declining, at whatever cost, to enter into any new engagements with the British Government that should leave any American citizen, engaged in whatever occupation or business, deprived of any right or privilege, other than fishing, in any British North American or other waters, that is or may be granted to citizens of the United States engaged in any other occupation, and that have been and are fully and freely granted by the United States to every British subject, whatever may be his occupation.

450 The committee thinks it due to the Senate to state that, contrary (as it believes) to the universal previous practice of the executive in connection with the consideration of treaties when the Senate has asked for all the papers and information in detail concerning the progress of the negotiations, the executive has not thought it for the "public interest," in this instance, to communicate all such papers and such detailed information to the Senate, although the Senate requested it; and it was stated in reply to the resolution of request that the deliberations of the plenipotentiaries were in confidence, and "that only results should be announced and such other matters as the joint protocolists should sign under the direction of the plenipotentiaries."

It is, however, stated that every point submitted to conference is covered by papers already in possession of the Senate, excepting the question of damages sustained by our fishermen, and which, it is

stated, was met by a counter-claim for damages to British vessels in the Behring Sea. It is then added that—

To the discretion and control of the executive are entrusted the initiation and conduct of the negotiation of treaties, and without the guaranty of mutual and implicit confidence between the agents, negotiations for the voluntary adjustment of vexed questions in controversy between nations could not hope-fully be entered upon.

It thus appears to be claimed by the executive that the Senate, without whose advice and consent no treaty can be concluded, has no right to be informed, confidentially, of the course of negotiations and discussions and the various propositions and arguments *pro* and *con* arising in the negotiation of a treaty. The committee feels it to be their duty to protest against any such assumption. It believes that such a claim is contrary to the essential nature of the constitutional relations between the President and the Senate on such subjects, and that it is the reverse of the continuous practice in such matters from the commencement of the Government to this time.

The principal points of the treaty, etc., that have been considered by the committee in the foregoing statement and discussion may be summarised substantially as follows:

SUMMARY.

I. The United States recognise as British territory and renounce forever all claim of independent right in all the great bays along the British North American coasts, named in the treaty, and admit that all such bays form a part of and are within British territorial sovereignty and jurisdiction.

II. Of the few of such great bays that are left to be visited by American fishermen, the larger part are understood to be valueless, and some of them are subject to French fishery rights older than our own, if they are British bays.

III. If bay fishing is not profitable now it may be in the future.

IV. Whether profitable or not, the United States ought not to give up, upon any consideration whatever, the right of its vessels of every character to visit and carry on business in any part of the public seas.

V. The treaty surrenders the claim and right of the United States, which has been acted upon and exercised for now more than a century, of its vessels engaged in fishing or other occupations to visit and carry on their business in these great bays, and the principle of which claim and right has once been solemnly decided against Great Britain by a tribunal organised under a treaty with that Government.

VI. The new area of delimitation described in the treaty greatly increases the danger of our fishermen unintentionally invading prohibited waters, and thereby exposing them to seizures and penalties.

VII. The treaty, by its fifth article, renounces any right of the United States in any bay, etc., however large, that "can not be reached from the sea without *passing* within the 3 marine miles mentioned in article 1 of the convention of October 20, 1818," thus excluding vessels of the United States from all waters, however extensive, and the distance between whose headlands is however great, the sailing channel to which may happen to be within 3 miles of the shore.

VIII. The treaty is a complete surrender of any claim of a right now existing either under the treaty of 1783, the treaty of 1818, the Acts of Congress and the British Orders in Council of 1830, or the twenty-ninth article of the treaty of 1871, for vessels of the United States engaged in fishing anywhere on the high seas, and even having a commercial character also, to enter any port of British North America for any commercial purpose whatever, and puts in the place of these clear rights, which, in respect of British fishing vessels, exist in the United States to the fullest extent, greatly restricted and conditional rights as arising solely from a present grant of Great Britain.

IX. It binds the United States to be content with whatever is given by this treaty as the full measure of its rights, and to be content with it forever, or until greater hospitality and freedom of intercourse can be obtained by further concessions or considerations on our part.

X. In the face of all this it leaves British North American fishing vessels possessed of all commercial rights in all the ports and waters of the United States.

XI. Whatever privileges of commerce, hospitality, or humanity are thus provided for in the treaty are to be obtained only upon condition that no fishing vessel of the United States shall receive any of them unless such fishing vessel shall, under regulations of the Secretary of the Treasury of the United States, be branded with an official number on each bow, and that such regulations shall, before they become effectual, be communicated to Her Majesty's Government.

XII. It provides that general, and even then, much limited, commercial rights and rights of transshipment, as mentioned in article fifteen, shall be obtained only at the price of exempting all Canadian fishery products from our custom duties.

XIII. Its provisions concerning the executive and judicial treatment of American vessels and fishermen that may be seized or arrested for supposed illegal conduct are, to make the most of them, nothing other, and probably something less, than a statement of what the laws and conduct of any administration of every Government professing to be civilised should adopt and exercise as an act of duty and justice.

XIV. Instead of diminishing sources of irritation and causes of difficulty, different interpretations and disputes, it will, the committee thinks, very largely increase them.

Various other suggestions adverse to the wisdom of ratifying this treaty might easily be made, but the committee does not think it necessary to go into them.

The committee can not but hope, that if these ill-advised negotiations, which, as is known to all the world, can not properly commit the United States in any degree until they shall have received the constitutional assent of the Senate, shall fail to meet the approval of this body, Her Majesty's Government will take measures to secure justice and fair treatment in her North American dominions to American vessels and American citizens, in all respects and under all circumstances, and that that Government will see the justice and propriety of according to American vessels engaged in the business of fishing all the commercial rights and facilities in her North American

ports that are so freely and cheerfully accorded to her own in the ports of the United States, and that thus the friendship and good feeling which ought to exist between neighbouring nations may be finally established and secured.

JOHN SHERMAN.
GEO. F. EDMUNDS.
WM. P. FRYE.
WM. M. EVARTS.
J. N. DOLPH.

May 7, 1888.

[*Minority Report of the Committee of the Senate, whose Report is printed above.*]

VIEWS OF THE MINORITY OF THE COMMITTEE ON FOREIGN RELATIONS

Upon the Treaty signed on the 15th February, 1888, by the Plenipotentiaries of the United States and Great Britain, dissenting from the Report of the Majority of that Committee, which recommends that the Senate refuse to Advise and Consent to the Ratification of said Treaty.

The minority of the Committee on Foreign Relations dissent from the report of the majority recommending the rejection of the treaty with Great Britain dated February 15, 1888, and submitted to the Senate for its consideration, and present the following as their principal reasons for their dissent:

Two objections to this treaty were stated in committee.

(1.) That it had been negotiated and signed by persons who were not duly empowered, under the constitution and laws of the United States, to conduct and conclude a treaty.

(2.) That the treaty, on its merits, should not be ratified by the Senate.

To meet the first objection, a member of the minority of the committee introduced the following resolution:

Resolved, That the treaty signed by Thomas F. Bayard, William L. Putnam, and James B. Angell, as plenipotentiaries of the United States, in conjunction with the British plenipotentiaries, on the 15th day of February, 1888, and sent to the Senate by the President as a treaty duly negotiated, for the consideration and action of the Senate, is properly authenticated as a treaty made by the President of the United States, acting within his constitutional powers, and is lawful and valid as a negotiation.

The purpose of this resolution was to bring before the Senate, in distinct form, the recommendation of the committee as to the merits of the treaty, apart from any collateral matter relating to the negotiation of the instrument.

In committee, this resolution was laid upon the table, and thereby any recommendation as to the question it presents, in answer to the first objection to the treaty, as above stated, was avoided.

The minority of the committee hold that it is entirely competent for a majority in the Senate to declare that the treaty has been negotiated and signed in a proper manner, and by persons duly qualified, or otherwise to return it to the President as a paper that does not call into exercise the powers and jurisdiction of the Senate upon the question of its ratification by them. And, if a majority in the

Senate shall declare that the treaty is sent to the Senate by
 452 the President and is duly signed and authenticated, or if no
 objection to it on that ground is made, then the subject-
 matter of the treaty is in order and should be considered by the
 Senate.

It is not disputed, or, so far as the undersigned are informed, doubted, by anyone that the Senate may accept and ratify, on the part of the United States, any treaty that the President has made with a foreign Government, that he sends to the Senate for consideration, and may waive any informality attending its negotiation.

In accepting the paper sent to the Senate by the President as a treaty, and by referring the same to its committee, the Senate have virtually waived any informality, if there is any, in the negotiation and signing of the instrument, and the undersigned conceive that the whole duty of the committee was to consider and report upon the merits of the treaty.

The undersigned will, therefore, present their views upon the substance of the treaty, first, and will then state the reasons that force them to the conclusion that there can be no just ground for the rejection of the treaty, growing out of the manner of its negotiation.

If it is better for the country that the treaty should be ratified, the rejection of it for matters that are merely formal or technical, in so grave an emergency as is now presented in connection with this old and harassing controversy, would be a serious injury to the country.

The undersigned believe that it is better for our country that the treaty should be ratified, and they are equally convinced that the entire class of our people who are actively engaged in our North Atlantic fishing industry will be benefited by its ratification.

The first article of the treaty of 1818 is as follows:

Whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbours, and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties that the inhabitants of the said United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland; from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours, and creeks, from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly, indefinitely, along the coast, without prejudice, however, to any of the exclusive rights of the Hudson Bay Company. And that the American fishermen shall also have liberty for ever to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but, so soon as the same or any portion thereof shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits: *Provided, however*, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

Articles 18 to 25, both inclusive, of the treaty of 1871, covered the whole subject of the fishing rights and liberties between the United States and the British North American colonies, "*in addition*" to those secured by the treaty of 1818. No other articles in the treaty of 1871 related to the fisheries, or the rights of fishermen. When the United States abrogated these articles, that completely ended the influence of that treaty over our fishing rights. Article 29 was not terminated, but it never had the least reference to the fisheries treaty of 1818, to enlarge its scope, change its meaning, or in any way to affect any right to which that treaty related. Yet, if that is not the true meaning of the 29th article of the treaty of 1871, this present treaty in no way affects that article, and it stands for all that it was ever worth in favour of our fishermen.

I. GENERAL STATEMENT OF THE SITUATION WHICH HAS RESULTED FROM THE "MISUNDERSTANDING" AS TO THE TRUE MEANING OF THE TREATY OF 1818.

During seventy years the people of the United States and of the British North American provinces in the northeast have been frequently engaged in contention and dispute, in controversy and conflict, about the true interpretation of the fisheries treaty of 1818.

The most frequent and serious disagreements have arisen under the *proviso* to the first article, which is as follows:

Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, and of purchasing wood, and of obtaining water, and for no other
453 purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

This proviso, as it was proposed by our negotiators, contained the words "and bait" after the word "water." These words were stricken out, with the consent of our commissioners. The right to obtain bait was thus finally disposed of as a treaty right.

In this proviso the four distinct "privileges hereby reserved to" American fishermen are stated definitely, while "such restrictions as may be necessary to prevent" them in any manner from "abusing the privileges" reserved to them are not defined, except in the most general terms.

American fishermen are placed "under such restrictions" with no guaranty as to the jurisdiction, whether provincial or imperial, that shall promulgate and enforce them; or whether they shall be declared by legislative authority, or administered by executive authority or by the judiciary.

It was contemplated in this treaty that further definitions on these delicate questions should be settled, either by the future agreement of the treaty powers, or that Great Britain should choose the tribunals that would declare and enforce these "restrictions" against American fishermen, subject only to the requirement that they should be "such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

That controversies would arise under this uncertain definition of the power to prescribe restrictions to our fishermen in the enjoy-

ment of positive treaty rights was as certain in 1818 as seventy years' experience has proven it to be, in an unfortunate history.

It was probably expected in 1818 that the good sense of the people and the good will of their Governments would enable them to arrange these indefinite "restrictions" by precedent and acquiescence, and thus adopt a series of regulations, the justice and propriety of which all would admit. But such hopes, if they were entertained, have been disappointed, and the eager rivalry that a very lucrative employment has stimulated has involved the people and their Governments in dangerous controversies as to the "restrictions" that were left without accurate definition in the proviso to the first article of the treaty of 1818.

Efforts have been made, that were for a time successful, to compose these and other troublesome questions growing out of article 1 of the treaty of 1818, by new treaty arrangements relating to the fisheries in British waters on the northeastern coasts.

In the treaty of 1854 the repose of these questions was secured for a time for the consideration of a liberal reciprocity extending to a variety of subjects. The right of the free navigation of the St. Lawrence River was included in that reciprocal agreement, and was made perpetual by the reciprocity treaty of 1871.

In the treaty of 1871 we again put these questions to rest for a time by the promise of enough money to equalise the possible advantages of the Canadian and other fisheries over those on our coast north of 39° north latitude.

Neither of these arrangements proved satisfactory to us as to the fisheries, and they were terminated by the United States.

In addition to these efforts, our diplomatists have employed every argument that seemed possible, through many years of laborious correspondence and conference, to find a ground of mutual understanding and consent as to the true interpretation of the treaty of 1818.

Without attempting to state all the cases of warnings, seizures, fines, and confiscations, of searches and captures and other rigorous applications of "restrictions" that have been visited upon our fishermen, it is painfully true that they have been very numerous, frequently very aggravated, and have caused our fishermen great expense and serious losses.

Every fishing season, when the reciprocity treaties were not in force, has added to these complications and rendered their solution more difficult.

That very little progress has been made in reaching a common basis of agreement in the solution of these contentions and conflicting constructions of the proviso in article 1 of the treaty of 1818, or in respect of the headland theory (which is based, as we understand, upon the language of that proviso and the preceding parts of that section, and not upon the principles of international law), is apparent from the citations of cases that have arisen since 1818, presently to be made.

Instead of a nearer approach to such an understanding as to a true and mutually acceptable construction of the first article of the treaty, a wider divergence of opinion and a more determined contention have characterised the diplomacy of both the treaty Powers.

We seem now to have reached a point where we must seek to allay the growing bitterness of these differences by a friendly, sincere, and mutually respectful consideration of the positions assumed by each

Government, or else we must enforce our views by vigorous measures of retaliation.

It seems to have become necessary to make such modifications of that treaty as are suggested by our changed commercial relations since 1818, and also by our methods of fishing with purse seines and of preserving fish in ice and snow, which have grown up into almost entirely new systems, with new attending wants, in the past thirty years.

The gradual abridgment of our right to land and cure fish on the shores of the British possessions, as the country along the shores should become populated, was provided for in the treaties of 1783, 1818, 1854, and 1871. This feature in a treaty is thought to be entirely novel. It relates to a future expected change in the condition of the then uninhabited coasts of British America. It certainly

suggests in a forcible way that it was contemplated that future
454 modifications of the treaties would be necessary to meet these changed conditions when they should occur.

The progress of civilisation on the North American continent, with the necessary increase of commerce and of improvement in every industry, has wrought changes in the condition of the people which have demanded, from time to time, changes in the treaty relations of the adjoining countries that were indispensable.

The right of navigating the Mississippi and St. Lawrence Rivers, as now agreed upon, is a most forcible illustration of this necessity for an international policy, modified by international agreement, that will provide for the mutual wants and advantage of these adjoining countries as the occasion demands.

An inflexible adherence to the literal construction of ancient agreements that have become too narrow for the convenience of either country, whether it results from national jealousy or commercial rivalry, creates an incubus upon the progress of the communities concerned that is derogatory to those who refuse to yield their prejudices.

Mr. Bayard, in presenting to the consideration of the British Government the reasons for a more liberal interpretation of the treaty of 1818, and for an enlargement of the privileges of our fishermen in the colonial ports, strongly urged the necessity for this relaxation of the strict and literal construction placed by that Government on that treaty, because of the growth of the commerce of both countries, the building of vast lines of railways, the increase of population, the enlarged demand for the products of the fisheries, and the more intimate commercial and social relations of the people.

Such considerations demand careful attention, and are, of themselves, sufficient reasons to induce both Governments to lay aside prejudices and resentments, and to induce their people to cultivate friendly relations, rather than to put their welfare at hazard by fostering ill-will towards each other, resulting in continual strife.

To show the very serious results of a different policy, the undersigned present the following statement of cases that have arisen out of the conflicting views as to the meaning of the first article of the treaty of 1818. It is probably far short of the full list of cases that have actually occurred, but it is large enough to disclose the fact that wide and serious differences have existed since 1819 in the inter-

pretation of that treaty, attended with complaints and remonstrances and protests, followed by diplomatic correspondence, and at times threatening the gravest consequences to the peace of the two countries.

In all the long list of cases that are here referred to only in one case, that of *The Washington*, seized for fishing in the Bay of Fundy in 1843, has any reparation been made for any wrong done our fishermen under the treaty of 1818.

Reparation was not, indeed, demanded in any such case until 1886.

List of Cases above referred to.

1. June 26, 1822, *L'Orient* seized, taken to St. John, and condemned September 14, 1822.
2. In 1823, *Charles of York*, Maine, seized by the *Argus* and taken into port for trial.
3. July 18, 1824, *Gallion* seized, taken to St. John, and condemned August 16, 1824.
4. July 18, 1824, *William* seized, taken to St. John, and condemned August 16, 1824.
5. October 7, 1824, *Escape* seized, taken to St. John, and condemned November 18, 1824.
6. October 7, 1824, *Rover* seized, taken to St. John, and condemned November 18, 1824.
7. October 7, 1824, *Sea Flower* seized, taken to St. John, and condemned November 18, 1824.
8. June 1, 1838, *Hero* seized, taken to Halifax, and condemned January 28, 1839.
9. November 1, 1838, *Combene* seized, taken to Halifax, and condemned January 28, 1839.
10. May —, 1839, *Java* seized, taken to Halifax, and condemned August 5, 1839.
11. June 4, 1839, *Shetland* seized, taken to Halifax, and condemned July 8, 1839.
12. May 26, 1839, *Independence* seized, taken to Halifax, and condemned August 5, 1839.
13. May 25, 1839, *Magnolia* seized, taken to Halifax, and condemned August 5, 1839.
14. May —, 1839, *Hart* seized, taken to Halifax, and condemned August 5, 1839.
15. June —, 1839, *Batelle* seized, taken to Halifax, and condemned July 8, 1839.
16. June 14, 1839, *Hyder Ally* seized, taken to Halifax, and condemned July 8, 1839.
17. June 14, 1839, *Eliza* seized, taken to Halifax, and condemned July 8, 1839.
18. June —, 1839, *May Flower* seized, taken to Halifax, and restored to its owners.
19. June 2, 1840, *Papineau* seized, taken to Halifax, and condemned July 10, 1840.
20. June 2, 1840, *Mary* seized, taken to Halifax, and condemned July 10, 1840.
21. September 11, 1840, *Alms* seized, taken to Halifax, and condemned December 8, 1840.
22. September 18, 1840, *Director* seized, taken to Halifax, and condemned December 8, 1840.
23. October 1, 1840, *Ocean* seized, taken to Halifax, and condemned December 8, 1840.
24. May 6, 1841, *Pioneer* seized, taken to Halifax, and condemned August 18, 1841.
25. May 20, 1841, *Two Friends* seized, taken to Halifax, and restored.
26. September 20, 1841, *Mars* seized, taken to Halifax, and condemned November 2, 1841.
27. September 20, 1841, *Egret* seized, taken to Halifax, and condemned November 2, 1841.
28. October 13, 1841, *Warrior* seized, taken to Halifax, and condemned November 9, 1841.
29. October 13, 1841, *Hope* seized, taken to Halifax, and restored.
30. October 13, 1841, *May Flower* seized, taken to Halifax, and condemned December 7, 1841.

31. May 7, 1843, *Washington* seized, taken to Halifax, and condemned August 1, 1843.
32. In 1844, *Argus* seized by the *Sylph*, off the coast of Cape Breton, when "15 miles from any land." "This was the second seizure under the new construction of the treaty of 1818."
- 455 33. In 1845, "an American fisherman * * * was seized in the Bay of Fundy at anchor inside the light-house at the entrance of Digby Gut."
34. In 1846, "the seizure and total loss of several American vessels," not named, is noted in S. Doc. 22, 2d sess., 32d Congress.
35. May 10, 1848, *Hyades* seized, taken to Halifax, and condemned September 5, 1848.
36. May 11, 1849, *Leonidas* seized, taken to Halifax, and condemned June 29, 1849.
37. September 14, 1850, *Harp* seized, taken to Halifax, and condemned January 28, 1851.
38. October 29, 1851, *Tiber* seized, but there is no information as to the disposition made of it.
39. June 16, 1872, *Coral* seized, taken to St. John, and condemned July 28, 1852.
40. July 20, 1852, *Union* seized, taken to Charlottetown, and condemned September 24, 1852.
41. August 5, 1852, *Florida* seized, taken to Charlottetown, and condemned September 7, 1852.
42. September 11, 1852, *Caroline Knight* seized, taken to Charlottetown, and condemned.
43. In 1852, *Golden Rule* detained and taken to Charlottetown, and liberated on the owner acknowledging violation of the treaty and that the liberation was an act of clemency.
44. November 16, 1869, Vice-Admiral Wellesley reported that during the past season 162 vessels had been boarded by the British cruisers, of which 131 within the three-mile limit had been warned once, and 19 had been warned twice.

In 1870 the following eleven (11) vessels were seized and taken into the provincial ports, some of which were condemned, while others, perhaps, were liberated: June 27, *Wampatuck* (condemned); June 30, *J. H. Nickerson* (taken to Halifax); August 27, *Lizzie A. Tarr* (condemned); September 30, *A. H. Wonson* (taken to Halifax); October 15, *A. J. Franklin* (taken to Halifax); November 8, *Romp*; November 25, *White Fawn* (taken to St. John); and *S. G. Marshall*, *Albert*, and *Clara F. Friend*.

In January, 1878, the *Fred P. Frye*, *Mary M.*, *Lizzie* and *Namari*, *Edward E. Webster*, *William E. McDonald*, *Crest of the Wave*, *F. A. Smith*, *Hereward*, *Moses Adams*, *Charles E. Warren*, *Moro Castle*, *Wildfire*, *Maud* and *Effie*, *Isaac Rich*, *Bunker Hill*, *Bonanza*, *Moses Knowlton*, *H. M. Rogers*, *John W. Bray*, *Maud B. Wetherell*, *New England*, and *Ontario* were driven from Long Harbour in Fortune Bay by the violence of a mob, which destroyed some of their seines, and did not again that season return to their fishing-grounds. Twenty-two vessels were included in this list, the interference with which was made the occasion of a separate and important correspondence, conducted, on our side, chiefly by Mr. Evarts, Secretary of State.

The following lists are taken from the subjoined correspondence of Secretary Bayard and Professor Baird with Mr. Edmunds, chairman of the Committee on Foreign Relations:

Revised List of Vessels involved in the Controversy with Canadian Authorities.

DEPARTMENT OF STATE,
Washington, January 26, 1887.

SIR: Responding to your request, dated the 17th and received at this Department on the 18th instant, on behalf of the Committee on Foreign Relations, for

a revision of the list, heretofore furnished by this Department to the committee, of all American vessels seized, warned, fined, or detained by the Canadian authorities during the year 1886, I now inclose the same.

Every such instance is therein chronologically enumerated, with a statement of the general facts attendant.

Very respectfully, yours,

T. F. BAYARD.

HON. GEORGE F. EDMUNDS,

United States Senate.

List of American Vessels seized, detained, or warned off from Canadian Ports during the last year.

1. *Sarah B. Putnam*. Beverley, Mass.; Charles Randolph, master. Driven from harbour of Pubnico in storm March 22, 1886.
2. *Joseph Story*. Gloucester, Mass. Detained by customs officers at Baddeck, N. S., in April, 1886, for alleged violation of the customs laws. Released after twenty-four hours' detention.
3. *Seth Stockbridge*. Gloucester, Mass.; Antone Olson, master. Warned off from St. Andrews, N. B., about April 30, 1886.
4. *Annie M. Jordan*. Gloucester, Mass.; Alexander Haine, master. Warned off at St. Andrews, N. B., about May 4, 1886.
5. *David J. Adams*. Gloucester, Mass.; Alden Kinney, master. Seized at Digby, Nova Scotia, May 7, 1886, for alleged violation of treaty of 1818, Act of 59, George III, and Act of 1883. Two suits brought in vice-admiralty court at Halifax for penalties. Protest filed May 12. Suits pending still, and vessel not yet released apparently.
6. *Susie Cooper*. (Hooper?) Gloucester?, Mass. Boarded and searched, and crew rudely treated, by Canadian officials in Canso Bay, Nova Scotia, May, 1886.
7. *Ella M. Doughty*. Portland, Me.; Warren A. Doughty, master. Seized at St. Ann's, Cape Breton, May 17, 1886, for alleged violation of the customs laws. Suit was instituted in vice-admiralty court at Halifax, Nova Scotia, but was subsequently abandoned, and vessel was released June 29, 1886.
- 456 8. *Jennie and Julia*. Eastport, Me.; W. H. Travis, master. Warned off at Digby, Nova Scotia, by customs officers, May 18, 1886.
9. *Lucy Ann*. Gloucester, Mass.; Joseph H. Smith, master. Warned off at Yarmouth, Nova Scotia, May 20, 1886.
10. *Matthew Keany*. Gloucester, Mass. Detained at Souris, Prince Edward Island, one day for alleged violation of customs laws, about May 31, 1886.
11. *James A. Garfield*. Gloucester, Mass. Threatened, about June 1, 1886, with seizure for having purchased bait in a Canadian harbour.
12. *Martha W. Brady*. Gloucester, Mass.; J. F. Ventier, master. Warned off at Canso, Nova Scotia, between June 1 and 8, 1886.
13. *Eliza Boynton*. Gloucester, Mass.; George E. Martin, master. Warned off at Canso, Nova Scotia, between June 1 and 9, 1886. Then afterwards detained in manner not reported, and released October 25, 1886.
14. *Mascot*. Gloucester, Mass.; Alexander McEachern, master. Warned off at Port Amherst, Magdalen Islands, June 10, 1886.
15. *Thomas F. Bayard*. Gloucester, Mass.; James McDonald, master. Warned off at Bonne Bay, Newfoundland, June 12, 1886.
16. *James G. Craig*. Portland, Me.; Webber, master. Crew refused privilege of landing for necessities at Brooklyn, Nova Scotia. June 15 or 16, 1886.
17. *City Point*. Portland, Me.; Keene, master. Detained at Shelburne, Nova Scotia, July 2, 1886, for alleged violation of customs laws. Penalty of \$400 demanded. Money deposited, under protest, July 12, and in addition \$120 costs deposited July 14. Fine and costs refunded July 21, and vessel released August 26. Harbor dues exacted August 26, notwithstanding vessel had been refused all the privileges of entry.
18. *C. P. Harrington*. Portland, Me.; Frellick, master. Detained at Shelburne, Nova Scotia, July 3, 1886, for alleged violation of customs laws; fined \$400 July 5; fine deposited, under protest, July 12; \$120 costs deposited July 14; refunded July 21, and vessel released.
19. *Hereward*. Gloucester, Mass.; McDonald, master. Detained two days at Canso, Nova Scotia, about July 3, 1886, for shipping seamen contrary to port laws.

20. *G. W. Cushing*. Portland, Me.; Jewett, master. Detained July (by another report, June) 3, 1886, at Shelburne, Nova Scotia, for alleged violation of the customs laws; fined \$400; money deposited with collector at Halifax about July 12 or 14, and \$120 for costs deposited 14th; costs refunded July 21, and vessel released.
21. *Golden Hind*. Gloucester, Mass.; Ruben Cameron, master. Warned off at Bay of Chaleurs, Nova Scotia, on or about July 23, 1886.
22. *Novelty*. Portland, Me.; H. A. Joyce, master. Warned off at Pictou, Nova Scotia, June 29, 1886, where vessel had entered for coal and water; also refused entrance at Amherst, Nova Scotia, July 24.
23. *N. J. Miller*. Booth Bay, Me.; Dickson, master. Detained at Hopewell Cape, New Brunswick, for alleged violation of customs laws, on July 24, 1886. Fined \$400.
24. *Rattler*. Gloucester, Mass.; A. F. Cunningham, master. Warned off at Canso, Nova Scotia, June, 1886. Detained in port of Shelburne, Nova Scotia, where vessel entered seeking shelter August 3, 1886. Kept under guard all night and released on the 4th.
25. *Caroline Vought*. Booth Bay, Me.; Charles S. Reed, master. Warned off at Paspébiac, New Brunswick, and refused water, August 4, 1886.
26. *Shiloh*. Gloucester, Mass.; Charles Nevit, master. Boarded at Liverpool, Nova Scotia, August 9, and subjected to rude surveillance.
27. *Julia Ellen*. Booth Bay, Me.; Burnes, master. Boarded at Liverpool, Nova Scotia, August 9, 1886, and subjected to rude surveillance.
28. *Freddie W. Allton*. Provincetown, Mass.; Allton, master. Boarded at Liverpool, Nova Scotia, August 9, 1886, and subjected to rude surveillance.
29. *Howard Holbrook*. Gloucester, Mass. Detained at Hawkesburg, Cape Breton, August 17, 1886, for alleged violation of the customs laws. Released August 20 on deposit of \$400. Question of remission of fine still pending.
30. *A. R. Crittenden*. Gloucester, Mass.; Bain, master. Detained at Hawkesbury, Nova Scotia, August 27, 1886, for alleged violation of customs laws. Four hundred dollars penalty deposited August 28 without protest and vessel released. Three hundred and seventy-five dollars remitted, and a nominal fine of \$25 imposed.
31. *Mollie Adams*. Gloucester, Mass.; Solomon Jacobs, master. Warned off into storm from Straits of Canso, Nova Scotia, August 31, 1886.
32. *Highland Light*. Wellfleet, Mass.; J. H. Ryder, master. Seized off East Point, Prince Edward Island, September 1, 1886, while fishing within prohibited line. Suit for forfeiture begun in vice-admiralty court at Charlottetown. Hearing set for September 20, but postponed to September 30. Master admitted the charge and confessed judgment. Vessel condemned and sold December 14. Purchased by Canadian Government.
33. *Pearl Nelson*. Provincetown, Mass.; Kemp, master. Detained at Arichat, Cape Breton, September 8, 1886, for alleged violation of customs laws. Released September 9, on deposit of \$200. Deposit refunded October 26, 1886.
34. *Pioneer*. Gloucester, Mass.; F. F. Cruched, master. Warned off at Canso, Nova Scotia, September 9, 1886.
35. *Everett Steel*. Gloucester, Mass.; Charles H. Forbes, master. Detained at Shelburne, Nova Scotia, September 10, 1886, for alleged violation of customs laws. Released by order from Ottawa, September 11, 1886.
- 457 36. *Moro Castle*. Gloucester, Mass.; Edwin M. Joyce, master. Detained at Hawksbury, Nova Scotia, September 11, 1886, on charge of having smuggled goods into Chester, Nova Scotia, in 1884, and also of violating customs laws. A deposit of \$1,600 demanded. Vessel discharged November 29, 1886, on payment, by agreement, of \$1,000 to Canadian Government.
37. *William D. Daisley*. Gloucester, Mass.; J. E. Gorman, master. Detained at Souris, Prince Edward Island, October 4, 1886, for alleged violation of customs law. Fined \$400 and released on payment; \$375 of the fine remitted.
38. *Laura Sayward*. Gloucester, Mass.; Medeo Rose, master. Refused privilege of landing to buy provisions at Shelburne, Nova Scotia, October 5, 1886.
39. *Marion Grimes*. Gloucester, Mass. Detained at Shelburne, Nova Scotia, October 9, for violation of port laws in failing to report at custom-house on entering. Fined \$400. Money paid under protest and vessel released. Fine remitted December 4, 1886.

40. *Jennie Seaverns*. Gloucester, Mass.; Joseph Tupper, master. Refused privilege of landing, and vessel placed under guard at Liverpool, Nova Scotia, October 20, 1886.
41. *Flying Scud*. Gloucester, Mass. Detained for alleged violation of customs laws at Halifax, November 1, or about that time. Released November 16, 1886.
42. *Sarah H. Prior*. Boston, Mass. Refused the restoration of a lost seine, which was found by a Canadian schooner, December 1886.
43. *Boat* (name unknown). Stephen R. Balcom, master, Eastport, Me. Warned off at St. Andrews, New Brunswick, July 9, 1886, with others.
44. *Two small boats* (unnamed); Charles Smith, Pembroke, Me., master. Seized at East Quaddy New Brunswick, September 1, 1886. for alleged violation of customs laws.
45. *Druid* (foreign built). Gloucester, Mass. Seized, warned off, or molested otherwise at some time prior to September 6, 1886.
46. *Abbey A. Snow*. Injury to this vessel has not been reported to the Department of State.
47. *Eliza A. Thomas*. Injury to this vessel has not been reported to the Department of State.
48. *Wide-Awake*. Eastport, Me.; William Foley, master. Fined at L'Etang, New Brunswick, \$75 for taking away fish without getting a clearance; again November 13, 1886, at St. George, New Brunswick, fined \$20 for similar offence. In both cases he was proceeding to obtain clearances.

U. S. COMMISSION OF FISH AND FISHERIES,
Washington, D. C., February 5, 1887.

SIR: I forward herewith, for your information, a copy of a communication from Mr. R. Edward Earll, in charge of the division of fisheries of this commission, accompanied by a list of New England fishing vessels which have been inconvenienced in their fishing operations by the Canadian authorities during the past season; these being in addition the vessels mentioned in the revised list of vessels involved in the controversy with the Canadian authorities, furnished to your committee on January 26 by the Secretary of State.

The papers containing the statements were received from the owners, masters, or agents of the vessels concerned, and, though not accompanied by affidavits, are believed to be correct.

Very respectfully, yours,

SPENCER F. BAIRD,
Commissioner.

HON. GEORGE F. EDMUNDS,
Chairman Committee on Foreign Relations, United States Senate.

U. S. COMMISSION OF FISH AND FISHERIES,
Washington, D. C., February 5, 1887.

SIR: Some time since, at your request, I mailed circulars to owners or agents of all New England vessels employed in the food-fish fisheries. These called for full statistics of the vessels' operations during the year 1886, and, in addition, for statements of any inconveniences to which the vessels had been subjected by the recent action of the Canadian Government in denying to American fishing vessels the right to buy bait, ice, or other supplies in its ports, or in placing unusual restrictions on the use of its harbours for shelter.

A very large percentage of the replies to these circulars have already been received, and an examination of same shows that, in addition to the vessels mentioned in the revised list transmitted by the Secretary of State to the Committee on Foreign Relations of the United States Senate on January 26, 1887, sixty-eight other New England fishing vessels have been subjected to treatment which neither the treaty of 1818 nor the principles of international law would seem to warrant.

I enclose for your consideration a list of these vessels, together with a brief abstract of the statements of the owners or masters regarding the treatment received. The statements were not accompanied by affidavits, but are believed to be entirely reliable. The name and address of the informant are given in each instance.

Very respectfully, yours,

R. EDWARD EARLL,
In charge Division of Fisheries.

Prof. SPENCER F. BAIRD,
U. S. Commissioner of Fish and Fisheries.

458 PARTIAL LIST OF VESSELS INVOLVED IN THE FISHERIES CONTROVERSY WITH THE CANADIAN AUTHORITIES, FROM INFORMATION FURNISHED TO THE UNITED STATES COMMISSIONER OF FISH AND FISHERIES.

[Supplementing a list transmitted to the Committee on Foreign Relations, United States Senate, by the Secretary of State, January 26, 1887.]

1. *Eliza A. Thomes* (schooner). Portland Me.; E. S. Bibbs, master. Wrecked on Nova Scotia shore, and unable to obtain assistance. Crew not permitted to land or to save anything until permission was received from captain of cutter. Canadian officials placed guard over fish saved, and everything saved from the wreck narrowly escaped confiscation. (From statements of C. D. Thomes, owner, Portland, Me.)
2. *Christina Ellsworth* (schooner). Eastport, Me.; James Ellsworth, master. Entered Port Hastings, Cape Breton, for wood; anchored at 10 o'clock, and reported at custom-house. At 2 o'clock was boarded by captain of cutter Hector and ordered to sea, being forced to leave without wood. In every harbour entered was refused privilege of buying anything. Anchored under lee of land in no harbour, but was compelled to enter at custom-house. In no two harbours were the fees alike. (From statements of James Ellsworth, owner and master, Eastport, Me.)
3. *Mary E. Whorf* (schooner). Wellfleet, Mass.; Simon Berrio, master. In July, 1886, lost seine off North Cape, Prince Edward Island, and not allowed to make any repairs on shore, causing a broken voyage and a long delay. Ran short of provisions, and being denied privilege of buying any on land, had to obtain from another American vessel. (From statements of Freeman A. Snow, owner, Wellfleet, Mass.)
4. *Stowell Sherman* (schooner). Provincetown, Mass.; S. F. Hatch, master. Not allowed to purchase necessary supplies, and obliged to report at custom-houses, situated at distant and inconvenient places; ordered out of harbours in stress of weather, namely, out of Cascumpee Harbour, Prince Edward Island, nineteen hours after entry, and out of Malpeque Harbour, Prince Edward Island, fifteen hours after entry, wind then blowing too hard to admit of fishing. Returned home with broken trip. (From statements of Samuel T. Hatch, owner and master, Provincetown, Mass.)
5. *Walter L. Rich* (schooner). Wellfleet, Mass.; Obadiah Rich, master. Ordered out of Malpeque, P. E. I., in unsuitable weather for fishing, having been in harbour only twelve hours. Denied right to purchase provisions. Forced to enter at custom-house at Port Hawkesbury, C. B., on Sunday, collector fearing that vessel would leave before Monday and he would thereby lose his fee. (From statements of Obadiah Rich, owner and master, Wellfleet, Mass.)
6. *Bertha D. Nickerson* (schooner). Booth Bay, Me.; N. E. Nickerson, master. Occasioned considerable expense by being denied Canadian harbours to procure crew, and detained in spring while waiting for men to come from Nova Scotia. (From statements of S. Nickerson and Sons, owners, Booth Bay, Me.)
7. *Newell B. Hawes* (schooner). Wellfleet, Mass.; Thomas C. Kennedy, master. Refused privilege of buying provisions in ports on Bay Saint Lawrence, and in consequence obliged to leave for home with half a cargo. Made harbour at Shelburne, Nova Scotia, in face of storm, at 5 p. m., and master immediately started for custom-house, 5 miles distant, meeting captain of cutter *Terror* on way, to whom he explained errand. On returning, found two armed men from cutter on his vessel. At 7 o'clock next morning was ordered to sea, but refused to go in the heavy fog. At 9 o'clock the fog lifted slightly, and, though the barometer was very low and a storm imminent, vessel was forced to leave. Soon met the heavy gale, which split sails, causing considerable damage. Captain of *Terror* denied claim to right of remaining in harbour twenty-four hours. (From statements of T. C. Kennedy, part owner and master, Wellfleet, Mass.)
8. *Helen F. Tredick* (schooner). Cape Porpoise, Me.; R. J. Nunan, master. July 20, 1886, entered Port Latour, N. S., for shelter and water. Was ordered immediately to sea. (From statements of R. J. Nunan, owner and master, Cape Porpoise, Me.)
9. *Nellie M. Snow* (schooner), Wellfleet, Mass.; A. E. Snow, master. Was not allowed to purchase provisions in any Canadian ports, or to refit or land and ship fish, consequently obliged to leave for home with broken trip. Not permitted to remain in ports longer than local Canadian officials saw fit. (From statements of J. C. Young, owner, Wellfleet, Mass.)

10. *Gertrude Summers* (schooner), Wellfleet, Mass.; N. S. Snow, master. Refused privilege of purchasing provisions, which resulted in injury to voyage. Found harbour regulations uncertain. Sometimes could remain in port twenty-four hours, again was ordered out in three hours. (From statements of N. S. Snow, owner and master, Wellfleet, Mass.)
11. *Charles R. Washington* (schooner), Wellfleet, Mass.; Jesse S. Snow, master. Master was informed by collector at Ship Harbour, C. B., that if he bought provisions, even if actually necessary, he would be subject to a fine of \$400 for each offence. Refused permission by the collector at Souris, P. E. I., to buy provisions, and was compelled to return home September 10, before close of fishing season. Was obliged to report at custom-house every time he entered a harbour, even if only for shelter. Found no regularity in the amount of fees demanded, this being apparently at the option of the collector. (From statements of Jesse S. Snow, owner and master, Wellfleet, Mass.)
12. *John M. Bull* (schooner), Provincetown, Mass.; N. W. Freeman, master. Driven out of Gulf of St. Lawrence to avoid fine of \$400 for landing two men in the port of Malpeque, P. E. I. Was denied all supplies, except wood and water, in same port. (From statements of N. W. Freeman, owner and master, Provincetown, Mass.)
- 459 13. *Zephyr* (schooner), Eastport, Me.; Warren Pulk, master. Cleared from Eastport, May 31, 1886, under register for West Isles, N. B., to buy herring. Collector refused to enter vessel, telling captain that if he bought fish, which were plenty at the time, the vessel would be seized. Returned to Eastport, losing about a week, which resulted in considerable loss to owner and crew. (From statements of Guilford Mitchell, owner, Eastport, Me.)
14. *Abdon Keene* (schooner), Bremen, Me.; William C. Keene, master. Was not allowed to ship or land crew at Nova Scotia ports, and owner had to pay for their transportation to Maine. (From statements of William C. Keene, owner and master, Bremen, Me.)
15. *William Keene* (schooner), Portland, Me.; Daniel Kimball, master. Not allowed to ship a man or to send a man ashore except for water, at Liverpool, N. S., and ordered to sea as soon as water was obtained. (From statements of Henry Trefethen, owner, Peak's Island, Me.)
16. *John Nye* (schooner), Swan's Island, Me.; W. L. Joyce, master. After paying entry fees and harbour dues was not allowed to buy provisions at Malpeque, P. E. I., and had to return home for same, making a broken trip. (From statements of W. L. Joyce, owner and master, Atlantic, Me.)
17. *Asa H. Pervere* (schooner), Wellfleet, Mass.; A. B. Gore, master. Entered harbour for shelter; ordered out after 24 hours. Denied right to purchase food. (From statements of S. W. Kemp, agent, Wellfleet, Mass.)
18. *Nathan Cleaves* (schooner). Wellfleet, Mass.; P. E. Hickman, master. Ran short of provisions, and, not being permitted to buy, left for home with a broken voyage. Customs officer at Port Mulgrave, Nova Scotia, would allow purchase of provisions for homeward passage, but not to continue fishing. (From statements of Parker E. Hickman, owner and master, Wellfleet, Mass.)
19. *Frank G. Rich* (schooner). Wellfleet, Mass.; Charles A. Gorham, master. Not permitted to buy provisions or to lay in Canadian ports over twenty-four hours. (From statements of Charles A. Gorham, owner and master, Wellfleet, Mass.)
20. *Emma O. Curtis* (schooner). Provincetown, Mass.; Elisha Rich, master. Not allowed to purchase provisions, and therefore obliged to return home. (From statements of Elisha Rich, owner and master, Provincetown, Mass.)
21. *Pleiades* (schooner). Wellfleet, Mass.; F. W. Snow, master. Driven from harbour within twenty-four hours after entering. Not allowed to ship or discharge men under penalty of \$400. (From statements of F. W. Snow, owner and master, Wellfleet, Mass.)
22. *Charles F. Atwood* (schooner). Wellfleet, Mass.; Michael Burrows, master. Captain was not permitted to refit vessel or to buy supplies, and when out of food had to return home. Found Canadians disposed to harass him and put him to many inconveniences. Not allowed to land seine on Canadian shore for purpose of repairing same. (From statements of Michael Burrows, owner and master, Wellfleet, Mass.)

23. *Gertie May* (schooner). Portland, Me.; I. Doughty, master. Not allowed, though provided with permit to touch and trade, to purchase fresh bait in Nova Scotia, and driven from harbours. (From statements of Charles F. Guptill, owner, Portland, Me.)
24. *Margaret S. Smith* (schooner). Portland, Me.; Lincoln W. Jewett, master. Twice compelled to return home from Bay of St. Lawrence with broken trip, not being able to secure provisions to continue fishing. Incurred many petty inconveniences in regard to customs regulations. (From statements of A. M. Smith, owner, Portland, Me.)
25. *Elsie M. Smith* (schooner). Portland, Me.; Enoch Bulger, master. Came home with half fare, not being able to get provisions to continue fishing. Lost seine in a heavy gale rather than be annoyed by customs regulations when seeking shelter. (From statements of A. M. Smith, Portland, Me.)
26. *Fannie A. Spurling* (schooner). Portland, Me.; Caleb Parris, master. Subject to many annoyances, and obliged to return home with a half fare, not being able to procure provisions. (From statements of A. M. Smith, owner, Portland, Me.)
27. *Carleton Bell* (schooner). Booth Bay, Me.; Seth W. Eldridge, master. Occasioned considerable expense by being denied right to procure crew in Canadian harbours, and detained in spring while waiting for men to come from Nova Scotia. (From statements of S. Nickerson & Sons, owners, Booth Bay, Me.)
28. *Abbie M. Deering* (schooner). Portland, Me.; Emory Gott, master. Not being able to procure provisions, obliged to return home with a third of a fare of mackerel. (From statements of A. M. Smith, owner, Portland, Me.)
29. *Cora Louisa* (schooner). Booth Bay, Me.; Obed Harris, master. Could get no provisions in Canadian ports and had to return home before getting full fare of fish. (From statements of S. Nickerson & Son, owners, Booth Bay, Me.)
30. *Eben Dale* (schooner). North Haven, Me.; R. G. Babbidge, master. Not permitted to buy bait, ice, or to trade in any way. Driven out of harbours, and unreasonable restrictions whenever near the land. (From statements of R. G. Babbidge, owner and master, Pulpit Harbour, Me.)
31. *Charles Haskell* (schooner). North Haven, Me.; Daniel Thurston, master. Obligated to leave Gulf of St. Lawrence at considerable loss, not being allowed to buy provisions. (From statements of C. S. Staples, owner, North Haven, Me.)
32. *Willie Parkman* (schooner). North Haven, Me.; William H. Banks, master. Unable to get supplies while in Gulf of St. Lawrence, which necessitated returning home at great loss, with a broken voyage. (From statements of William H. Banks, owner and master, North Haven, Me.)
33. *D. D. Geyer* (schooner). Portland, Me.; John K. Craig, master. Being refused privilege of touching at Nova Scotia port to take on resident crew already engaged, owner was obliged to provide passage for men to Portland, at considerable cost, causing great loss of time. (From statements of F. H. Jordan, owner, Portland, Me.)
- 460 34. *Good Templar* (schooner). Portland, Me.; Elias Tarlton, master. Touched at La Have, Nova Scotia, to take on crew already engaged, but was refused privilege and ordered to proceed. The men being indispensable to voyage, had them delivered on board outside of three-mile limit by a Nova Scotia boat. (From statements of Henry Trefethen, owner Peak's Island, Maine.)
35. *Eddie Davidson* (schooner). Wellfleet, Mass.; John D. Snow, master. June 12, 1886, touched at Cape Island, Nova Scotia, but was not permitted to take on part of crew. Boarded by customs officer and ordered to sail within twenty-four hours. Not allowed to buy food in ports on Gulf of St. Lawrence. (From statements of John D. Snow, owner and master, Wellfleet, Mass.)
36. *Alice P. Higgins* (schooner). Wellfleet, Mass.; Alvin W. Cobb, master. Driven from harbors twice in stress of weather. (From statements of Alvin W. Cobb, master, Wellfleet, Mass.)
37. *Cynosure* (schooner). Booth Bay, Me.; L. Rush, master. Was obliged to return home before securing a full cargo, not being permitted to purchase provisions in Nova Scotia. (From statements of S. Nickerson & Sons, owners, Booth Bay, Me.)

38. *Naiad* (schooner). Lubec, Me.; Walter Kennedy, master. Presented frontier license (heretofore acceptable) on arriving at St. George, N. B., but collector would not recognise same; was compelled to return to Eastport and clear under register before being allowed to purchase herring, thus losing one trip. (From statements of Walter Kennedy, master, Lubec, Me.)
39. *Louisa A. Grout* (schooner). Provincetown, Mass.; Joseph Hatch, jr., master. Took permit to touch and trade; arrived at St. Peter's, Cape Breton, in afternoon of May 19, 1886; entered and cleared according to law; was obliged to take inexperienced men at their own prices to complete fishing crew, to get to sea before the arrival of a seizing officer who had started from Straits of Canso at 5 o'clock same afternoon in search of vessel, having been advised by telegraph of the shipping of men. (From statements of Joseph Hatch, jr., owner and master, Provincetown, Mass.)
40. *Lottie E. Hopkins* (schooner). Vinal Haven, Me.; Emery J. Hopkins, master. Refused permission to buy any article of food in Canadian ports. Obtained shelter in harbours only by entering at custom-house. (From statement of Emery J. Hopkins, owner and master, North Haven, Me.)
41. *Florine F. Nickerson* (schooner). Chatham, Mass.; Nathaniel E. Eldridge, master. Engaged fishermen for vessel at Liverpool, Nova Scotia, but action of Canadian Government necessitated the paying of their transportation to the United States and loss of time to vessel while awaiting their arrival; otherwise would have called for them on way to fishing-grounds. Returning, touched at Liverpool, but immediately on anchoring, Canadian officials came aboard and refused permission for men to go ashore. Captain at once signified his intention of immediately proceeding on passage, but officer prevented his departure until he had reported at custom-house, vessel being thereby detained two days. (From statement of Kendrick & Bearse, owners, South Harwich, Mass.)
42. *B. B. B.* (sloop). Eastport, Me.; George W. Copp, master. Obligated to discontinue business of buying sardine herring in New Brunswick ports for Eastport canneries, as local customs regulations were, during the season of 1886, made so exacting that it was impossible to comply with them without risk of the fish becoming stale and spoiled by detention. (From statements of George W. Copp, master, Eastport, Me.)
43. *Sir Knight* (schooner). Southport, Me.; Mark Rand, master. Compelled to pay transportation for crew from Nova Scotia to Maine, the vessel not being allowed to call at Nova Scotia port for them on her way to the fishing-grounds. (From statements of William T. Maddocks, owner, Southport, Me.)
44. *Uncle Joe* (schooner), Southport, Me.; J. W. Pierce, master. Compelled to pay transportation for crew from Nova Scotia to Maine, the vessel not being allowed to call at Nova Scotia ports for them on her way to the fishing-grounds. (From statements of William T. Maddox, owner, Southport, Me.)
45. *Willie G.* (schooner). Southport, Me.; Albert F. Orme, master. Compelled to pay transportation for crew from Nova Scotia to Maine, the vessel not being allowed to call at Nova Scotia ports for them on her way to the fishing-grounds. (From statements of William T. Maddocks, owner, Southport, Me.)
46. *Lady Elgin* (schooner). Southport, Me.; George W. Pierce, master. Compelled to pay transportation for crew from Nova Scotia to Maine, the vessel not being allowed to call at Nova Scotia ports for them on her way to the fishing grounds. (From statements of William T. Maddocks, owner, Southport, Me.)
47. *John H. Kennedy* (schooner). Portland, Me.; David Dougherty, master. Called at a Nova Scotia port for bait, but left without obtaining same, fearing seizure and fine, returning home with a broken voyage. At a Newfoundland port was charged \$16 light-house dues, giving draft on owners for same, which, being excessive, they refused to pay. (From statements of E. G. Willard, owner, Portland, Me.)
48. *Ripley Ropes* (schooner). Southport, Me.; C. E. Hare, master. Vessel ready to sail when telegram from authorities at Ottawa refused permission to touch at Canadian ports to ship men; consequently obliged to pay for their transportation to Maine, and vessel detained while awaiting their arrival. (From statements of Freeman Orne & Son, owners, Southport, Me.)

49. *Jennie Armstrong* (schooner). Southport, Me.; A. O. Webber, master. Vessel ready to sail when telegram from authorities at Ottawa refused permission to touch at Canadian ports to ship men; consequently obliged to pay for their transportation to Maine, and vessel detained while awaiting their arrival. (From statements of Freeman Orne & Son, owners, Southport, Me.)
50. *Vanguard* (schooner). Southport, Me.; C. C. Dyer, master. Vessel ready to sail when telegram from authorities refused permission to touch at Canadian ports to ship men; consequently obliged to pay for their transportation to Maine, and vessel detained while awaiting their arrival. (From statements of Freeman Orne & Son, owners, Southport, Me.)
51. *Electric Flash* (schooner). North Haven, Me.; Aaron Smith, master. Unable to obtain supplies in Canadian ports and obliged to return home before obtaining full cargo. (From statements of Aaron Smith, master and agent, North Haven, Me.)
52. *Daniel Simmons* (schooner). Swan's Island, Me.; John A. Gott, master. Compelled to go without necessary outfit while fishing in Gulf of St. Lawrence. (From statements of M. Stimpson, owner, Swan's Island, Me.)
53. *Grover Cleveland* (schooner). Boston, Mass.; George Lakeman, master. Compelled to return home with only partial fare of mackerel, being refused supplies in Canadian ports. (From statements of B. F. De Butts, owner, Boston, Mass.)
54. *Andrew Burnham* (schooner). Boston, Mass.; Nathan F. Blake, master. Not allowed to buy provisions or to land and ship fish to Boston, thereby losing valuable time for fishing. (From statements of F. B. De Butts, owner, Boston, Mass.)
55. *Harry G. French* (schooner). Gloucester, Mass.; John Chisholm, master. Refused permission to purchase any provisions or to land cargo for shipment to the United States. (From statements of John Chisholm, owner and master, Gloucester, Mass.)
56. *Col. J. H. French* (schooner). Gloucester, Mass.; William Harris, master. Was refused permission to purchase any supplies, or to forward fish to the home port by steamer, causing much loss of time and money. (From statements of John Chisholm, owner, Gloucester, Mass.)
57. *W. H. Wellington* (schooner). Gloucester, Mass.; D. S. Nickerson, master. Was refused permission to purchase any supplies, or to forward fish to the home port by steamer, causing much loss of time and money. (From statements of John Chisholm, owner, Gloucester, Mass.)
58. *Ralph Hodgdon* (schooner). Gloucester, Mass.; Thomas F. Hodgdon, master. Was refused permission to purchase any supplies, or to forward fish to the home port by steamer, causing much loss of time and money. (From statements by John Chisholm, owner, Gloucester, Mass.)
59. *Hattie Evelyn* (schooner). Gloucester, Mass.; James A. Cromwell, master. Not allowed to buy any provisions in any provincial ports, and thereby compelled to return home during the fishing season, causing broken voyage and great loss. (From statements of James A. Cromwell, owner and master, Gloucester, Mass.)
60. *Emma W. Brown* (schooner). Gloucester, Mass.; John McFarland, master. Was forbidden buying any provisions at provincial ports, and thereby lost three weeks' time, and was compelled to return home with only part of cargo. (From statements of John McFarland, master, Gloucester, Mass.)
61. *Mary H. Thomas* (schooner). Gloucester, Mass.; Henry B. Thomas, master. Prohibited from buying provisions, and, in consequence, had to return home before close of fishing season. (From statements of Henry B. Thomas, owner and master, Gloucester, Mass.)
62. *Hattie B. West* (schooner). Gloucester, Mass.; C. H. Jackman, master. Prevented from buying provisions to enable vessel to continue fishing. Two of crew deserted in a Canadian port, and captain went ashore to report at custom-house and to secure return of men. Was delayed by customs officer not being at his post, and ordered to sea by first officer of cutter *Howlett* before having an opportunity of reporting at custom-house or of finishing business. Had to return and report on same day or be subject to fine. Prevented from shipping men at same place. At Port Hawkesbury, Nova Scotia, while on homeward passage, not allowed to take on board crew of seized American fishing schooner *Moro Castle* who desired to return home. (From statements of C. H. Jackman, master, Gloucester, Mass.)

63. *Ethel Maud* (schooner). Gloucester, Mass.; George H. Martin, master. Provided with a United States permit to touch and trade, entered Tignish, Prince Edward Island, to purchase salt and barrels. Was prohibited from buying anything. Collector was offered permit, but declared it to be worthless, and would not examine it. Vessel obliged to return home for articles mentioned. On second trip was not permitted to get any food. (From statements of George H. Martin, owner and master, East Gloucester, Mass.)
64. *John W. Bray* (schooner). Gloucester, Mass.; George McLean, master. "On account of extreme prohibitory measures of the Canadian Government in refusing shelter, supplies, and other conveniences, was obliged to abandon her voyage and come home without fish." (From statements of John F. Wonson & Co., owners, Gloucester, Mass.)
65. *Henry W. Longfellow* (schooner). Gloucester, Mass.; W. W. King, master. Obligated to leave the Gulf of St. Lawrence with only 62 barrels of mackerel, on account of restrictions imposed by Canadian Government in preventing captain from procuring necessary supplies to continue fishing. (From statements of John F. Wonson & Co., owners, Gloucester, Mass.)
66. *Rushlight* (schooner). Gloucester, Mass.; James L. Kenney, master. Compelled to leave Gulf of St. Lawrence with only 90 barrels of mackerel, because of restrictions imposed by Canadian Government in prohibiting captain from purchasing supplies needed to continue fishing. (From statements of John F. Wonson & Co., owners, Gloucester, Mass.)
- 462 67. *Belle Franklin* (schooner). Gloucester, Mass.; Henry D. Kendrick, master. Obligated to leave Gulf of St. Lawrence with 156 barrels of mackerel, on account of restrictions imposed by Canadian Government in denying to captain the right to procure necessary supplies to continue fishing. (From statements of John F. Wonson & Co., owners, Gloucester, Mass.)
68. *Neponset* (schooner). Boston, Mass.; E. S. Frye, master. August 27, 1886, anchored in Port Hawkesbury, C.B., and immediately reported at custom-house. Being short of provisions, master asked collector for permission to buy, but was twice refused. The master, expressing his intention of seeing the United States consul at Port Hastings, C.B., 3 miles distant, the customs officer forbade him landing at that port to see the consul. He did so, however, saw the consul, but could get no aid, the consul stating that if provisions were furnished the vessel would be seized. Master being sick and wishing to return home by rail, at the suggestion of the consul he landed secretly and travelled through the woods to the station, 3 miles distant. (From statements of E. S. Frye, owner and master, Boston, Mass.)

In 1886 700 vessels were boarded, and 1,362 in 1887, to investigate their conduct, of which 30 were brought to the attention of the British Government.

These lists comprise, in all, nearly 400 vessels that have been involved in seizures and other interferences growing out of disputed constructions of the treaty of 1818.

That so many cases have arisen out of this conflict of opinion is, in part, fairly attributable to an aggressive temper on the part of the Canadians, which has not been successfully restrained by the Government of Great Britain, and to an obstinate adherence to the letter of the treaty, to the sacrifice of its spirit and to the prejudice of the "liberties" and "privileges" secured by its terms to American fishermen, as our Government understands the matter.

The treaty had reference to extensive lines of sea-coast upon which the bays, harbours, and creeks were as well known by name and location in 1818 as they are now, but they were not exactly described in that instrument.

It can not be assumed, at least in our diplomacy, that it is irrational or uncandid for the British Government to contend that the entrance of these places, so well known, was intended to designate a base-line from which to measure the 3-mile limit, within which we forever renounced the right to take or cure or dry fish.

Our construction has been that we did not renounce these "liberties" in the bays, harbours, and creeks, except within 3 miles of the coasts thereof, while the British contention has been that the word "coasts" in the treaty relates only to the open sea-coasts, and not to the coasts of bays, harbours, and creeks that are claimed and controlled by the provincial governments as territorial waters.

The British contention is also fortified by the argument, as they insist, that, in the proviso to article 1 of the treaty, our right to enter for shelter, wood, water, and repairs, is limited to "bays or harbours" and does not extend to "creeks" or to "coasts," and that these were not opened to our right of entry, because of the difficulty of enforcing the "restrictions" upon the use of these privileges, to which we gave our consent in the treaty, on the coasts and creeks, at places remote from their ports.

It has been the duty of our diplomatists, forced upon them by the importance of our interests, to endeavour to overcome these contentions of the British Government, and to insist upon a more liberal construction of the treaty.

The task has not been an easy one, and the progress we have made is scarcely discernible; for no admitted change in British opinion seems to have been accomplished in respect of the exclusion, from our treaty rights of fishery, of the creeks, bays, and harbours whose names, limits, and location were known, and were recognised by their laws as territorial waters in 1818, except in reference to the Bay of Fundy.

In 1854 and in 1871 we submerged these questions beneath others of great importance, and paid heavily, in reciprocal tariff arrangements in one case, and in money in the other instance, for the security and protection of our fishermen against the British head-land theory, as they claimed it, in territorial waters, and for the right of inshore fishing.

On the other branch of the subject, relating to the promulgation and enforcement of "such restrictions as may be necessary to prevent * * * * abusing the privileges * * * * reserved to" American fishermen, the cases have been more numerous, the discussions more heated, the interferences with our fishermen and their vessels, and with other vessels, more annoying and damaging, than those that have arisen under the head-land theory.

In most of these cases the provincial courts, or the privy council of the local governments, have made decisions, or statements, expounding their laws, both provincial and imperial, and insisting upon their right and jurisdiction, under the treaty, to do all that has been done by them to our fishermen, except in the affair of Fortune Bay.

What is sometimes termed the reciprocity of 1830, by which the interdict on commercial intercourse between the North American British Provinces and the United States was relieved, and commercial intercourse was established on a liberal footing, gave to our merchant ships extensive privileges that the treaty of 1818, under the British construction, denied to our fishing vessels.

This so-called reciprocity was not established by positive law in either country; but, under the proclamation of President Jackson, authorised by law, and under the orders of the Privy Council of Great Britain, the liberties of commerce were mutually accorded to

the merchant ships of each country in the ports of the other. We will hereafter refer more particularly to that arrangement.

463 Many of our fishing vessels being licensed, under our laws, to touch and trade in foreign ports, our Government has since claimed for them in Canadian ports the hospitality accorded to our other merchant vessels and all the liberties that they enjoy.

This reasonable claim was based upon the new conditions of our commercial intercourse with Canada as established by "the reciprocity of 1830."

It was met with the declaration that American fishermen and their vessels had only the rights, in Canadian waters and ports, that are expressly reserved to them under the treaty of 1818; and that all other rights are denied to them by that treaty; and the further insistence that the United States can confer no other rights upon them, in those waters, than such as the treaty gives them in their character as fishermen.

This question has led to serious disagreement and has been unavoidably mixed up with the question of the proper construction of the treaty of 1818.

This blending of these subjects has resulted, in part, from the enlarged privileges secured to our fishermen in the treaties of 1854 and 1871, and from the British laws and regulations, under which no express distinction is made between fishing vessels and purely commercial vessels as to entrance and clearance; port and harbour dues; pilotage and tonnage dues; the right to demand manifests and to inspect cargoes.

They employ their regulations, prescribed for commercial vessels, to prevent fishing vessels from having shelter for more than twenty-four hours in a bay or harbour; or from obtaining water or wood, or making repairs, unless they have been duly entered in the custom-house and have conformed to all the regulations that apply to merchant vessels.

The denial of every commercial privilege to our fishermen, even to the supply of wants that humanity demands, while imposing upon them every "restriction" that merchant vessels were required to endure, naturally excited the indignation of our people.

The contrast between the treatment, in these respects, of merchant vessels of all nations (including those of the United States) and our fishing vessels was painful and unjust, as it was unnecessary, and placed the men engaged in an honourable and highly useful pursuit under the ban of unjust and unfriendly discrimination, and branded them as persons against whom there was a general and recognised suspicion of bad character or of unworthy designs.

During the interval between 1818 and 1830 the treaty of 1818 furnished the only rule, equitable or legal, for the admeasurement of the rights of our fishermen.

Since 1830, except when the treaties of 1854 and 1871 were in force, the British Government, instead of relaxing the "restrictions" upon our fishermen, has increased them, and has been very alert in confining them to the strict letter of the treaty of 1818, whenever that has operated, as to their fishing and other liberties and privileges.

II. WHETHER IT IS OUR WISEST AND SAFEST POLICY TO RESORT TO THE LAWS OF NATIONS, ENFORCED BY ALL MEASURES THAT MAY BE NECESSARY, OR TO TREATY ARRANGEMENTS, FOR THE REGULATION, GENERALLY, OF OUR FISHING RIGHTS?

It is quite clear that, until we are free from the obligations of the treaty of 1818, they are a part of our supreme law, which no department of our own Government can violate without violating our Constitution.

As the treaty is perpetual in the renunciation of our right of common fishery, partitioned to us as an appanage of the country whose independence we established, we can not, by any means short of a successful war, re-instate the United States, by our own act, in the enjoyment of the right that was so renounced.

We can free ourselves of any embarrassment arising out of the treaty of 1818, as to our fishermen, licensed to touch and trade, by repealing it, but nobody seems to desire such a course of action, or to court the situation in which it would place both countries.

The struggle, in such an event, would be at once renewed under retaliatory laws (if this treaty is rejected); but every movement in such a policy would be very costly to the people of both countries, and, as a probable result, would eventuate in war.

So, we must live under the treaty and be constantly embroiled with the British Government as to its proper interpretation; or we must reform that interpretation by a fair and just agreement with that Government; or we must repeal or abandon it, and then rely upon retaliation to redress our wrongs.

The demand of our fishermen for an enlargement of their commercial privileges, to correspond with those of our merchant vessels, and for a more liberal hospitality in their bays, is the pith and essence of our demand for a more liberal interpretation of the treaty of 1818.

This demand has to a great degree grown out of the changed conditions, both of fishing ventures and commercial intercourse, with the British provinces since 1830.

It was not considered in 1818, but it can not be denied consideration now, in view of these changed conditions.

It is insisted by some that the treaty of 1818 gives no commercial rights to our fishing vessels; that it relates only to fishing rights and to some incidental privileges of hospitality accorded to our fishermen; that there is no need to amend the treaty so as to secure them commercial rights; and that these should be secured, and would be, through our legislative powers of retaliation upon the commerce of the British possessions.

If we infuse into that treaty the substance of this demand, it must be done by an agreement, in the nature of an amendment, that
464 furnishes some reciprocal concession to the people of the British possessions concerned in the fisheries; otherwise we will fail to gain their consent to it.

If we stand upon that treaty without amendment, as a fishing treaty, insisting that it has nothing to do with the commercial privileges of our fishing vessels, and that it leaves us free to demand for them the same commercial privileges that we accorded to Canadian fishermen, we place this demand alone upon the ground of inter-

national comity, which is in no sense a substantial right, and is outside of all treaty agreements.

We would then have the treaty prohibition against our fishing vessels entering Canadian bays and harbours for "any other purpose whatever" than to buy wood, obtain water, make repairs, and find shelter; while their commercial privileges would entitle them to enter the ports of these bays and harbours for any lawful commercial purpose; and this would result from our act in giving them, under our laws, the double character of fishermen and merchantmen.

The British Government treats this proposition as a mere attempt to evade the treaty of 1818, and, in that view, they insist upon its rigid enforcement. They quote the restrictions of the treaty of 1818 as being obligatory upon the United States, and insist that we can not change the character of a vessel from a fisherman to a merchantman by giving to such vessel any form of licence, enrollment, registry, or sea papers, in addition to such as place it in the class of a fishing vessel.

However illiberal such a contention may be, they certainly claim the right, under the treaty, and outside of it as well, to deny all entrance of our fishing vessels to their bays and harbours, except in their character as fishermen. As vessels of commerce, the British Government claims that they enter the ports by comity alone. As fishing vessels, they admit that they enter the bays and harbours by right, under the treaty, but only for the purposes to which the treaty of 1818 restricts them.

We do not intend to lay down what we may believe to be the limits of jurisdiction over adjacent seas that are said to be secured to the Governments owning the coasts by the laws of nations. Chancellor Kent, Mr. Jefferson, Mr. Madison, and Mr. Seward, and many other great lawyers and statesmen of our country have advocated theories on this subject quite at variance with the 3-mile boundary of our right of jurisdiction seaward from the coast. This question needs to be handled with great circumspection. This is a very important matter.

A vast extent of the coast of the Pacific, reaching to the arctic circle, and destined to become a more important fishing-ground than the Atlantic coasts, must be affected by the principles of international law which the United States shall assert as defining the limits seawards from the coasts of our exclusive right to fish for seals and sea-otters, whales, and the many varieties of food-fishes that swarm along the coasts of Behring Sea and Straits. We might find, in that quarter, a very inconvenient application of the doctrine that, by the law of nations, the three-mile limit of the exclusive right of fishery is to follow and be measured from the sinuosities of the coasts of the bays, creeks, and harbors that exceed six miles in width at the entrance; and an equally inconvenient application of our claim for full commercial privileges in Canadian ports for our fishermen, when applied to British Columbian fishermen in our Pacific ports, which are nearer to them than to our fisheries in Alaska.

No allusion is made in the treaty of 1818 to the laws of nations as furnishing canons for its interpretation; and we infer that its meaning is to be gathered alone from its context and the circumstances that attended its adoption.

The undersigned believe that the interpretation of that treaty, which has led to its reformation in the treaty now before the Senate, is far in advance of anything that any American diplomat has officially demanded of the British Government, and will lead to a full and amicable adjustment of all troubles of the sort that have heretofore arisen; and that it will open the way for a liberal and neighborly agreement as to such differences as may hereafter arise, both on the Atlantic and Pacific coasts.

In this interpretation and reformation of our existing treaty, the United States make no committals as to the exclusive rights of fishing under the laws of nations that may affect our interests in the Pacific and the Gulf of Mexico in the future; nor do they place the delimitations of the fishing-grounds, or the alleged commercial rights of our fishermen, upon any principle of the international law that may be quoted against us at Victoria (within a very short distance of our northern border), or along the extensive sea-coast between Puget Sound and Alaska, our great Pacific fishery.

The undersigned prefer the certainty which this treaty has secured as to our specific rights in the fisheries of the Atlantic coasts of North America to the uncertainty of the international law as to all those questions, which will leave in bitter dispute our rights and liberties both on the Atlantic and Pacific coasts, bays, harbors, and creeks, and in Behring's Sea and Straits.

The undersigned believe that the treaty now under consideration affords a better foundation for both our fishing and commercial rights than any that can be stated as resting alone upon international law, or upon comity secured by retaliatory laws and maintained by the fluctuating interests of commerce, that are very unstable.

Those who assert that it is not the duty, and is scarcely the right, of the President to resort to negotiations, in preference to the retaliation provided for in existing laws, in order to secure commercial rights to fishermen in Canadian ports, are not willing that their *privileges* shall be enlarged and converted into *rights* secured by treaty. They prefer the chances of greater success through legislation that will intimidate the British Government or greatly embarrass British commerce. This seems to indicate that they rely for success more upon British cupidity and the fear that Government has of the consequences of war, than upon its sense of justice, or its good faith in keeping treaty obligations.

Whether or not this may be true, it is very obvious, as the undersigned believe, that the advantages we are supposed to enjoy under such circumstances would be quite as available for the increase of our commercial privileges by retaliatory laws, after this treaty is ratified, as they are at present. Our good faith is no more pledged in this treaty than it is in the treaty of 1818.

This treaty does not bind us to advance no claim hereafter to increased commercial privileges in favour of our fishermen. The spirit in which it is framed is one of conformity, in our treaty relations, to the progressive interests and necessities of the country, so that a further increase of commercial privileges would naturally result from the policy of both countries; as is shown by the fact of the negotiation of this treaty, when such increase should appear to be, as it will be, mutually advantageous.

III. AN IMPORTANT PRECEDENT FOR THIS TREATY IN THE ARRANGEMENT OFFERED BY MR. SEWARD IN 1866 TO THE BRITISH GOVERNMENT.

There is a very important precedent for the plan of this treaty, and for some of its leading features, in the protocol proposed in 1866 by Mr. Seward, then Secretary of State, through Mr. Adams, our Minister to Great Britain. The letter of Mr. Seward and the protocol are as follows:

Mr. Seward to Mr. Adams.

No. 1737.]

DEPARTMENT OF STATE.

Washington, April 10, 1866.

SIR: I send you a copy of a very suggestive letter from Mr. Richard D. Cutts, who, perhaps you are aware, was employed as surveyor for marking, on the part of the United States, *the fishery limits under the reciprocity treaty*. Mr. Cutts's long familiarity with that subject practically and theoretically entitles his suggestions to respect.

It is desirable to avoid any collision or misunderstanding with Great Britain on the subject growing out of the termination of the reciprocity treaty. With this view I inclose a draught of a protocol, which you may propose to Lord Clarendon for a temporary regulation of the matter. If he should agree to it, it may be signed. When signed it is desirable that the instructions referred to in the concluding paragraph should at once be dispatched by the British Government.

As the fishing season is at hand, the collisions which might be apprehended may occur when that season advances.

I am, sir, your obedient servant,

WILLIAM H. SEWARD.

Draught Protocol communicated by Mr. Adams to the Earl of Clarendon in 1866.

Whereas in the first article of the convention between the United States and Great Britain, concluded and signed in London on the 26th October, 1818, it was declared that—

“The United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within 3 marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America, not included within certain limits heretofore mentioned;”

And whereas differences have arisen in regard to the extent of the above-mentioned renunciation, the Government of the United States and Her Majesty the Queen of Great Britain, being equally desirous of avoiding further misunderstanding, have agreed to appoint, and do hereby authorise the appointment, of a mixed commission for the following purposes, namely:

(1) To agree upon and define, by a series of lines, the limits which shall separate the exclusive from the common right of fishery, on the coasts and in the seas adjacent, of the British North American colonies, in conformity with the first article of the convention of 1818. The said lines to be regularly numbered, duly described, and also clearly marked on charts prepared in duplicate for the purpose.

(2) To agree upon and establish such regulations as may be necessary and proper to secure to the fishermen of the United States the privilege of entering bays and harbors for the purpose of shelter; and of repairing damages therein; of purchasing wood, and of obtaining water; and to agree upon and establish such restrictions as may be necessary to prevent the abuse of the privilege reserved by said convention to fishermen of the United States.

(3) To agree upon and recommend the penalties to be adjudged, and such proceedings and jurisdiction as may be necessary to secure a speedy trial and judgment with as little expense as possible, for the violation of rights and the transgression of the limits and restrictions which may be hereby adopted.

Provided, however, that the limits, restrictions, and regulations which may be agreed upon by the said commission shall not be final, nor have any effect, until so jointly confirmed and declared by the United States and Her Majesty

466 the Queen of Great Britain, either by treaty or by laws mutually acknowledged and accepted by the President of the United States, by and with the consent of the Senate, and by Her Majesty the Queen of Great Britain.

Pending a different arrangement on the subject, the United States Government engages to give all proper orders to officers in its employment; and Her Britannic Majesty's Government engages to instruct the proper colonial or other British officers to abstain from hostile acts against British and United States fishermen respectively.

This protocol was offered by Mr. Seward, as a *modus vivendi*, after the termination of the treaty of 1854 had thrown us back upon that of 1818, as to our fishery rights. He offered it, also, for acceptance by Great Britain as the basis of a new treaty of interpretation and regulation of those rights.

Mr. Seward's recommendation of a mixed commission, (1) "to agree upon and define by a series of lines" the fishing limits, in conformity with the first article of the convention of 1818; (2) "to agree upon and establish such regulations as may be necessary and proper to secure the fishermen of the United States the privilege of entering bays and harbours" under the proviso to the treaty; and (3) "to agree upon and recommend the penalties to be adjudged, and such proceedings and jurisdiction as may be necessary to secure a speedy trial," etc., "for violations of rights and transgressions of *limits and restrictions*," etc., indicates an earnest apprehension on his part *that no settlement could be reached by ordinary negotiations*; that the treaty could not be amicably kept unless it was amended; and that the amendments he proposed would cure the defects of the indefinite description of the *rights and restrictions and fishing limits* that were too generally stated in the treaty of 1818.

He saw the increasing danger of the situation, and came boldly forward to provide against its results.

The cordial manner in which these three propositions were then received by the British Government, as a basis of agreement, inspired the efforts of the present administration to renew the negotiation on this plan as the basis of a new treaty.

IV. MEASURES OF HOSTILITY, EITHER COMMERCIAL OR ACTUAL, ARE NOT PREFERABLE TO THE TREATY BEFORE THE SENATE.

The undersigned have found no opinion expressed by any of our diplomatists in their official correspondence that the proper interpretation of article 1 of the treaty of 1818 could be otherwise secured than by a further agreement, as to its meaning, between the treaty Powers.

If we demand a still more favorable agreement than that presented in this convention now under consideration, we shall probably encounter many more years of controversy and negotiation before a better result can be reached.

If, laying aside all treaty agreements, we attempt to coerce a better understanding and less grievous practices than we have already suffered through commercial retaliation, we shall find that the cost to our own people is far greater than the entire value of the fisheries.

If we resort to war, or to measures that may lead to hostilities, upon what precise definition of our rights and grievances will we justify such grave proceedings, either to our own people, or before the nations of the earth? We believe that no man can safely venture to formulate such a declaration.

Unless we can clearly state the causes that justify a war for the redress of grievances, or the clear definition of the right we seek to assert or defend, we have no right to subject the country to the perils, or even the apprehensions, of hostilities.

It has never been stated by any administration, or diplomatist, or by Congress that any one case, or that all the cases that have grown out of our disputes with Great Britain about the treaty of 1818, gave a just ground for retaliation, reprisals, or war.

The undersigned think it can not be safely denied that in articles 10, 12, 13, and 14 of this treaty we have gained advantages and privileges of a very important character. In them is found the full concession of every claim to fishing rights we have ever made, as being within the letter or the spirit of the treaty of 1818 that is now of any practical value; and the methods provided for their administration are quite as satisfactory as any we have ever claimed under our interpretation of that treaty. For convenience of reference we insert those articles in this paper, as follows:

ARTICLE X.

United States fishing vessels entering the bays or harbors referred to in article 1 of this treaty shall conform to harbor regulations common to them and to fishing vessels of Canada or of Newfoundland.

They need not report, enter, or clear when putting into such bays or harbors for shelter or repairing damages, nor when putting into the same, outside the limits of established ports of entry, for the purpose of purchasing wood or of obtaining water; except that any such vessel remaining more than twenty-four hours, exclusive of Sundays and legal holidays, within any such port, or communicating with the shore therein, may be required to report, enter, or clear; and no vessel shall be excused hereby from giving due information to boarding officers.

They shall not be liable in any such bays or harbors for compulsory pilotage; nor, when therein for the purpose of shelter, of repairing damages, of
 467 purchasing wood, or of obtaining water, shall they be liable for harbor dues, tonnage dues, buoy dues, light dues, or other similar dues; but this enumeration shall not permit other charges inconsistent with the enjoyment of the liberties reserved or secured by the Convention of October 20, 1818.

ARTICLE XI.

United States fishing vessels entering the ports, bays, and harbors of the Eastern and Northeastern coasts of Canada or of the coasts of Newfoundland under stress of weather or other casualty may unload, reload, tranship, or sell, subject to customs laws and regulations, all fish on board, when such unloading transhipment, or sale is made necessary as incidental to repairs, and may replenish outfits, provisions, and supplies damaged or lost by disaster; and in case of death or sickness shall be allowed all needful facilities, including the shipping of crews.

Licenses to purchase in established ports of entry of the aforesaid coasts of Canada or of Newfoundland, for the homeward voyage, such provisions and supplies as are ordinarily sold to trading vessels, shall be granted to United States fishing vessels in such ports, promptly upon application and without charge; and such vessels having obtained licenses in the manner aforesaid shall also be accorded upon all occasions such facilities for the purchase of casual or needful provisions and supplies as are ordinarily granted to the trading vessels; but such provisions or supplies shall not be obtained by barter, nor purchased for resale or traffic.

ARTICLE XIII.

The Secretary of the Treasury of the United States shall make regulations providing for the conspicuous exhibition, by every United States fishing

vessel, of its official number on each bow; and any such vessel, required by law to have an official number, and failing to comply with such regulations, shall not be entitled to the licenses provided for in this treaty.

Such regulations shall be communicated to Her Majesty's Government previously to their taking effect.

ARTICLE XIV.

The penalties for *unlawfully fishing* in the waters, bays, creeks, and harbours, referred to in Article I of this treaty, may extend to forfeiture of the boat or vessel, and appurtenances, and also of the supplies and cargo aboard when the offence was committed; and for *preparing* in such waters to *unlawfully fish therein*, penalties shall be fixed by the court, not to exceed those for unlawfully fishing; and for *any other violation of the laws of Great Britain, Canada, or Newfoundland* relating to the rights of fishery in such waters, bays, creeks, or harbours, penalties shall be fixed by the court, *not exceeding in all three dollars for every ton of the boat or vessel concerned*. The boat or vessel may be holden for such penalties and forfeitures.

The proceedings shall be summary and as inexpensive as practicable. The trial (except on appeal) shall be at the place of detention, unless the judge shall, on request of the defence, order it to be held at some other place *adjudged by him more convenient*. Security for costs shall not be required of the defence, except when bail is offered. Reasonable bail shall be accepted. There shall be proper appeals *available to the defence only*; and the *evidence at the trial may be used on appeal*.

Judgments of forfeiture shall be reviewed by the Governor-General of Canada in council, or the governor in council of Newfoundland, *before the same are executed*.

We accord (in Article 12) to the fishing vessels of Canada and Newfoundland the same *privileges* on the Atlantic coasts of the United States that are secured to our fishing vessels by this treaty, without admitting them to fish within 3 miles of the coasts of the bays, harbours, or creeks along that sea-coast.

This treaty secures to our fishermen the free navigation of the Strait of Canso.

Article 15 secures to us the option to acquire very important commercial privileges to our fishermen whenever Congress shall conclude that they are worth the money that we may otherwise collect in duties on fish.

Congress may never make this concession; but the power to acquire these privileges, as permanent treaty rights, may become very valuable to us when the diminishing products of the fisheries in the waters adjacent to the eastern coasts of the United States and of Canada and Newfoundland increase in value, because they will be required to supply the needs of 100,000,000 of people in the United States and 30,000,000 of people in the Dominion of Canada.

This article is suggested by a wise forecast of the future necessities of our fishermen, as well as those of the people of the United States, when our population is greatly increased, and the supply of food is to be distributed to such a vast multitude of people that the allowance, *per capita*, will be, accordingly, diminished.

The treaty now before the Senate is one of reciprocal concessions.

The unconditional concessions to the fishermen are not strictly commercial, but they give them great assistance in their business and in the means of relieving any distress which may befall them.

Can we ever hope to engraft on the treaty of 1818 any new
468 agreement for commercial privileges to our fishermen without giving an equivalent in some liberty or privilege that Great Britain will claim for her fishermen?

This question is answered by the fact that we renounced in 1818 the best part of the fisheries that were of the fruits of the war for independence in order to make the residue a permanent right; and in 1854 and 1871 we agreed to pay heavily for a temporary suspension of the restrictions and limitations of the treaty of 1818.

We have made four fisheries treaties with Great Britain, in 1783, 1818, 1854, and 1871, and in none of them has any commercial privilege been secured to our fishermen. No serious effort has been made to secure such privileges prior to the negotiation now before the Senate. All that we have heretofore secured to our fishermen has been the privilege of inshore fishing, of curing and drying fish on certain parts of the British coasts, more or less restricted and changed in each successive treaty, and the right to buy wood, obtain water, make repairs, and find shelter.

Now, we find, according to the testimony of everybody concerned, and the thoroughly considered report of our Committee on Foreign Relations, made after a searching investigation conducted upon our coasts, and upon the testimony of experts laid before the Senate, that the inshore fisheries, for which we have paid and suffered so much, are of no value to us, and that the privilege of purchasing bait from the Canadians is an injury to our fishing interests rather than a benefit.

These declarations, which were true, show that many of the contentions and strifes we have had over this subject, for seventy years, have been about a claim of rights and privileges that are no longer of any advantage to us.

They prove that we need only such advantages, or privileges, for our fishermen on the Canadian coasts as are enjoyed by our merchant vessels, and that these are not very important to them.

Purse-seining has revolutionized the mackerel fishery almost entirely, and has largely affected the herring fishery, and has given to our fishermen great advantages in "the catch." But Canadian capital and energy will not long permit us to do all the purse or deep-water seining.

The freezing of fish on shipboard, so as to get them fresh to our markets, is of recent date, but is a very important change in the fishing business. In this the Canadians have no greater advantages than our fishermen.

These two improvements in the fishing business, with the added power of steam, which has been applied to sea navigation since 1818, have produced the revolution in these pursuits which renders it more convenient to have commercial rights for some of our fishing vessels, but has removed the necessity to have fishing privileges within three miles of any of the coasts or in the bays of the British possessions that are not classed as great arms of the sea.

The history of the controversies that have found a final solution in the treaty now before the Senate, and the explanation of the bearing of the treaty upon those questions, are so clearly and ably stated by Hon. W. L. Putnam, in a letter dated April 16, 1888, that we append it to this report (Appendix E).

Mr. Putnam being one of our plenipotentiaries who negotiated this treaty, his review of the diplomatic and legislative history is an important exposition of the merits of this subject.

V. THIS TREATY COMPARED WITH THE COMMERCIAL ARRANGEMENT STYLED "THE RECIPROCITY OF 1830."

This treaty proposes liberal reciprocity to us, confined to fishing interests, and gives us all the time we may choose to claim in which to consider our best interests and determine whether we will accept or reject the overture.

The right of choosing between this proffered commercial reciprocity and the privileges accorded to us under what is termed "the reciprocity of 1830" is a decided advantage in favor of our fishermen.

The products of our fisheries in Canadian waters are not permitted to enter Canadian ports on any ships of the United States by the British proclamation of November 5, 1830. That proclamation declares "that the ships of and belonging to the said United States of America may import from the United States aforesaid into the British possessions abroad *goods the produce of those States*, and may export goods from the British possessions abroad to be carried to any foreign country whatever."

This cannot apply to fishery products taken or purchased in the Canadian waters or ports, and was not intended in any manner to add to the four purposes for which our fishermen may enter Canadian ports under the treaty of 1818, as we understand that proclamation, or to repeal that treaty.

This proclamation was a month later than that made by President Jackson, and was the British response to our proclamation, under which "British vessels and their cargoes are admitted to an entry into the ports of the United States from the islands, provinces, and colonies of Great Britain, on or near the North American continent and north or east of the United States." The full text of these proclamations is hereto appended as Appendices A and B.

These proclamations set forth the entire concurrent action of the two Governments (which is called the reciprocity of 1830). There having been no change in the situation since that time, that is "the reciprocity" which still exists, as matter of law.

The broad liberality of our concession is in very striking contrast with that of great Britain; but we have lived under this inequality of rights for more than fifty years, without a serious
469 protest until within three years, and the complaints we have made arose from the British construction of our fishing rights and not of our commercial rights under that reciprocity.

Our fishing vessels are equally barred (under the British contention) by the treaty of 1818, and by the British proclamation of November 5, 1830, from entering their ports with cargoes of fish taken in Canadian waters, without reference to the rights to touch and trade or to any other commercial character, that we may give them under our laws. To gain these rights for our fishermen, we have a choice of grave alternatives.

But the cost of the naval and military preparation that would be necessary to give confidence to our own people, in supporting any extreme demand or stringent measures connected with this subject, would be greater than the whole value of these fisheries for the next half century.

VI. THE PRESIDENT HAS ONLY PERFORMED A PLAIN DUTY, IN THE INTERESTS OF ALL THE PEOPLE OF THE UNITED STATES, AND TO THE SENATE IS LEFT THE RESPONSIBILITY.

The undersigned do not find it necessary to answer in detail the various objections urged in committee by the Senators opposed to the ratification of this treaty, because no amendment was offered to indicate that the treaty could be so improved as to gain the support of any member of the majority of the committee.

The undersigned understand that the dissent from this negotiation is directed to it as an entirety. This dissent is based, in part, upon the opinion of some members of the majority that the President should not have entered upon any negotiation, in view of the resolution adopted by the Senate on the 3d day of February, 1886, and the opinion of Congress as it was expressed in the non-intercourse act approved March 3, 1887. That resolution is as follows:

Resolved, That in the opinion of the Senate the appointment of a commission, in which the Governments of the United States and Great Britain shall be represented, charged with the consideration and settlement of the fishing rights of the two Governments on the coasts of the United States and British North America, ought not to be provided for by Congress.

This resolution related, as we understand it, solely to the question whether such negotiation should be conducted by commissioners, under an act of Congress, or by the President, under his constitutional power to make treaties.

The Senate adhered to its constitutional power to ratify or reject a treaty, and insisted that the President should make any negotiation he might see fit to conduct in such form and under such conditions that the power of the Senate over such subjects should not be interfered with.

The retaliatory act of Congress above mentioned was not intended, and could not have been intended, to instruct the President as to the will of the legislature in a matter over which Congress has no authority—the negotiation, ratification, or promulgation of a treaty.

Congress has the right to declare that in some or all of the hundreds of cases that have occurred in which the treaty of 1818 has been in question, it has been violated, and that retaliation, reprisals, or war shall follow such abuses until they are compensated, and they shall cease. Such a declaration as to the violation of the treaty was distinctly made in the report of the Senate Committee on Foreign Relations, on the 19th of January, 1887. We quote from that report as follows:

It will be seen, from the correspondence and papers submitted by the President, in his message on the subject, of the 8th of December last (Ex. Doc. No. 19, Forty-ninth Congress, second session), and from the testimony taken by the committee, that some of these instances of seizure or detention, or of driving vessels away by threats, etc., were in clear violation of the treaty of 1818, and that others were on such slender and technical grounds, either as applied to fishing rights or commercial rights, as to make it impossible to believe that they were made with the large and just object of protecting substantial rights against real and substantial invasion, but must have been made either under the stimulus of the cupidity of the seizing officer, sharpened and made safe by the extraordinary legislation to which the committee has referred, whereby the seizing officer, no matter how unjust or illegal his procedure may have been, is made practically secure from the necessity of making substantial redress to the party wronged, or of punishment, or else they must have arisen from a systematic disposition on the part of the Dominion authori-

ties to vex and harass American fishing and other vessels so as to produce such a state of embarrassment and inconvenience with respect to intercourse with the provinces as to coerce the United States into arrangements of general reciprocity with the Dominion.

But Congress did not follow up this bold declaration of that committee with a demand for redress, or with any provision of law that was based upon the fact that the treaty of 1818 had been violated by Great Britain. It was our commercial rights that Congress undertook to protect.

The committee did not ask the Senate to pass a bill that would commit the country, if it should become a law, to a state of
470 actual hostility towards Great Britain, or even to a firm declaration that Great Britain had violated the treaty of 1818 in the manner and with the motives stated in the foregoing extract from their report.

Congress was either satisfied that no occasion had arisen which would justify decisive measures, such as retaliation, reprisals, or war, in resentment for any actual violation of the treaty, or else it sought to evade its just responsibility to the country by increasing the powers of the President to retaliate on British commerce, and by throwing upon him the responsibility of deciding whether the "recent" conduct of that Government and of the provinces demanded of the United States that any retaliation should be proclaimed and enforced.

The House of Representatives demanded broader powers for the President than the Senate would agree to, but both houses hastened to devolve upon him the decision of the whole question of our treaty relations with Great Britain, and gave him the discretion to employ all necessary means to put his decision in force.

This is the law that Congress enacted to meet that aggravated state of affairs, as described in the report of the Senate committee:

AN ACT to authorize the President of the United States to protect and defend the Rights of American Fishing-vessels, American Fishermen, American Trading and other Vessels, in certain cases and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the President of the United States shall be satisfied that American fishing vessels or American fishermen, visiting or being in the waters or at any ports or places of the British dominions of North America, are or then lately have been denied or abridged in the enjoyment of any rights secured to them by treaty or law, or are or then lately have [been] unjustly vexed or harassed in the enjoyment of such rights or subjected to unreasonable restrictions, regulations, or requirements in respect of such rights; or otherwise unjustly vexed or harassed in said waters, ports, or places; or whenever the President of the United States shall be satisfied that any such fishing vessels or fishermen, having a permit under the laws of the United States to touch and trade at any port or ports, place or places, in the British dominions of North America, are or then lately have been denied the privilege of entering such port or ports, place or places, in the same manner and under the same regulations as may exist therein applicable to trading vessels of the most favoured nation, or shall be unjustly vexed or harassed in respect thereof, or otherwise be unjustly vexed or harassed therein, or shall be prevented from purchasing such supplies as may there be lawfully sold to trading vessels of the most favoured nation; or whenever the President of the United States shall be satisfied that any other vessels of the United States, their masters or crews, so arriving at or being in such British waters or ports or places of the British dominions of North America, are or then lately have been denied any of the privileges therein accorded to the vessels, their masters or crews, of the most favoured nation, or unjustly vexed or harassed in respect of the same, or unjustly vexed or harassed therein by the authorities thereof, then, and in either or all of such

cases, it shall be lawful, and it shall be the duty of the President of the United States, in his discretion, by proclamation to that effect, to deny vessels, their masters and crews, of the British dominions of North America, any entrance into the waters, ports, or places of, or within the United States (with such exceptions in regard to vessels in distress, stress of weather, or needing supplies as to the President shall seem proper), whether such vessels shall have come directly from said dominions on such destined voyage of by way of some port or place in such destined voyage elsewhere; and also, to deny entry into any port or place of the United States of fresh fish or salt fish or any other product of said dominions, or other goods coming from said dominions to the United States. The President may, in his discretion, apply such proclamation to any part or to all of the foregoing-named subjects, and may revoke, qualify, limit, and renew such proclamation from time to time as he may deem necessary to the full and just execution of the purposes of this act. Every violation of any such proclamation, or any part thereof, is hereby declared illegal, and all vessels and goods so coming or being within the waters, ports, or places of the United States contrary to such proclamation shall be forfeited to the United States; and such forfeiture shall be enforced and proceeded upon in the same manner and with the same effect as in the case of vessels or goods whose importation or coming to or being in the waters or ports of the United States contrary to law may now be enforced and proceeded upon. Every person who shall violate any of the provisions of this act, or such proclamation of the President made in pursuance hereof, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding two years, or by both said punishments, in the discretion of the court.

Approved, March 3, 1887.

This law relates to past offenses as well as to those that may hereafter occur. As to past offenses, Congress abdicated its authority to declare that they constituted just grounds for retaliation, and left that matter solely to the discretion of the President or else Congress intended that the President should have these powers to meet
 471 a case of emergency, and should also employ his constitutional power of making treaties (which Congress could not control) as a part of "his discretion" in providing a way through which the evils complained of should be remedied.

The undersigned can not impute to Congress that its purpose, in devolving upon the President those broad discretionary powers and conditional duties, was to forbid, or to embarrass, the free exercise by him of his constitutional power to make treaties, with the advice and consent of the Senate, or that these extraordinary powers were given him to enable Congress to escape its just responsibility for measures that were necessary for the protection of the honor of the country or the interests of the people.

If the President had resorted to retaliatory measures against Canadian commerce, under this act of March 3, 1887, without having attempted any negotiation with Great Britain, the open way that was indicated by Mr. Seward's protocol in 1865, to which we have referred, and the favorable impression it made on the British Government, would have been pointed out by an indignant people as an abandoned opportunity for an amicable agreement with Great Britain, and he would have been amenable to just censure.

But, aside from this, his duty to humanity, as well as to his country, forbade him from exposing the interests and prosperity of 65,000,000 of people to danger, by hasty or extreme measures of retaliation, while it was possible to reach a just settlement of our disputes with Great Britain over matters that concern only a few thousand people, who would be more benefitted by such an agreement than they could be by retaliatory laws.

The President has succeeded in making provision for a settlement of these long-standing disputes on terms that are just and reasonable, as we are satisfied—a much better settlement than has been even attempted heretofore, and one that will increase, in the future, the liberality of commerce with Canada.

If the Senate shall decline to ratify this treaty there will remain no doubt that it assumes all the responsibility for what may hereafter result from the proper employment by the President of the retaliatory powers that Congress has conferred upon him.

If the proper use of those powers is considered by Great Britain as a violation of the treaty of 1818, in demanding for our fishermen greater liberties and privileges than that treaty secured to them, and that we are enforcing that demand through commercial duress, the Senate will also take whatever responsibility may belong to that situation.

Congress declined to say in the act of March 3, 1887, that the rights of American fishermen had been denied or abridged, but left it to the President to determine that question. If this treaty is rejected, it is beyond dispute that retaliation is the only means, short of war, by which we can redress our wrongs, if we have suffered any.

The Senate, in rejecting this treaty, will affirm that such wrongs exist, which Congress did not so assert, and, because thereof, will force the President to proclaim non-intercourse.

VII. THE PROTOCOL TO THE TREATY IS AN HONORABLE AND FRIENDLY OVERTURE OF THE BRITISH GOVERNMENT, AND SHOULD BE ALLOWED TO DEVELOP, BY ACTUAL EXPERIENCE, WHETHER THIS TREATY WILL BE BENEFICIAL TO OUR FISHERIES AND COMMERCE.

In view of a possible disagreement between the Senate and President as to the value of this treaty to our fishermen, the undersigned respectfully call the attention of the Senate to the importance of postponing its consideration until the next December session of Congress.

The protocol to the treaty, suggested and offered by the British plenipotentiaries, tenders to our fishermen very liberal commercial privileges in Canadian ports for two years.

This overture is equivalent, almost, to a guaranty that during this period the British Government, in conjunction with the provincial governments, will prevent the recurrence of the interferences with our fishermen that have given them such serious disquietude. It will also put into practice, substantially, all the provisions of the present treaty, except those relating to the delimitation of fishing boundaries.

A single fishing season, under such conditions, will demonstrate that this treaty is a failure, or else that it is of great value to the country.

The advantage of such experience is manifest, and we should not rashly trust to our opinions, which must be largely conjectural, when we can fortify them or disprove their soundness by a short delay in our action, which does not commit us, in the least degree, either for or against the treaty.

The British Government has exerted a restraining influence during the whole period since 1818 over the provincial governments as to their demands and proceedings under that treaty. That Govern-

ment has encouraged liberality in the conduct of the fishermen and in commercial interchange between the United States and the provinces; seeing that the prosperity of those countries greatly depended on such a policy.

It has not been an easy task to restrain the people of the provinces to a course of moderation. Political reasons, not always favorable to the Crown, and the jealousies of rival interests in fishing rights held in common by the people of two countries, and even the lingering hatreds engendered by our Revolutionary war, have been active in promoting discord in these colonies. Great Britain never before had so capital an interest in fostering the loyalty of the Canadians. The Suez Canal is scarcely more important to the interests of that Empire than the Canadian Pacific Railway.

But other interests of the most important character inspire the British Government with an earnest purpose to cultivate the closest friendship with the people of Canada.

It is evidently the true policy of the British Government to 472 satisfy the people of these provinces that the treaty now before the Senate will be of advantage to them, because of the additional liberty of commerce that it extends to our fishermen; and this was doubtless a strong inducement to that Government to offer voluntarily to us the privileges stated in the protocol to the treaty.

We have almost as great an interest in affording to our people the opportunity of a practical test of the advantage of these privileges offered in this protocol.

In matters of such moment we can not justify a rejection of such a proposition, not requiring our formal acceptance to make it available, on the ground that we could not, without dishonor, permit such a course, resulting in such possible advantages to us, even for one fishing season, and then reject the treaty.

We have not in any way invited or suggested this offer of the British Government, and we are not asked to accept it. It proposes, for a time, to liberalize the commercial privileges of our fishermen in the provincial ports, for reasons satisfactory to the British Government.

If we should hasten our action on this treaty with the purpose of preventing an effort of that Government to satisfy Her Majesty's subjects that a liberal policy towards us is the best, or even of convincing our people by experience that such a policy is also best for us, we would incur greater discredit by such action than could possibly attend our rejection of the treaty, after a fair trial of the British expedient presented in this protocol had satisfied our people that the treaty should not be ratified.

VIII.—THE HEADLAND THEORY, AS APPLICABLE TO THE BAYS, HARBORS, AND CREEKS THAT ARE CLAIMED AS TERRITORIAL WATERS, HAS NOT BEEN ABANDONED BY THE BRITISH GOVERNMENT, EXCEPT IN THIS TREATY. IT WAS A VITAL QUESTION WHEN THIS NEGOTIATION WAS ENTERED UPON.

It is insisted by some that Great Britain had abandoned the headland theory, and that it was obsolete when this treaty was made.

The undersigned do not understand that the British headland theory, as applied to the bays, harbors, and creeks that had geographical names and limits, and were included by British or pro-

vincial laws within the local jurisdictions in 1818, has been abandoned by Great Britain. Outside of a limit of 3 miles from the headlands of such indentations of the sea-coast it was abandoned as early as 1815, in the case of the American fishing vessels that were warned off the coast by the British man-of-war *Josueur*.

Our claims could not be fairly predicated, diplomatically, on such an admission by Great Britain as to the base-line from which the 3-mile limit is to be measured.

That being still an open question, the claims of either side were a necessary feature in the negotiation of this treaty.

If our contention was *indisputably just*, a peremptory demand for its allowance was the only course we could adopt. Such a demand, we believe, has never been formally made by this Government. Congress certainly has never affirmed the indisputable justice of our claim. The United States have preferred to let this question, with all the others that have arisen under the treaty of 1818, continue in reach of discussion and negotiation.

In that situation the present administration found this controversy.

Mr. Bayard proposed to the British Government that the 3-mile fishing limit should be measured, in the bays that were 10 miles or less in width, from that point nearest the entrance where the shores are 10 miles distant from each other. He found his support for that offer in the arrangement between Great Britain and other European nations for fishing in the bays and harbors of their respective coasts along the North Atlantic and the northern seas.

It being generally conceded that the limit of local jurisdiction extended 3 miles from the coast out into the sea, and that this distance was adopted because it measured the range of artillery in ancient times, it is obvious that when the range of artillery is extended to 5 miles it is due to the security of bays and harbors reaching far inland that treaty arrangements fixing a new measurement should have some reference to the increased limits for the protection of the people residing along such shores corresponding with the improved range of artillery.

This offer made no allusion to any headland theory that the British Government had ever asserted; still it was directly opposed to assertions of that theory which Great Britain had often made, and called forth the following "observation from the Marquis of Salisbury upon the proffer made by Mr. Bayard:—"

A reference to the action of the United States Government, and to the admission made by their statesmen in regard [to] bays on the American coasts, strengthens this view; and the case of the English ship *Grange* shows that the Government of the United States, in 1793, claimed Delaware Bay as being within territorial waters.

Mr. Bayard contends that the rule, which he asks to have set up, was adopted by the umpire of the commission, appointed under the convention of 1853, in the case of the United States fishing schooner *Washington*; that it was by him applied to the Bay of Fundy, and that it is for this reason applicable to other Canadian bays.

It is submitted, however, that as one of the headlands of the Bay of Fundy is in the territory of the United States, any rules of international law applicable to that bay are not therefore equally applicable to other bays the headlands of which are both within the territory of the same power.

This provision would involve a surrender of fishing rights which have always been regarded as the exclusive property of Canada, and would make
 473 common fishing-grounds of the territorial waters which, by the law of nations, have been invariably regarded both in Great Britain and the

United States as belonging to the adjacent country. In the case, for instance, of the Baie des Chaleurs, a peculiarly well-marked and almost land-locked indentation of the Canadian coast, the 10-mile limit would be drawn from points in the heart of Canadian territory, and almost 70 miles from the natural entrance or mouth of the bay. This would be done in spite of the fact that, both by imperial legislation and by judicial interpretation, this bay has been declared to form a part of the territory of Canada. (See Imperial Statute, 14 and 15 Vict., cap. 63; and *Mouatt v. McPhee* [*Mowat v. McFee*], 5 Sup. Court of Canada Reports, p. 66.)

From this statement of the British contention, it appears that the headland theory was still adhered to by that Government in March, 1887, but it was admitted that it had been relaxed as to the Bay of Fundy for special reasons.

Mr. Bayard's reply to the "observations" of the Marquis of Salisbury, which is set forth on pages 56 to 60, inclusive, of Senate Executive Document No. 113, first session of Fiftieth Congress, refutes the force of those "observations" by citing precedents furnished by the conduct of the British Government in this matter, and the decision of the umpire in the cases of the *Washington* and the *Argus*, in which he wholly discarded the headland theory and made an award in favor of the owner.

But these counter-statements only served to show that the headland theory, in its application to bays within the jurisdictional limits, was still in controversy between the two Governments, and that there was little disposition on the part of the British Government to yield, as there was on our part to admit, the justice of that construction of the treaty of 1818.

These contentions made it necessary that a better understanding should be reached; and if the two Governments could not accomplish this by negotiation, it was certain that increasing strife and broils between their people would seriously endanger the commerce of each, and would expose both countries to the peril of being driven into hostilities by the designs of vicious men, or through the angry contentions of well-meaning persons.

IX. THE CLOSE RELATIONS BETWEEN THE PEOPLE OF CANADA AND THE UNITED STATES IN THE USE OF THE COMMON RIGHT OF FISHERY MAKE IT IMPERATIVE TO REGULATE THEIR ASSOCIATION BY FRIENDLY AGREEMENT RATHER THAN BY RETALIATORY LAWS.

Mutual and amicable agreement between the two Governments, clearly understood and faithfully executed, is the only way in which the people of Newfoundland and Canada and of the United States can ever peacefully enjoy, *in common*, the valuable rights of fishery.

Reciprocity, in some form, is an element in every treaty made for the settlement of questions that are sincerely in dispute between independent powers. In all of our treaties with Great Britain, relating to the extra-territorial rights, liberties, or privileges of each in the other's country or jurisdiction, reciprocity has been conspicuously stated as a leading motive and purpose. The provisional treaty of peace of November 30, 1782, sets out with this declaration:

Whereas reciprocal advantages and mutual convenience are found by experience to form the only permanent foundation of peace and friendship between States, it is agreed to form the articles of the proposed treaty on such prin-

principles of liberal equity and reciprocity as that, partial advantages (those seeds of discord) being excluded, such a beneficial and satisfactory intercourse between the two countries may be established as to promise and secure to both perpetual peace and harmony.

This declaration was repeated, in substance, in the definitive treaty of peace of September 3, 1783.

In both these treaties the right of fishery was defined as between the people of both countries, the United States expressly yielding some of the liberties they had enjoyed in common with the colonies that remained subject to the British Crown on the coasts of Newfoundland as to curing and drying fish on that island.

The treaty of October 20, 1818; was made "to cement the good understanding which happily exists between" the two Governments. In that treaty we renounced our right of fishery on certain coasts, etc., but regained the right to cure and dry fish on a part of the southern coasts of Newfoundland.

Under that treaty, which was reciprocal, misunderstanding arose as to its meaning, and the reciprocity treaty of 1854 was made, in part, "to avoid further misunderstanding between their respective citizens and subjects in regard to the extent of the right of fishing on the coasts of British North America secured by Article I of the Convention" of 1818, and "to regulate the commerce and navigation between their respective territories and people."

The extensive reciprocity of this treaty continued for twelve years.

At its termination by the United States the "misunderstandings" under the treaty of 1818 again arose, when that convention became then, as it is now, the measure of our treaty rights.

The treaty of 1871 was made so as "to provide for an amicable settlement of causes of difference between the two countries," and arbitration and reciprocity pervaded every one of its forty-three articles.

474 In all the wide range of our treaty engagements with the treaty powers of the world there is scarcely one that does not contain some mutual advantage or reciprocal concession, and they cover every subject that has been suggested, in the experience of mankind, as being fit or convenient to be settled by international agreement rather than to be left under the control or security that might be afforded by the laws enacted by the respective countries, which they could alter or repeal at pleasure.

Now we are again remitted to the field of "misunderstanding," "in regard to the extent of the right of fishing on the coasts of British North America," with an increased number of cases of seizures and interferences with our fishermen growing out of those disputes, and the question is, whether we shall abandon all efforts to remove these misunderstandings by further agreements, or shall we treat every claim we make as a *sine qua non*, and its refusal an ultimatum, and resort, as the first expedient, to retaliatory legislation to enforce it. That failing, shall we stop and abandon the claim, or prepare for its support by coercive measures?

Retaliation may secure just dealing between nations whose interests are entirely distinct and separate; but that is not our situation toward the people or the governments of Canada or Newfoundland.

X. THE CHARACTER AND VALUE OF THE FISHERIES ON THE COAST OF LABRADOR AND THE BANKS OF NEWFOUNDLAND AND THE INCREASING DEMAND FOR FOOD-FISHES TO SUPPLY THE WANTS OF THE PEOPLE.

The inshore fishing along the coast of Labrador are the best we have in the Gulf of St. Lawrence, while that along the southern and western shores of Newfoundland is far better than any along the coasts of Nova Scotia or New Brunswick.

Our plenipotentiaries who negotiated the treaty of 1818 mention these facts to show that we lost nothing of value when we gave up the inshore fisheries of Nova Scotia, and gained much advantage by having access to the shores of Labrador, as will hereafter appear in this report.

Mr. Sabine, in his report to the Secretary of the Treasury, in 1852, gives a very interesting account of the fisheries on the northeastern coast, from which we make the following extracts, found in Senate Ex. Doc. 22, second session Thirty-second Congress:

An account of the fishing-grounds has been reserved for the conclusion. Of those near our cities, and visited for the purpose of supplying our markets with fish to be consumed fresh, it is unnecessary to speak. Those within the limits of British America, and secured to us by treaty, as well as those on the eastern coasts of Maine, are less generally known and may properly claim attention. Of the distant, Newfoundland is the oldest. That vessels from Boston fished there as early as the year 1645 is a fact preserved in the journal of Governor Winthrop. The "great bank," which has been so long resorted to, is said to be about 200 miles broad and nearly 600 miles long. In gales the sea is very high, and dense fogs are prevalent. The water is from 25 to 95 fathoms deep. The edges of the bank are abrupt and composed of rough rocks. The best fishing-grounds are between the latitudes of 42° and 46° north. The "bankers," as the vessels employed there are called, anchor in the open sea, at a great distance from the land, and pursue their hazardous and lonely employment, exposed to perils hardly known elsewhere. The fish are caught with hooks and lines, and (the operations of splitting and dressing performed) are salted in bulk in the hold, from day to day, until the cargo is completed. The bank fish are larger than those taken on the shores of Newfoundland, but are not often so well cured. The first American vessel which was fitted for the Labrador fishery sailed from Newburyport toward the close of the last century. The business, once undertaken, was pursued with great energy, and several hundred vessels were engaged in it annually previous to the war of 1812. A voyage to Labrador, unlike a trip to the Banks of Newfoundland, is not without pleasant incidents, even to landsmen. The coast is frequented for a distance of 10 or 12 degrees of latitude. It has been preferred to any other on account of its security and a general certainty of affording a supply of fish. Arriving in some harbour early in June, an American vessel is moored and remains quietly at anchor until a full "fare" has been obtained, or until the departure of the fish requires the master to seek another inlet.

The fishing is done entirely in boats, and the number usually employed is one for about 30 tons of the vessel's register. Here, under the management of an experienced and skilful master, everything may be rendered systematic and regular. As soon as the vessel has been secured by the necessary anchors, her sails and light rigging are stowed away, her decks cleared, her boats fitted, and a day or two spent in fowling and sailing, under color of exploring the surrounding waters and fixing upon proper stations for the boats, and the master announces to his crew that they must try their luck with the hook and line. Each boat has now assigned to it a skipper or master, and one man. At the time designated, the master departs with his boats, to test the qualities of his men, and to mark out for them a course for their future procedure.

Nothing could be more injurious to men, who are brought into such intimate association by their common right of fishing on those distant shores, than a policy of their governments which would cause them to make reprisals, the stronger against the weaker.

475 Hon. Robert J. Walker, whose ability as a statesman is nowhere seriously questioned, in a letter to Mr. Seward, Secretary of State, dated April 24, 1868, thus describes the value of the fisheries as sources of food supply. He says:

But there are other most important considerations connected with extended coasts and great fisheries. The fisheries are capable of furnishing more and cheaper food than the land.

The reasons are—

(1) The ocean surface is nearly four times that of the land, the area being 145,000,000 square miles of ocean surface to 52,000,000 of land.

(2) The ocean everywhere produces fish, from the equator to the pole, the profusion of submarine animals increasing as you go north up to a point but 433 miles from the pole and believed to extend there, whereas, in consequence of mountains, deserts, and the temperature of the surface of the earth in very high latitudes, less than half its surface can be cultivated so as to produce food in any appreciable quantities.

(3) The temperature of the ocean, in high latitudes, being much warmer than that of the land surface, there is increased profusion of submarine animal life, especially in the Arctic and Atlantic Seas, where, on account of extreme cold, the land surface produces no food. In warm latitudes the deep-sea temperature diminishes with the depth, until a certain point, below which it maintains an equable temperature of 40° Fahrenheit. The temperature of the ocean in latitude 70° (many degrees warmer than the land surface) is the same in all depths. There are wonderful provisions for the multiplication of animal life in the ocean, and it moderates both heat and cold. These are additional reasons in favor of the existence of a Polar Sea, filled with a far greater profusion of submarine animal life than any other seas, and, as a consequence, possessing far the best fisheries. Indeed, as fish progress northward, on account of the better ocean temperature there, as also, because the marine food there is more abundant, there can be little doubt that the open Polar Sea will furnish fisheries of *incredible value*.

(4) The ocean produces food in all latitudes for the support of animal submarine life. These are squid (the principal food of the whale), also abundance of nutritious sea-grasses, etc., upon which the fish feed. Besides, as the earth is more and more cultivated, and farms, as well as towns and cities, drained by creeks and rivers to the seas, the submarine food is correspondingly augmented. Even in mid-ocean the phosphorescence observed there is produced by the presence in the water of myriads of living animals.

(5) Whilst the earth produces food by plowing its surface only a few inches deep, the ocean supplies myriads of fish, tier on tier, thousands of fathoms deep. Thus, the registered take of herrings in the Scotch fisheries, in 1861, was 900,000,000, whilst that of Norway, in the latitude of Iceland and Greenland, was far greater.

Perhaps, however, the main reason why the ocean produces so much more food for man than the land is, that whilst land animals only give birth to one or two of their young at a time, some fish produce millions of ova, to be matured into life. Thus, a female cod has been found to contain 3,400,000 ova; and other fish ova varying from several millions to 36,000. Hence, the vast success attending the increased production of fish by transfer, by sowing the spawn, and other methods known to ichthyology.

Nothing could more certainly lessen the food supply of the people, which, after all, is the basis of all human progress, than to promote strife amongst fishermen visiting the same waters. A policy that leads to such a result is an injustice to the human family.

No wealth, national or personal, can be justly earned when it comes from diminishing the supply of human food.

With all our vast excess of cereals and of animal food we still need all the fish we can gather from the oceans and seas for the comfort and economy of living, especially among the industrial classes of our rapidly increasing population. The Atlantic and Pacific fisheries rank in importance along with the production of beef, mutton, and pork as a source of food supply, and as a competitive element in the food markets even of this abundant country.

Our fishing rights and liberties along the coasts of Labrador and Newfoundland, as fixed by the treaty of 1818, are rights to be enjoyed in common with the British people, and are such as no other nation has. They are partnership rights, in the intimate character of the association, in their labors and privileges, of our fishermen with theirs. No two nations were ever drawn into a closer relationship, or one in which good-will and mutual forbearance were more essential to the profitable pursuit of a great industry, than that established between us by the joint struggles of the colonies, confirmed by the treaty of 1783, and renewed, as to ports of Labrador and Newfoundland, almost without restriction, by the treaty of 1818.

As to this, by far the most essential part of the rights reserved to us in that treaty, we can no more preserve and enjoy its value to us, under the plan of reprisals, through retaliatory laws, upon British commerce, than copartners can promote their joint business interests by each one attempting constantly to destroy the value of the other partner's share in the venture.

Our vessels and theirs are anchored side by side in the bays, or follow the same schools of fish, and capture them wherever they are found along these coasts. One fisherman entices the fish around his vessel with bait and another comes in and takes what he can with his lines or nets, just as if the whole business was a copartnership.

If these vessels belong to countries that are arrayed in commercial hostility based upon retaliatory laws and ready to break out, upon slight provocation, into a war their friendly association will be impossible.

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XI. THE USE OF FLEETS TO INTERPRET A TREATY.

Under the misunderstandings of the past we have on both sides sent fleets to these waters to protect our fishermen against each other and against the unfriendly conduct of the local governments; fleets to enforce agreements that the governments concerned could not expound by a mutual understanding.

If these questions are left open, and commercial war is inaugurated through measures of retaliation, how many ships and guns is it supposed will be needed to keep the peace between our fishermen on the coasts of Labrador and Newfoundland?

The danger in this direction does not come from the desire of either Government to promote a war, but from their inability to prevent its initiation through the personal hostilities of men associated in the use of common rights and privileges, and stimulated by rivalries which are encouraged by laws of retaliation enacted by their respective Governments.

These are some of the dangers against which this treaty wisely makes safe provision.

XII. THE AREA YIELDED BY THE DELIMITATIONS OF THIS TREATY, AS COMPARED WITH THOSE YIELDED BY THE BRITISH GOVERNMENT ON THEIR CONSTRUCTION OF THE LIMITS OF OUR "RENUNCIATION" UNDER THE TREATY OF 1818.

It is alleged by some that this treaty yields to the British Government 50,000 square miles of exclusive fishing-grounds beyond what we yielded in the treaty of 1818.

Taking the contention of the United States that no headland theory is to be found in the treaty of 1818, and that the exclusive fishing limit is a line 3 miles from the shore, at low water, that enters all harbors, bays, and creeks that are more than 6 miles wide at the entrance, and follows the sinuosities of the coast thereof, this estimate of the area surrendered in this treaty is greatly exaggerated.

This is the narrowest limit to which we have confined our renunciation in the treaty of 1818, of the common right of fishery, in our contentions with Great Britain.

The total area as to which we renounced the common right of fishing, according to this construction of that treaty, is 16,424 nautical square miles.

The additional area of renunciation under the delimitations of the proposed treaty, now before the Senate, is 1,127 square miles, being $6\frac{8}{10}$ per cent. addition to the former area of exclusion.

The total area of bays, creeks, and harbors not more than 6 miles wide at their mouths is about 6,599 square miles, and is included in the above-mentioned measurement of 16,424 square miles.

The British claim as the true construction of the agreement in the treaty of 1818, that it fixed the line within which we renounced the common right of fishery at the distance, measured seaward, of 3 miles from the entrance of *all* bays, harbors, and creeks of His Majesty's dominions. This would add an area of 3,489 square miles to the exclusive fishing grounds claimed by the British Government, while the area in which we have renounced the common right of fishing in those bays, harbors, and creeks under the proposed treaty now before the Senate is 1,127 square miles.

Thus, under the British contention that Government yields, in this treaty, 3,489 square miles of exclusive fishing waters to the people of the United States as a common fishery, and we yield 1,127 square miles to the British Government as exclusive fishing waters, which we now claim to enjoy with them as a common fishery under our construction of the treaty of 1818, which they refuse to admit.

They yield more than two-thirds of their claim to us, and we yield less than one-third of our claim to them, for the sake of settling forever a dispute that has lasted for seventy years, and has been in every way a costly and disturbing contention to our people. (See official statement from the Coast Survey, marked D.)

If these disputed areas were the richest fisheries in the world, the settlement of our respective rights in them, as arranged in the treaty now before the Senate, should be welcomed by the American people with entire satisfaction.

When we know, from the examination and report of the Senate Committee on Foreign Relations, that this disputed area is of no real advantage to our fishermen, and that this statement is supported by conclusive evidence, furnished by the Halifax Commission, and by Professor Baird, our former Commissioner of Fisheries, no ground seems to be left for the contention of those who oppose this settlement.

XIII. THE VIEWS OF THE PRESIDENT OF THE UNITED STATES AS TO THE PROPER EXECUTION OF THE ACT OF CONGRESS OF MARCH 3, 1887, OPPOSED TO THOSE OF THE CAPITALISTS WHO CONTROL OUR FISHING INDUSTRY AND REAP THE GREATEST ADVANTAGES FROM THEM.

The president of the American Fishery Union, in 1887, brought the subject of retaliation to the attention of the President of the
477 United States, and insisted that it should be applied only to the exclusion of British-American fishing products from the markets of the United States. To that demand the President of the United States replied as follows:

EXECUTIVE MANSION,
Washington, D. C., April 7, 1887.

GENTLEMEN: I have received your letter lately addressed to me, and have given full consideration to the expression of the views and wishes therein contained in relation to the existing differences between the Government of Great Britain and the United States growing out of the refusal to award to our citizens engaged in fishing enterprises the privileges to which they are entitled either under treaty stipulations or the guaranties of international comity and neighborly concession. I sincerely trust the apprehension you express of unjust and unfriendly treatment of American fishermen lawfully found in Canadian waters will not be realized; but if such apprehension should prove to be well founded, I earnestly hope that no fault or inconsiderate action of any of our citizens will in the least weaken the just position of our Government, or deprive us of the universal sympathy and support to which we should be entitled.

The action of this administration since June, 1885, when the fishery articles of the treaty of 1871 were terminated under the notification which had two years before been given by our Government, has been fully disclosed by the correspondence between the representatives and the appropriate departments of the respective Governments, with which I am apprised by your letter you are entirely familiar. An examination of this correspondence has doubtless satisfied you that in no case have the rights or privileges of American fishermen been overlooked or neglected, but that, on the contrary, they have been sedulously insisted upon and cared for by every means within the control of the executive branch of the Government.

The act of Congress approved March 3, 1887, authorizing a course of retaliation, through executive action, in the event of a continuance on the part of the British-American authorities of unfriendly conduct and treaty violations affecting American fisherman, has developed upon the President of the United States exceedingly grave and solemn responsibilities, comprehending highly important consequences to our national character and dignity, and involving extremely valuable commercial intercourse between the British possessions in North America and the people of the United States.

I understand the main purpose of your letter is to suggest that, in case recourse to the retaliatory measures authorized by this act should be invited by unjust treatment of our fishermen in the future, the object of such retaliation might be fully accomplished by "prohibiting Canadian-caught fish from entry into the ports of the United States."

The existing controversy is one in which two nations are the parties concerned. The retaliation contemplated by the act of Congress is to be enforced, not to protect solely any particular interest, however meritorious or valuable, but to maintain the national honour, and thus protect all our people. In this view the violation of American fishery rights and unjust or unfriendly acts towards a portion of our citizens engaged in this business is but the occasion for action, and constitutes a national affront, which gives birth to or may justify retaliation. This measure once resorted to, its effectiveness and value may well depend upon the thoroughness and extent of its application; and in the performance of international duties, the enforcement of international rights, and the protection of our citizens, this Government and the people of the United States must act as a unit, all intent upon attaining the best result of retaliation upon the basis of a maintenance of national honor and duty.

The nation seeking by any means to maintain its honor, dignity, and integrity, is engaged in protecting the right of the people; and if, in such efforts, particular interests are injured and special advantages forfeited, these things should be

patriotically borne for the public good. An immense volume of population, manufactures, and agricultural productions, and the marine tonnage and railways to which these have given activity, all largely the result of intercourse, between the United States and British America, and the natural growth of a full half century of good neighborhood and friendly communication, form an aggregate of material wealth and incidental relation of most impressive magnitude, I fully appreciate these things, and am not unmindful of the great number of our people who are concerned in such vast and diversified interests.

In the performance of the serious duty which Congress has imposed upon me, and in the exercise, upon just occasion, of the power conferred under the act referred to, I shall deem myself bound to inflict no unnecessary damage or injury upon any portion of our people; but I shall, nevertheless, be unflinchingly guided by a sense of what the self-respect and dignity of the nation demand. In the maintenance of these and in the support of the honor of the Government, beneath which every citizen may repose in safety, no sacrifice of personal or private interests shall be considered as against the general welfare.

Yours, very truly,

GROVER CLEVELAND.

GEORGE STEELE,

President American Fishery Union, and others, Gloucester, Mass.

From this letter, to which the minority of the committee refer with great satisfaction, as a correct exposition of the duties that Congress has imposed upon the President in the enforcement of our laws of retaliation, it will be seen that the present administration
478 will treat this subject in the same sense that Congress has treated it, as a question of national concern, and not as a means of promoting the pecuniary interests of those who control and derive the chief benefit of our fisheries, such as the owners and outfitters of fishing fleets, and warehousemen and those engaged in salting, drying, and canning fish for the interior markets.

The hardy fishermen of the United States will, we believe, also be protected in the administration of our retaliatory laws, and other similar statutes, against the common practice that speculators in the fishing industry now resort to of placing their vessels in charge of captains and crews imported from Canada, because they can underbid our fishermen in the matter of wages.

This practice is a far more serious injury to our fishermen and to the people of the United States than would come from yielding twice the area of fishing waters that are yielded by the delimitations of this treaty, even if they were good fishing waters. It has already compelled many of our best fishermen to withdraw from this, and to seek a living in other pursuits.

XIV. THE QUESTION OF THE BRITISH HEADLAND THEORY, AS TO SMALLER BAYS AND HARBORS ALONG THE COASTS, AND THE LIMITS OF OUR RENUNCIATION OF THE RIGHTS OF FISHING, AND THE NATURE OF THE RESTRICTIONS UPON THE RIGHTS OF OUR FISHERMEN TO ENTER THE BAYS AND HARBORS OF BRITISH NORTH AMERICA, ARE MATTERS OF DISPUTED RIGHT. ADMISSIONS MADE HERETOFORE BY AMERICAN DIPLOMATISTS, AS TO THE DIFFICULTY OF CONSTRUING, GRAMMATICALLY, THE TEXT OF THE TREATY OF 1818, GIVE COLOR TO THE BRITISH CONSTRUCTION, AND PROVE, AT LEAST, ITS SINCERITY.

It is boldly asserted, in opposition to this treaty, that there is no sort of equivalent for the 1,127 square miles of fishing waters that we concede by the fixed lines of delimitation in this treaty. This assertion impeaches both the right of the British Government and the sincerity of its claim of the headland theory, as it applies to

bays more than 6 miles wide at the entrance. Nevertheless that assertion is much weakened by the official opinions of eminent American publicists, communicated to the British Government.

If the territorial claims of both Governments were sincerely asserted, as we believe they were, in reference to the fishing waters, the modification of them by mutual consent has always been held in the conduct of nations as a good equivalent, moving from each to the other, for the concessions mutually made. This doctrine is also applied by the courts as between individuals to support agreements based on the consideration of yielding or settling disputed claims.

In contrast with the assertion of the utter want of reason in the claims of Great Britain, based on the headland theory, we find many strong declarations of our Government. Mr. Monroe, Secretary of State, on December 30, 1816, admitted that a discussion of *rights* should be avoided when mutual *concessions were necessary to bring the treaty powers to a mutual agreement*. He said to Mr. Bagot:

In providing for the accommodation of the citizens of the United States engaged in the fisheries on the coasts of His Britannic Majesty's colonies on conditions advantageous to both parties, I concur in the sentiment that it is desirable to avoid a discussion of *their respective rights*, and to proceed, in a spirit of conciliation, to examine *what arrangement will be adequate to the object*. The discussion which has already taken place between our Government has, it is presumed, *placed the claim of each party in a just light*.

Our claim then was that we had a common right of fishery, on all the coasts, with the people of the British North American Possessions.

The British Government then claimed that the war of 1812-'15 had destroyed all our claims in such fisheries. On the 28th July, 1818, Mr. Adams, Secretary of State, instructed Mr. Gallatin and Mr. Rush as follows:

The President authorises you to agree to an article whereby the United States will desist from the liberty of fishing, and curing, and drying fish *within the British jurisdiction generally*, upon condition that it shall be secured as a permanent right, not liable to be impaired by any future war, *from Cape Ray to Ramea Islands, and from Mount Joli, on the Salvador coast, through the straits of Belle Isle, indefinitely north, along the coast*; the right to extend as well to curing and drying the fish as to fishing.

This instruction was certainly much more liberal to the subjects of Great Britain than the first article of the treaty that was made under it. But the instruction stated the demand of the United States, and the British have a right to argue, at least, that the treaty was intended to conform to it as to the principles involved in it.

Claiming absolutely the right to enjoy these fisheries in common, with the Canadians, and basing our claim upon the highest considerations of justice, we were met with the counter-claim of Great Britain, that all our fishing rights in Canadian waters were granted to us by the treaty of 1783, and that that treaty had been abrogated by war. In this dispute, which was vital, we found so much reason for an adjustment, that our plenipotentiaries offered to Great Britain the surrender of our rights to the extent they were renounced in the treaty of 1818.

Our plenipotentiaries, in explaining the treaty to our Government, say:

It will also be perceived that we insisted on the clause by which the United States renounce their right to the fisheries relinquished by the convention, that clause being omitted in the first British counter-project.

479 We insisted on it with the view: (1) Of preventing any implication that the fisheries secured to us were a new grant and of placing the permanence of the rights secured and of those renounced precisely on the same footing; (2) of its being expressly stated *that our renunciation extended only to the distance of three miles from the coasts.*

The reasons they assigned for the importance of this point bring into serious doubt the question whether this renunciation extended to the ocean coasts, or the coasts of the bays. They are as follows:

This last point was the more important, as, with the exception of the fishery *in open boats within certain harbors*, it appeared from the communications above mentioned, *that the fishing-ground on the whole coast of Nova Scotia is more than three miles from the shores; whilst, on the contrary, it is almost universally close to the shore on the coasts of Labrador. It is in that point of view that the privilege of entering the ports for shelter is useful*, and it is hoped that, with that provision, *a considerable portion of the actual fisheries ON THAT COAST (of Nova Scotia) will, notwithstanding the renunciation, be preserved.*

In view of these declarations of our plenipotentiaries, who negotiated the treaty of 1818, no censure can be due to Daniel Webster for having expressed the opinion, in what is termed his "proclamation" to our fishermen, that "it would appear that, by a strict and rigid construction of this article" (of the treaty of 1818), "the fishing vessels of the United States are precluded from entering into the bays," etc., and that "it was undoubtedly an oversight in the convention of 1818 to make so large a concession to England, since the United States had usually considered that these vast inlets or recesses of the ocean ought to be open to American fishermen, as free as the sea itself, to within three miles of the shore."

It was not until March, 1845, that the Bay of Fundy was declared open to our fisheries by the British Government, on condition "*that they do not approach, except in cases specified in the treaty of 1818, within three miles of the entrance of any bay on the coast of Nova Scotia, or New Brunswick.*"

On the 17th September, 1845, the governor of Nova Scotia was instructed by the British Government that the permission to fish that had been conceded to us in the Bay of Fundy did not extend "to the Bay of Chaleur and other large bays of similar character on the coast of Nova Scotia and New Brunswick," and that they "*still adhere to the strict letter of the treaties,*" of which Mr. Webster afterwards spoke in his circular letter of 1852.

Many other disputations have occurred over the meaning of this treaty, as to the extent of the renunciation of our fishing rights within 3 miles of the coasts, bays, harbors, and creeks of the British North American possessions, and we are not aware that any of them have been definitely settled. Mr. Everett, minister to Great Britain, on the 25th March, 1845, replied to the letter of Lord Aberdeen, stating the action of the British Government in relation to our right to fish in the Bay of Fundy, in which Lord Aberdeen said:

The undersigned will confine himself to stating that, after the most deliberate reconsideration of the subject, and with every desire to do full justice to the United States, and to view the claims put forward on behalf of the United States citizens in the most favourable light, Her Majesty's Government are nevertheless still constrained to deny the right of United States citizens, under the treaty of 1818, to fish in that part of the Bay of Fundy which, from its geographical position, may properly be considered as included within the British possessions.

Her Majesty's Government still maintain—and in this they are fortified by high legal authority—that the Bay of Fundy is rightfully claimed by Great Britain as a bay within the meaning of the treaty of 1818, and they equally

maintain the position which was laid down in the note of the undersigned, dated the 15th of April last, that with regard to the other bays on the British American coasts no United States fisherman has, under that convention, the right to fish within 3 miles of the *entrance* of such bays as designated by a line drawn from headland to headland at that entrance.

That treaty was then 27 years old. It is now 70. But Mr. Edward Everett, instead of recommending war as the means of meeting this flat denial of our rights, that are now considered so clear as to be indisputable, replied to Lord Aberdeen, in the same spirit that subsequently pervaded Mr. Webster's circular (above quoted), as follows:

Speaking of the attitude of the United States as to the British construction of the treaty of 1818, he says:

While they have ever been prepared to admit, that in the letter of one expression of that instrument there is some reason for claiming a right to exclude United States fishermen from the Bay of Fundy (it being difficult to deny to that arm of the sea the name of "bay," which long geographical usage has assigned to it), they have ever strenuously maintained that it is only on their own construction of the entire article that its known design in reference to the regulation of the fisheries admits of being carried into effect.

Will Mr. Everett also be censured for finding difficulties in the headland theory of the British Government (so clearly stated by Lord Aberdeen) that staggered Mr. Webster's honest mind in 1852?

A still more conspicuous and deliberate presentation of the difficulty of arriving at a satisfactory construction of the first article of the treaty of 1818, and of the propriety and necessity of an agreement with Great Britain, as to its true meaning, is found in the letter of Mr. Evarts, Secretary of State, to Mr. Welsh, our minister to England, of September 27, 1878. Mr. Evarts says:

If the benevolent method of arbitration between nations is to commend itself as a discreet and practical disposition of international disputes, it must be by a due maintenance of the safety and integrity of the transaction, in the essential point of the award, observing the limits of the submission.

But this Government is not at liberty to treat the fisheries award as of this limited interest and operation in the relations of the two countries to the important, permanent, and difficult contention on the subject of the fisheries, which for sixty years has, at intervals, pressed itself upon the attention of the two Governments and disquieted their people. The temporary arrangement of the fisheries by the treaty of Washington is terminable, at the pleasure of either party, in less than seven years from now.

And he then proceeds to argue that if this Government acquiesced in the measure of damages assessed by the Commission, our rights might be prejudiced after the twelve years' period expired. Referring, further on in the dispatch, to the historical aspect of the matter, Mr. Evarts said:

Our diplomatic intercourse has unfolded the views of successive British and American cabinets upon the conflicting claims of mere right on the one side and the other, and at the same time evinced on both sides an amicable preference for practical and peaceful enjoyment of the fisheries, compatibly with a common interest, rather than a sacrifice of such common interest to a purpose of insisting upon extreme right at a loss on both sides of what was to each the advantage sought by the contention.

In this disposition the two countries have inclined more and more to retire from irreconcilable disputations as to the true intent covered by the somewhat careless and certainly incomplete, text of the convention of 1818, and to look at the true elements of profits and prosperity in the fisheries themselves, which alone, to the one side or the other, made the shares of their respective participation therein worthy of dispute. This sensible and friendly view of the matter in dispute was greatly assisted by the experience of the provincial populations

of a period of common enjoyment of the fisheries *without attention to any sea-line of demarkation, but with a certain distribution of industrial and economical advantages in the prosecution and the product of this common enjoyment.*

Here is almost an exact repetition of Mr. Webster's declaration of 1852 as to the unsatisfactory and uncertain character of the convention of 1818, especially to the "sea-line of demarkation."

As to the representations made by the Secretary of State to the British minister in Washington in the cases of the *Joseph Story* and *David J. Adams*, in notes dated respectively the 10th and 20th of May, 1886, the Earl of Rosebery communicated to Sir Lionel West a report of the Canadian minister of marine and fisheries, copy of which was communicated to Mr. Bayard by Mr. Harding, British *chargé d'affaires*, on August 2, 1886. From this report the following in reply to Mr. Bayard's argument for commercial privileges is here quoted:

In addition to this evidence, it must be remembered that the United States Government admitted, in the case submitted by them before the Halifax Commission in 1877, that neither the Convention of 1818 nor the Treaty of Washington conferred any right or privilege of trading on American fishermen. The British case claimed compensation for the privilege which had been given since the ratification of the latter treaty to United States fishing vessels "to transfer cargoes, to outfit vessels, by [buy] supplies, obtain ice, engage sailors, procure bait, and traffic generally in British ports and harbors.

This claim was, however, successfully resisted, and in the United States case it is maintained "that the various incidental and reciprocal advantages of the treaty, such as the privileges of traffic, purchasing bait and other supplies, are not the subject of compensation, because the Treaty of Washington confers no such rights on the inhabitants of the United States, who now enjoy them merely by sufferance, and who can at any time be deprived of them by the enforcement of existing laws or the re-enactment of former oppressive statutes. Moreover, the treaty does not provide for any possible compensation for such privileges."

Still later a reply to the representations made by Mr. Phelps, at London, was written by the Canadian minister of justice. From his reply we quote the following:

But even at this barrier the difficulty in following Mr. Phelps's argument by which he seeks to reach the interpretation he desires, does not end. After taking a view of the treaty which all authorities thus forbid, he says: "Thus regarded, it appears to me clear that the words 'for no other purpose whatever,' as employed in the treaty, mean for no other purpose inconsistent with the provisions of the treaty." Taken in that sense the words would have no meaning, for no other purpose would be consistent with the treaty, excepting those mentioned. He proceeds, "or prejudicial to the interests of the provinces or their inhabitants." If the United States authorities are the judges as to what is prejudicial to those interests, the treaty will have very little value; if the provinces are to be the judges, it is most prejudicial to their interests that United

481 States fishermen should be permitted to come into the harbors on any pretext, and it is fatal to their fishery interests that these fishermen, with whom they have to compete at such a disadvantage in the markets of the United States, should be allowed to enter for supplies and bait, even for the pursuit of the deep-sea fisheries. Before concluding his remarks on this subject, the undersigned would refer to a passage in the answer on behalf of the United States to the case of Her Majesty's Government as presented to the Halifax Fisheries Commission in 1877: "The various incidental and reciprocal advantages of the treaty, such as the privileges of traffic, purchasing bait and other supplies, are not the subject of compensation, because the treaty of Washington confers no such rights on the inhabitants of the United States, who now enjoy them merely by sufferance, and who can at any time be deprived of them by the enforcement of existing laws or the re-enforcement of former oppressive statutes."

If the proclamation of 1830 and the order in council of that year extended to the fishing vessels engaged in the fisheries adjacent to the British Provinces on the North Atlantic and repealed the treaty of 1818, in its restrictive parts, the position taken by the United States before the Halifax Commission was a serious error.

XV. A PRECEDENT WAS ESTABLISHED BY PRESIDENT JACKSON IN 1834 AS TO THE WISDOM OF FORBEARANCE IN COMMERCIAL RETALIATION, OR IN MAKING REPRISALS FOR A WILLFUL VIOLATION OF TREATY OBLIGATIONS, AS TO THE MEANING OF WHICH THERE WAS NO DISPUTE, RATHER THAN DISTURB SERIOUSLY THE INTERESTS OF OUR PEOPLE.

The results of a firm but pacific policy in demanding a compliance with treaty obligations with friendly powers are strongly exemplified in the conduct of President Jackson, in reference to the treaty of July 4, 1831, with the French Government.

By that treaty France acknowledged an indebtedness to the United States of 25,000,000 francs payable in six annual instalments, with interest, the first due February 7, 1833. The Chamber of Deputies, by a majority of eight, refused to enable the King to carry out the treaty by withholding the necessary appropriation. This was on the alleged ground that our plenipotentiary, having a superior knowledge of the facts, had obtained an undue advantage of the French negotiator in the terms of the treaty.

The reply of Mr. Livingston, that he had obtained the information on which he had acted almost exclusively on papers obtained in France, was a conclusive vindication of that good and eminent man.

This and subsequent refusals of the deputies, together with irritating expressions of the French Government, caused the withdrawal of diplomatic intercourse with that Government. And demands of the French deputies that President Jackson should withdraw certain forcible comments made by him in his messages to Congress on this subject gave him just cause for indignation.

In view, however, of the serious results that always follow reprisals, retorsions, and retaliations, even under the heat of a just indignation for a flagrant wrong, President Jackson thus advised Congress, in his sixth annual message (1834), as to the policy of such action:

Our institutions are essentially pacific. Peace and friendly intercourse with all nations are as much the desire of our Government as they are the interest of our people. But these objects are not to be permanently secured by surrendering the rights of our citizens, or permitting solemn treaties for their indemnity in cases of flagrant wrong to be abrogated or set aside.

It is undoubtedly in the power of Congress seriously to affect the agricultural and manufacturing interests of France by the passage of laws relating to her trade with the United States. Her products, manufactures, and tonnage may be subjected to heavy duties in our ports, or all commercial intercourse with her may be suspended. But there are powerful and, to my mind, conclusive objections to this mode of proceeding. We can not embarrass or cut off the trade of France without at the same time, in some degree, embarrassing or cutting off our own trade. The injury of such a warfare must fall, though unequally, upon our own citizens, and could not but impair the means of the Government, and weaken that united sentiment in support of the rights and honor of the nation which must now pervade every bosom.

Nor is it impossible that such a course of legislation would introduce once more into our national councils these disturbing questions in relation to the tariff of duties which have been so recently put to rest; besides, by every measure adopted by the Government of the United States, with the view of

injuring France, the clear perception of right which will induce our own people, and the rulers and people of all other nations, even of France herself, to pronounce our quarrel just, will be obscured, and the support rendered to us, in a final resort to more decisive measures, will be more limited and equivocal.

There is but one point in the controversy, and upon that the whole civilized world must pronounce France to be in the wrong. We insist that she shall pay us a sum of money which she has acknowledged to be due, and of the justice of this demand there can be but one opinion among mankind. True policy would seem to dictate that the question at issue should be kept thus disencumbered, and that not the slightest pretense should be given to France to persist in her refusal to make payment by any act on our part affecting the interests of her people. The question should be left as it is now, in such an attitude that when France fulfills her treaty stipulations all controversy will be at an end.

XVI.—BY THE DELIMITATIONS FIXED IN THIS TREATY WE YIELD NOTHING THAT IS OF ANY VALUE TO OUR FISHERMEN. WHAT WE YIELD IS OF VALUE TO THE BRITISH PROVINCES AS A MEANS OF CONDUCTING THEIR LOCAL GOVERNMENTS. THE TREATY IS A JUST AND FAIR SETTLEMENT.

The treaty now before the Senate wisely and reasonably provides for the settlement of all disputed questions that have been under discussion by the two Governments, and adds greatly to the privileges of our fishermen in the British-American ports.

In a published letter of the chief counsel of the "outfitters" and owners of fishing vessels—Mr. Woodbury—he says, that "the right to fish on the coast of Nova Scotia, within the 3-mile limit, our fishermen consider of no value whatever."

The report of the Senate Committee on Foreign Relations of January 19, 1887, on the value of inshore fishing rights, and the right to take or buy bait, to which reference has been made, shows conclusively that they are of no value to our fishermen. In their report, the committee say:

From the investigations made by the committee during the last summer and fall, and as the result of the great mass of testimony taken by it and herewith returned, the committee believe it to be clear, beyond all dispute, that the right to fish within 3 miles of the Dominion shores is of no practical advantage whatever to American fishermen. The cod and halibut fishing has been for many years almost entirely carried on at long distances from the shores, in the deep waters, on banks, etc.; and it is believed that were there absolute liberty for Americans to fish, without restriction or regulation of any kind, within 3 miles of the Dominion shores, no such fisherman would ever think of going there for the purpose of catching cod or halibut.

As regards the obtaining of bait for this class of fishing, the testimony taken by the committee in its inquiries clearly demonstrates that *there is no necessity whatever for American fishermen to resort to Canadian waters for that purpose.* Clam bait is found in immense quantities in our own waters, and there have been instances, so frequent and continuous as to amount to a habit, of the Canadians themselves resorting to American waters or ports for the purpose of obtaining it. *The squid bait is found on the very banks where the fishing goes on.* So that the instances would be extremely rare when any American fishing vessel would wish to resort to a Dominion port for the purpose of buying bait for this kind of fishing.

It was also proved before the committee that, with the rarest exceptions, it would be absolutely injurious to the pecuniary interests of all concerned for American vessels to resort to Dominion ports or waters, except in need or distress, for the time taken in such departures from the cod and halibut grounds, or from direct sailing to and from them, is so great that, with or without the difference of port expenses, time and money are both lost in such visits.

In respect of the mackerel fishery the committee finds, as will be seen from the evidence referred to, *that its course and methods have of late years entirely changed.* While it used to be carried on by vessels fishing with hook and line, *and sometimes near the shores,* it is now almost entirely carried on by the use of immense seines, called purse-seines, of great length and descending many fathoms into the water. This gear is very expensive, and a fishing vessel does not usually carry more than one or two. The danger of fishing near the shore with such seines is so great, on account of striking rocks and reefs, that it is regarded as extremely hazardous ever to undertake it. *Besides this, the large schools of mackerel, to the taking of which this great apparatus is best adapted, are almost always found more than 3 miles from land, either in great bays and gulfs or entirely out at sea.*

There will be found accompanying this report (see Appendix) statements showing the total catch of mackerel during certain years and the parts of the seas where they have been taken; and it will also be seen from the evidence *that in general the mackerel fisheries by Americans in the Gulf of St. Lawrence and in the Bay of Chaleur have not been remunerative.*

In view of these facts, well known to the great body of the citizens of the United States engaged in fisheries and embracing every variety of interest connected therewith, from the wholesale dealer, vessel owner, and outfitter, to that portion of the crew who receive the smallest share of the venture, it must be considered as conclusively established that *there would be no material value whatever in the grant by the British Government to American fishermen of absolutely free fishing; and in this conclusion it will be seen, by a reference to the testimony, that all these interests fully concur.*

When we consider that the inshore fisheries are of no value and that the right to take bait, or to buy it, is worse than useless to our people, the alleged surrender of fishing territory to the British in this treaty is of far less consequence to us than the surrender we made in 1854, to get these privileges, by purchasing with reciprocity the repose of the British contentions, restrictions, and exclusions, at a cost to our revenues of nearly \$10,000,000; and in 1871, by a purchase with \$5,500,000 in money, and a great sum in the loss of revenues on fish imported from Canada.

We have paid for everything we have got from Great Britain, since 1783, in connection with the fisheries. That concession was the last thing we got under our *strict demand for the right.* It is the last thing we will ever get, without compensation, until we go to war to regain our attitude of 1783.

The extract from the report of the Senate committee, above copied, shows that in such a war we would be fighting over a subject
483 that is utterly barren of any actual value to the American people—a war in which the principles involved would have no

relation to rights secured by international laws, but would relate only to the meaning of words in a treaty, that were put there by the mutual consent of two enlightened Governments.

This treaty closes the discussion on the subject of delimitation of fishing boundaries, a matter that was, in some sort, provided for in the treaty of 1854.

It presents a fair and equitable settlement of questions that have been in dispute for seventy years.

It gives our fishermen, as an equivalent for the concessions we make, largely increased privileges, as navigators, beyond the narrow and inhospitable provisions of the treaty of 1818.

And, for the first time that such a thing was ever attempted, this treaty proposes to open the door to wide commercial privileges for our fishermen, based on concessions that concern them alone.

The *modus vivendi* provided in the protocol enables our fishermen, during two fishing seasons, to compare the value of the very broad commercial privileges therein accorded with the price of annual license at \$1.50 per ton on their ships. A fisherman, outfitting with all he needs to sustain his business in Canadian ports, and having the privilege of sending his fares to our market under bond, over railroads and through such ports as would be easily reached, would be able to make so many more voyages that the annual license of \$1.50 a ton on his ship would be reduced to 30 cents or 40 cents per ton on the voyage. If the business will not bear such a tax in compensation for such privileges, it is scarcely worth a war, or a serious disturbance of good will with our neighbors, to secure these commercial advantages to our fishermen.

We venture to repeat the recommendation that the Senate will await the developments that even one fishing season will make under this protocol before taking final action on the treaty.

XVII. THERE IS NO FAULT IN THE MANNER OF NEGOTIATING THIS TREATY, AND THE PRESIDENT HAS NOT IN ANY WAY EXCEEDED HIS CONSTITUTIONAL POWERS, OR WITHHELD ANY COURTESY DUE TO THE SENATE IN RESPECT OF THE AGENTS SELECTED BY HIM TO CONDUCT THE NEGOTIATION, OR IN THE TIME OR PLACE OF NEGOTIATING OR CONCLUDING THE TREATY.

On the other question, as to the form in which this negotiation has been conducted and the authority of the two plenipotentiaries, Mr. Putnam and Mr. Angell, to act, without a confirmation by the Senate, we rely upon the precedents cited in the annexed brief of cases that seem to conclude any question on this point.

The table hereto appended, marked C, will furnish on easy reference to all the appointments of diplomatic agents to negotiate and conclude conventions, agreements, and treaties with foreign powers since 1792. The whole number of persons appointed or recognized by the President, without the concurrence or advice of the Senate, or the express authority of Congress, as agents to conduct negotiations and conclude treaties is four hundred and thirty-eight. Three have been appointed by the Secretary of State and thirty-two have been appointed by the President with the advice and consent of the Senate.

It will be seen that an interval of fifty-three years, between 1827 and 1880, occurred during which the President did not ask the consent of the Senate to any such appointment.

The following important appointments and many others were made when the Senate was in session:

March 2, 1793.—David Humphries. By Washington. Commissioned plenipotentiary to treat with Algiers. Congress adjourned on that day.

January 26, 1832.—Edmund Roberts. By Jackson. Commissioner to treat with Cochin China and Siam. Congress in session.

May 3, 1838.—Nathaniel Niles. By Van Buren. Special agent to negotiate treaty with Sardinia. Congress in session.

March 28, 1846.—A. Dudley Mann. By Polk. Special agent to treat with sundry States of Germany. Congress in session.

The constitutional power of the President to select the agents through whom he will conduct such business, is not affected by the fact that the Senate is or is not in session at the time of such appointment, or while the negotiation is being conducted; or the fact that he may prefer to withhold, even from the Senate, or from other countries, the fact that he is treating with a particular power, or on a special subject.

The secret-service fund that Congress votes to the Department of State annually is that from which such agents are usually paid. That is the most important reasons for such appropriations.

The following is a summary of Appendix C:

Persons appointed by the President and confirmed by the Senate:

1792. William Carmichael, William Shott, to treat with Spain.

1794. John Jay, to treat with Great Britain.

1794. Thomas Pinckney, to treat with Spain.

1796. Rufus King, to treat with Great Britain.

1797. John Q. Adams, to treat with Prussia.

1797. John Q. Adams, to treat with Sweden.

1797. C. C. Pinckney, John Marshall, Elbridge Gerry, to treat with France.

484 1798. John Q. Adams, to treat with Sweden.

1799. Rufus King, to treat with Russia.

1799. Oliver Ellsworth, Patrick Henry, and William Van Murray, to treat with France.

1799. W. R. Davis, *vice* Henry, as above.

1803. James Monroe and R. R. Livingston, to treat for Louisiana.

1803. Rufus King, to treat with Great Britain, northeast boundary.

1806. James Armstrong and James Bowdoin, to treat with Spain.

1814. J. Q. Adams, J. A. Bayard, Henry Clay, and Jonathan Russell, to treat with Great Britain.

1814. Albert Gallatin, to treat with Great Britain.

1826. R. C. Anderson and John Sargeant, to treat with the American nations.

1827. Joel R. Poinsett, *vice* Anderson, above.

1880. James B. Angell, John T. Swift, and W. H. Prescott, to treat with China.

Total number, 32.

Persons appointed by the Secretary of State:

1825. Ghristopher Hughes, to treat with Denmark.

1826. John James Appleton, to treat with Naples.

1886. George H. Bates, to treat with Tonga.

Total number, 3.

Persons appointed by the President:

Total number, 438.

JOHN T. MORGAN,
ELI SAULSBURY,
JOSEPH E. BROWN,
H. B. PAYNE.

No. 242.—1892-3: *Extracts from proceedings of Behring Sea Arbitration between the United Kingdom and the United States relative to the taking of Seals by British Fishermen.*

* * * * *

Mr. H. E. M. Gram, the arbitrator designated by Sweden and Norway, read the following statement:

The Appendix Vol. 1 to the United States Case gives the text of the law and regulations relating to the protection of whales on the coast of Finumarken. It was my intention later on to explain to my Colleagues these laws and regulations in supplying some information about the natural conditions of Norway and Sweden which have necessitated the establishment of special rules concerning the territorial waters, and to state at the same time my opinion as to whether those rules and their subject-matter may be considered as having any bearing upon the present case. As, however, in the latest sittings reference has repeatedly been made to the Norwegian Legislation concerning this matter, I think it might be of some use at the present juncture to give a very brief relation of the leading feature of those rules.

The peculiarity of the Norwegian Law quoted by the Counsel for the United States consists in its providing for a close season for the whaling. As to its stipulations about inner and territorial waters, such stipulations are simply applications to a special case of the general principles laid down in the Norwegian Legislation concerning the gulfs and the waters washing the coasts. A glance on the map will be sufficient to show the great number of gulfs or fiords and their importance for the inhabitants of Norway. Some of these fiords have a considerable development, stretching themselves far into the country and being at their mouth very wide. Nevertheless, they have been from time immemorial considered as inner waters, and this principle has always been maintained, even as against foreign subjects.

More than twenty years ago a foreign government once complained that a vessel of their nationality had been prevented from fishing in one of the largest fiords of Norway, in the northern part of the country. The fishing carried on in that neighbourhood during the first four months of every year is of extraordinary importance to the country, some 30,000 people gathering there from south and north, in order to earn their living. A government inspection controls the

fishing going on in the waters of the fiord, sheltered by a range of islands against the violence of the sea. The appearance in these waters of a foreign vessel pretending to take its share of the fishing was an unheard of occurrence, and in the ensuing diplomatic correspondence the exclusive right of Norwegian subjects to this industry was energetically insisted upon as founded in immemorial practice.

Besides, Norway and Sweden have never recognized the three mile limit as the confines of their territorial waters. They have neither concluded nor acceded to any treaty consecrating that rule.

By their municipal laws the limit has generally been fixed at
485 one geographical mile, or one fifteenth part of a degree of latitude, or four marine miles, no narrower limits having ever been adopted. In fact, in regard to this question of the fishing rights, so important to both of the United Kingdoms, the said limits have in many instances been found to be even too narrow. As to this question and others therewith connected, I beg to refer to the communications presented by the Norwegian and Swedish members in the sittings of the Institut de Droit International in 1891 and 1892. I wish also to refer, concerning the subject which I have now briefly treated, to the proceedings of the conference of Hague, in 1882 (*Martens. Nouveau recueil général, II série, Vol. IX*), containing the reasons why Sweden and Norway have not adhered to the treaty of Hague.

* * * * *

[Extract from the Appendix to the United States' case referred to above by Mr. Gram.]

LAW OF NORWAY OF JUNE 19, 1880, RELATING TO THE PROTECTION OF WHALES.

[Translation.]

SEC. 1. It shall be prohibited on that part of the sea on the coast of Finmarken which the King will define to kill or chase whales during the period extending from the 1st of January till the end of May; but whales which have been wounded outside of the limits of protection may be killed or be utilized within these limits.

SEC. 2. Any one violating the provisions of Section 1 or becoming party to such violation will be punished by a fine of from 4,000 to 8,000 kroner for each whale which is chased or killed. Of a ship's crew, however, none but the captain shall be punished, if the law has been violated either by his order or with his knowledge and if he has not done everything in his power to prevent such violation.

The provisions of the last clause of section 40 of chapter 2 of the Criminal Law of June 3rd, 1874, shall not apply.^a

SEC. 3. Cases arising from violations of the present law are treated before the police courts. For fines to which the captain or the owner of a vessel has become liable the vessel is held as a pledge.

SEC. 4. The present law shall not prevent any one from taking possession of a whale which has been driven ashore or which is found floating in the sea in a wounded condition.

^a See Law of May 18, 1876, Sec. 2, relating to the protection of seals in the Polar Sea.

SEC. 5. This law shall go into operation on the 1st of January of next year and shall remain in force for five years.

PROCLAMATION CONTAINING THE REGULATIONS RELATIVE TO THE PROTECTION OF WHALES ON THE COAST OF FINMARKEN, JANUARY 5, 1881.

Referring to the law of June 19th, 1880, relative to the protection of whales on the coast of Finmarken, it is hereby ordered :

In the sea coast of Finmarken, at a distance not exceeding one geographical mile from the coast, counted from the outermost islands or rocks which are never covered by the sea, it shall, until further notice, be prohibited to kill or chase whales during the period from the 1st of January till the end of May.

As regards the Varangerfjord, the limit for the protected tract and towards the sea shall be a straight line drawn from Kibergnos to the boundary, the Jakobselv, but it shall also be prohibited outside of this line, during the season of protection mentioned above, to kill or chase whales at a distance of less than one geographical mile from Kibbergnos.^a

[Extract from the Case of the United States.]

* * * * *

Game and Fishery laws are usually limited in their effects to the land and territorial waters of the country which enacts them. But instances are many wherein nations have not hesitated to extend the effects of their laws to the waters contiguous to their shores, beyond the ordinary three-mile limit. Citations have already been made of the laws for the protection of seals of quite a number of nations, which, so far as their own subjects are concerned, apply to large areas of the high seas, and it has been shown that Great Britain and Russia extend their exclusive jurisdiction for the protection of seals, frequenting waters contiguous to their shores, far beyond the marine league. But further instances may be cited where nations have exercised extraterritorial jurisdiction on the ocean for the protection of other species of marine life besides the seal. In fact, it may be laid down as a principle, established by international usage, that any nation which has a peculiar interest in the continued existence of any valuable marine product, located in the high seas adjacent to its coasts or territorial waters, may adopt such measures as are essential to the preservation of the species, without limitation as to the distance from land at which such necessary measures may be enforced.

This principle is well illustrated by two recent Statutes enacted by the Parliament of Great Britain. By the British "Sea Fisheries Act" of 1868 provision is made for the regulation of oyster dredging on any oyster bed within twenty miles of a straight line drawn from the Eastern end of Lamby Island to Carnsore Point on the Eastern coast of Ireland. The law states in terms that it is to be enforced "outside of the exclusive Fishery limits of the British isles," and that every order issued in pursuance of it shall be binding not only on British sea-fishing boats, but also "on any other sea-fishing boats in that behalf specified in the order and on the crews

^a See Decrees of February 22, 1812, and October 16, 1869.

of such boats." In other words, jurisdiction may be asserted over foreigners as well as British subjects at a distance of twenty miles from land.

The Scotch herring Fishery Act of 1889 furnishes another illustration in point. That Act provides that certain destructive methods of fishing may be prohibited by the Fishery Board in any part of an area of the open sea, two thousand seven hundred square miles in extent, lying off the North east coast of Scotland, within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire." The Act is not confined in its operations to British subjects, but provides that "any person" offending against its provisions shall be liable to a fine and the forfeiture of his fishing apparatus.

The legislation of several of the colonies of Great Britain also abounds in instances of the exercise of extraterritorial jurisdiction upon the high seas for the protection of different species of marine life. The pearl fisheries of Ceylon extend into the open sea for a distance of twenty miles, and they have been the subject of a series of ordinances and regulations from 1811 down to the present time, which for certain purposes define the limit of marine jurisdiction to be twelve miles, and for other purposes a distance which varies from six to twenty miles.

* * * * *

[Extract from the Argument of the United States.]

* * * * *

The right of self-defence by a nation upon the sea, and the right of municipal jurisdiction over a limited part of the sea adjacent to the coast, are not to be confounded, for the two are totally distinct. The littoral jurisdiction, indeed, is only a branch of the general right of self-defence, accorded by usage and common consent: first, because it is always necessary for self-protection, and next, because it is usually sufficient for it. Upon no other ground was it ever attempted to be sustained. That jurisdiction must be limited by an ascertained or ascertainable line, is its necessary condition. That the right of self-defence is subject to no territorial line, is equally plain. All rights of self-defence are the result of necessity. They are co-extensive with the necessity that gives rise to them, and can be restricted by no other boundary. As remarked by Chief Justice Marshall, "all that is necessary to this object is lawful, all that transcends it is unlawful."

Precisely what is the limit of jurisdiction upon the littoral sea, and precisely what are the nature and extent of the jurisdiction that can be asserted within it, whether it is absolute or qualified, territorial or extraterritorial, are questions that have been a subject of grave difference of opinion among jurists. Nor have they ever been entirely settled. They will be found to be discussed with a fullness of learning, a depth of research, and a masterly power of reasoning, to which nothing can be added, in the opinions of the English judges in the important and leading case of the *Queen v. Kehn* (2 Law Rep. Exch. Div., 1876—77, pp. 63 to 239). These learned and eminent judges were not fortunate enough to agree upon all the questions involved, and every view that can be taken of them, and every consideration that is pertinent, are exhaustively presented in their opinions.

Upon these vexed questions it is not at all necessary to enter in the present case, for they have little to do with it. Whether the conclusions of one or the other of these conflicting opinions are to be accepted, is immaterial here. All authorities agree that the sole reason upon which a certain right of jurisdiction upon the sea, and within a limit that is variously stated, has been conceded to Maritime nations, is found in the necessities of self-defence. This part of the Dominion over the sea, whether it be greater or less, has never been surrendered. It is a remnant of the former more extended dominion, retained for the same reason for which that was asserted. Lord Chief Justice Cockburn, in his opinion in the case just cited, reviews the history of this subject, quoting the language of every previous writer of repute, and referring to every judicial decision respecting it which then existed. He points out very clearly the different views that have prevailed and which then prevailed as to the nature of the jurisdiction, and as to the distance over which it could be extended. This limit has been variously asserted by writers of distinction and authority, at two days' sail, one hundred miles, sixty miles, the horizon line, as far as can be seen from the shore, as far as bottom can be found with the dead line, the range of a cannon shot, two leagues, one league, or so far as the Government might think necessary.

On the other point, the character of the jurisdiction, it may be assumed that by the controlling opinion of the present time, and by the usage of nations, it is not regarded as so far absolute that a nation may exclude altogether from within the range of cannon shot the ships of another country, innocently navigating, and violating no reasonable regulation of the municipal law. But the power which may be exerted within that limit is only coextensive with the just requirements of the self-protection for which it exists, although undoubtedly the nation exercising the jurisdiction must be allowed, so long as it acts in good faith, to be its own judge as to the regulations proper to be prescribed, and the manner of their enforcement.

This somewhat indefinite area of a greater or less jurisdiction over the marginal sea, which has thus come to be recognized and conceded, though accorded for the purposes of national self-protection, is by no means its boundary. It illustrates the right of which it is an example, but does not exhaust it. It is but one application of the principle out of many. The necessity which gave rise to it justifies

likewise the larger power, and further means of defence, which may from time to time be required. No nation, in whatever Statute or Treaty it may have assented to the three-mile or cannon-shot limit of municipal jurisdiction, has ever agreed to surrender its right of self defence outside of that boundary, or to substitute for that right the contracted and qualified power which is only one of the results of it, and which must often prove inadequate or inapplicable. On the contrary, as will be seen hereafter, many nations have been compelled to assert, and have successfully asserted, much wider and larger powers in the defence of their manifold interests.

It is under the operation of the same principle on which jurisdiction is awarded to nations over the sea within the 3-mile or cannon-shot limit, that a similar jurisdiction is allowed to be exercised not only over navigable rivers, bays, and estuaries, which may be fairly

regarded as lying within territorial boundaries, but over those larger portions of the ocean comprised within lines drawn between distant promontories or headlands, and often extending much more than three miles from the nearest coast. Such waters were formerly known in English law as "the King's Chambers."

Chancellor Kent remarks on this subject (1 Com., pp. 30, 31) :

Considering the great extent of the line of the American coasts, we have a right to claim for fiscal and defensive regulations a liberal extension of maritime jurisdiction; and it would not be unreasonable as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that Point to the Capes of the Delaware, and from the South Cape of Florida to the Mississippi.

The principle upon which this exercise of maritime jurisdiction reposes is only that of self-defence. As Chancellor Kent further observes (1 Com., p. 26) :

Navigable rivers which flow through a territory, and the seacoast adjoining it * * * belong to the sovereign of the adjoining territory, as being necessary to the safety of the nation and to the undisturbed use of the neighbouring shores.

That the right of self-defence is not limited by any physical boundary, but may be exerted wherever and whenever necessity requires it, upon the high sea or even upon foreign territory, is not only the inevitable result of the application of just principles, but is established by the highest authorities in the law of nations.

Vattel says upon this subject (p. 128, sec. 289) :

It is not easy to determine to what distance the nation may extend its rights over the sea by which it is surrounded. * * * Each state may on this head make what regulation it pleases so far as respects the transactions of the citizens with each other, or their concerns with the Sovereign; but, between nation and nation, all that can reasonably be said is that in general the dominion of the state over the neighbouring seas extends as far as her safety renders it necessary, and her power is able to assert it.

Chancellor Kent observes (1 Com., p. 29) :

It is difficult to draw any precise or determined conclusion amidst the variety of opinions as to the distance to which a state may lawfully extend its exclusive dominion over the sea adjoining its territories and beyond those portions of the sea which are embraced by harbors, gulfs, bays, and estuaries, and over which its jurisdiction unquestionably extends. All that can reasonably be asserted is, that the dominion of the Sovereign of the shore over the contiguous sea extends as far as is requisite for his safety and for some lawful end.

And states may exercise a more qualified jurisdiction over the seas near their coast for more than the three (or five) mile limit for fiscal and defensive purposes. Both Great Britain and the United States have prohibited the transshipment within four leagues of their coasts of foreign goods without payment of duties. (Kent, Com. 1, p. 31.)

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[Extract from the oral argument of Mr. James C. Carter, one of the United States' Counsel.]

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* * * But there is nothing in this Ukase of 1821 importing that the intention of Russia was to make any such pretension as that in the way of authority over the sea. She said this:

SEC. 1.—The pursuits of commerce, whaling, and fishery, and of all other industry on all islands, ports, and gulfs, including the whole of the northwest

coast of America, beginning from Bering's Straits to the 51° of northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Bering's Straits to the South Cape of the Island of Urup, viz., to the 45° 50' northern latitude, is exclusively granted to Russian subjects.

That was a grant of colonial trade, and of colonial trade alone; that is all. And that is what Russia, according to the doctrine of that age, had a perfect right to do. Nothing was more clearly admitted at that time, than that every nation had a right to arrogate to itself the exclusive benefits of trade with its colonies, and to prohibit every other nation from engaging in such trade, and to
488 take such measures as might be necessary to enforce the exclusion of other nations. What did Russia next do? Did she assert anything of the nature of Sovereign dominion over the sea? Nothing of the kind.

SEC. 2.—It is therefore prohibited to all foreign vessels not only to land on the coasts and islands belonging to Russia as stated above, but also to approach them within less than a hundred Italian miles. The transgressor's vessel is subject to confiscation along with the whole cargo.

Mr. Justice HARLAN. That is not an absolute doctrine now.

Mr. CARTER. It is an admitted doctrine now. Every nation has a right to claim for itself the benefits of its colonial trade. Now all that Russia undertook to do was to protect an exclusive grant of its colonial trade; and it adopted the measure—a familiar one in that age—of interdicting the approach of a foreign vessel within a certain line of the coast. * * *

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[Extract from the reasons for his opinion given by the Hon. Senator Morgan, one of the Arbitrators named by the United States.]

* * * * *

The right of dominion in a sea like Bering Sea or the sea of Okhotsk does not depend on its being separated from water communication with the ocean. If the configuration of the land surrounding it is such as to make it necessary to the peculiar commerce of the country within which it is embayed, or to the defence of such country, or to the proper administration of its powers of government over its own people, it is a right *ex debito justitiæ* that there should be dominion over such sea.

This is the right that is now the foundation of the exclusive right of several nations to dominion over seas that are not inclosed by the land on their shores, as stated by Sir Robert Phillimore, page 225, as follows:

The exclusive right of the British Crown to the Bristol Channel, to the Channel between Ireland and Great Britain (Mare Hibernicum, Canal de St. George), and to the Channel between Scotland and Ireland is uncontested. Pretty much on the same category are the three straits forming the entrance to the Baltic, the Great and Little Belt, and the Sound, which belong to the Crown of Denmark; the straits of Messina (il faro di Messina, fretum Siculum), once belonging to the Kingdom of the Sicilies; the straits leading to the Black Sea, the Dardanelles and Hellespont; the Thracian Bosphorus, belonging to the Turkish Empire. The narrow sea which flow between separate portions of the same kingdom, like the Danish and Turkish straits, as to other seas common to all nations, like the straits of Messina and, perhaps the St. George's Channel, the doctrine of *innocent use* is, according to Vattel, strictly applicable.

In the case of seas here mentioned other nations have the right to the innocent use of them, but it must rest with the nation claiming them to determine whether the use that is made of them by another nation is innocent. This is all that the United States claim of "dominion" over Behring Sea in respect to the protection and preservation of the fur-seals resorting to those waters and the industry in the pelts and oil so long established on their islands, which have no value for any other industrial purpose.

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No. 243.—1903: *Alaska Boundary Arbitration. Extracts from the Argument of the United States.*

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DISTINCTION BETWEEN THE OUTER AND INNER COAST LINE.

An eminent English publicist has said that "certain physical peculiarities of coasts in various parts of the world, where land impinges on the sea in an unusual manner, require to be noticed as affecting the territorial boundary. Off the coast of Florida, among the Bahamas, along the shores of Cuba, and in the Pacific, are to be found groups of numerous islands and islets rising out of vast banks, which are covered with very shoal water, and either form a line more or less parallel with land or compose systems of their own, in both cases enclosing considerable sheets of water, which are sometimes also shoal and sometimes relatively deep. The entrance to these interior bays or lagoons may be wide in breadth of surface water, but it is narrow in navigable water. To take a specific case, on the south coast of Cuba the Archipiélago de los Canarios stretches from sixty to eighty miles from the mainland to La Isla de Pinos, its length from the Jardines bank to Cape Frances is over a hundred miles. * * *

In cases of this sort the question whether the interior waters are, or are not, lakes enclosed within the territory, must always depend upon the depth upon the banks, and the width of the entrances. Each must be judged upon its own merits. But in the instance cited, there can be little doubt that the whole Archipiélago de los Canarios is a mere salt-water lake, and that the boundary of the land of Cuba runs along the exterior edge of the banks.^a

489 In the famous case of the *Anna* (56 Rob. Adm. 373) Lord Stowell held that the extent of territorial waters must be estimated from the outer edge of the land represented in that case by certain low mud islands formed from the alluvial wash and debris of the Mississippi river, more than three miles from the Belize, the extreme point of the main land. "It is argued," said Lord Stowell, "that the line of territory is to be taken only from the Belize, which is a fort raised on made land by the former Spanish possessors. I am of a different opinion. I think that the protection of territory is to be reckoned from these islands, and that they are the natural ap-

^a Hall, "International Law," pp. 129, 130.

pendages of the coast on which they border, and from which, indeed, they are formed."

It thus appears that from *the outer coast line* of a maritime state, as defined in physical geography, is invariably measured under international law, the limit of that zone of territorial water generally known as the marine league. The boundary of Alaska,—that is, the exterior boundary from which the marine league is measured,—runs along the outer edge of the Alaskan or Alexander Archipelago, embracing a group composed of hundreds of islands. When "measured in a straight line from headland to headland" at their entrances, Chatham Strait, Cross Sound, Sumner Strait and Clarence Strait, by which this exterior coast line is pierced, measure less than ten miles. That fact, according to the authorities quoted in the British Counter Case, pp. 24–28, place them within the category of territorial waters. All of the interior waters touching upon the *lisière*, such as Behm Canal, Taku Inlet and Lynn Canal are, in the language of Hall, "lakes enclosed within the territory," and as such are territorial waters, regardless of their width at their entrances when measured from headland to headland.

DISTINCTION BETWEEN THE COAST LINE OF PHYSICAL GEOGRAPHY FOR THE PURPOSES OF BOUNDARY, AND THE POLITICAL COAST LINE, FOR THE PURPOSES OF JURISDICTION.

Physical geography simply reproduces the actual coast lines of maritime states, as they are defined by nature at the point of contact of the sea with the land. The following description of the coast of Maine, from an eminent geographical authority, may be taken as an apt illustration:

On the Atlantic coast Maine presents an uninterrupted succession of peninsulas, islands, and bays; and all these bays are the mouths of rivers—outlets of valleys having their origin far in the interior. Nothing similar is seen on all the territory of the Union. One must come to Norway or go to the extreme point of South America to find so long a part of the coast—400 kilometers in a straight line from the southwest to the northeast—so deeply cut up that we measure on it more than 4,000 kilometers of contact with the deep sea. All these bays of Maine are also fiords, but spacious, and which in spite of their equally rocky banks, of comparatively little elevation, receive the morning and afternoon sun, as well as that of noon, and open to mariners more ports, more anchorages and safe shelters than all the other coasts upon the three seas of the Union.^a

It thus appears that the actual coast line of Maine, as known to physical geography, following as it must the sinuosities defined by the contact of the sea with the land, is about 4,000 kilometers, while the political coast line superimposed upon it by operation of international law, is vastly shorter by reason of the fact that the artificial and imaginary line cuts across the heads of bays and inlets. The natural coast line, as known to physical geography, exists primarily for the purposes of boundary. The artificial coast line, as known to international law, exists only for the purposes of jurisdiction. That obvious distinction is well illustrated by Rivier in his *Principes du Droit des Gens*. Speaking of "*La mer littorale*," he says: "The name territorial sea is applied to all the seas or portions of the sea

^a See Maine, in *Nouveau Dictionnaire de Géographie universelle*, Saint Martin, vol. iii, p. 559.

which belong to the territory: to the littoral sea, to the interior sea, in the various acceptations of this word, to gulfs and straits. It is the general and juridical term (*le terme général et juridique*), while the others are rather physical or geographical (*physiques ou géographiques*). The term littoral sea has the advantage of a special meaning. They say also jurisdictional sea, after one of the elements of the juridical situation of that part of the sea.

The principle that the littoral sea forms a part of the territory is justified by the necessities of the preservation and security of the state, from the point of view, military, sanitary, fiscal, as well as the point of view of the interests of industry, specially of the right of fishing. The result is, for the coast and for *terra firma*, the littoral sea has the character of an accessory (*le caractère d'un accessoire*), and it cannot be taken independently of the coast (*indépendamment de la côte*). Speaking of "*Les Frontières*" he says: "I have spoken already of the frontier of the sea, and of that of the land. There exists also special limits for the wants of administration because the geographical and political frontier (*la frontière politique et géographique*) do not always answer in a sufficient manner."^a The distinction thus clearly recognized between a geographical and political frontier is too obvious to require further illustration.

If the geographical frontier happens to be on the sea or ocean, it is known as the coast, the point of contact between the sea water and the land, upon which the political frontier is superimposed as an accessory that can not be taken independently of the coast (*et qu'on ne saurait l'acquérir indépendamment de la côte*). That dependent and accessorial frontier created by international law solely for the purposes of jurisdiction, is annexed *only to the outer coast* of a maritime state which it shortens by cutting across the heads of bays and inlets, thus following what is called the general trend of the coast.

490 THE POLITICAL COAST LINE NOT INVOLVED IN THIS CASE.

The artificial coast line created by international law for the purposes of jurisdiction only, which, following the general trend of the coast, cuts across the heads of bays and inlets is not involved in this case in any form, for the simple reason that *the outer coast*, to which it is exclusively an accessory, is not involved.

The entire British Case rests upon the admission that the eastern boundary of the *lisière* is to be determined with reference to the inner coast only, and on the contention that a political coast line can be predicated of this coast. In the language of the British Case (p. 24), "It seems clear that, in the whole course of these negotiations, Count Nesselrode used the term 'côte' as meaning the general line of the continent." The eastern line of the *lisière* as now contended for by Great Britain is drawn in reference to "the general line of the continent," that is, of the inner coast. The heart of that contention is that such inner coast is not the entire natural coast of physical geography, but that it is to be ignored at places and that for it shall be substituted an artificial coast line which under the international law is a mere accessory to a physical coast. Such an artificial coast line relates to the outer coast only, and can have no

^a Vol. 1, pp. 145, 146, 170.

reference whatever to the inner coast line in question. The only coast with which we are dealing is the inner coast, the physical coast, the coast defined by the contact of the sea with the land.

The result of the British claim that the line shall be drawn from headland to headland is that a principle which became established in international law for the purpose of giving additional rights as incident to the ownership is perverted to the purpose of determining what shall be considered coast. It could only apply where there was admitted sovereignty over a coast line, and then only for the purpose of giving, by enlarging the jurisdiction beyond the actual coast, accessorial rights. It was never adopted and has never before been applied for the purpose of determining the sovereignty over coasts. What was adopted as a shield for the protection of the coast is turned into an instrument for dissevering it.

The British Counter Case (p. 28) quotes from Mr. Joshua Bates who in 1853 says: "This doctrine of the headlands is new." And yet it is sought to make it appear that the negotiators for the Treaty of 1825 must have intended to apply it, for the purpose of determining what was "coast" as that word was used by them.

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Dr. Hannis Taylor, one of the United States Counsel in his oral argument said:—

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* * * The simple proposition that I have been trying to emphasize is that this political coast line is outside that archipelago, and when a political coast line has been once established by a country as against foreign nations it is impossible for any political coast line to be established behind it.

I say that that is a self-evident proposition, because according to the statement of Hall all these interior waters are nothing but salt water lakes. And it is no extreme statement, because if my proposition is true, this statement is true; it is just as irrational to talk about a political coast line in Loch Lomond as it is to talk about a political coast line back of that archipelago. If I am right one position is just as untenable as the other. So that I say if the British Counsel shall undertake to contend that under any circumstances or for any purpose an interior coast line can exist here they have to maintain their proposition on one of two bases: they have to support it by reason, or they have to support it by authority. It has to have something to rest upon.

I say it is absolutely repugnant to reason, because the whole "raison d'être" of the political line is a barrier or bulwark set up by a nation so that it may have territory for three miles from its coast just as if it were land for the purpose of protecting itself against foreign states. That is the reason of its existence, and in the great case of the Franconia, where the most exhaustive investigation ever made in the history of international law was made, as to the existence of that line and its "raison d'être," nothing could be more clearly illustrated, if it requires illustration, than that the purpose for which it exists is the purpose of a bulwark against foreign states. The authority of Rivier, if authority is needed, is a demonstration that the political coast line is simply a legal creation; it is a fiction of law.

It is an imaginary line which the law superimposes upon the physical coast line as a basis. But for the purposes of international law, instead of following all the convolutions and sinuosities of the coast, it is permitted to go across the heads of bays and inlets, and it is in that particular that the rule of international law comes in as to the width of bays and inlets, either six or ten miles. We are not encumbered with that question, because the British Case contends that they must be ten miles, and we do not dispute it, and these outside inlets are ten miles. So we are not encumbered with that question. It is a legal fiction imposed by the operation of law as an accessory, as Rivier puts it, to the political coast line. * * *

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491 No. 244.—1905, October 12: Letter from Mr. Root (*United States Secretary of State*) to Sir M. Durand (*British Minister at Washington*).

DEPARTMENT OF STATE,
Washington, October 12, 1905.

DEAR MR. AMBASSADOR, I have just telegraphed you at Lenox expressing my wish for an interview at your early convenience. The occasion for the request is a despatch which I have just received from Senator Lodge, containing the following statement based, I assume, upon information received from his constituents in Massachusetts, who are interested in the fisheries:—

Newfoundland cruiser "Fiona" has arrived in Bay of Islands, on Treaty Coast, with Minister of Marine and Fisheries on board. The Minister has forbidden all vessels on American register to fish on Treaty Coast, where they now are, and where they have fished unmolested since 1818.

The American boats are already upon the Treaty Coast. I have felt bound to advise Senator Lodge that I have no doubt of their right to proceed to take fish upon the ground where the Minister of Marine and Fisheries of Newfoundland has prohibited them from fishing. The history of the fisheries and the numerous difficulties which have arisen upon the Treaty Coast indicate that this conflict between the orders of the Newfoundland Government and the rights of our fishermen, as we conceive them to be, may lead to very serious and regrettable incidents. It seems unfortunate that the Government of Newfoundland should undertake to prohibit a practice justified by the construction of the various Treaties relating to the Newfoundland fisheries for more than a century without any suggestion by the Government of Great Britain that that Government proposes any change of construction, and without any exchange of views between the two Governments upon the subject.

I shall wish to satisfy you that immediate representation should be made to the Government of Newfoundland, which will lead to a different way of raising and disposing of any questions which there may be regarding our fishermen's rights under the existing Treaty.

I am, &c.

(Signed)

ELIHU ROOT.

No. 245.—1905, October 19: *Letter from Mr. Root to Sir M. Durand.*

DEPARTMENT OF STATE,
Washington, October 19, 1905.

EXCELLENCY, Mr. Gardner, the representative in Congress of the Gloucester district, has placed in my hands a number of despatches received by him from masters of American vessels now on the Newfoundland coast. These despatches are answers to inquiries sent by him at my request for the purpose of ascertaining definitely, if possible, what is the precise difficulty there.

These despatches agree in the statement that vessels of American registry are forbidden to fish on the Treaty Coast. One captain says that he was informed that he could not fish by the Inspector of the Revenue Protection Service of Newfoundland, and several of them that they have been ordered not to take herring by the Collector of Customs at Bonne Bay, Newfoundland.

It would seem that the Newfoundland officials are making a distinction between two classes of American vessels. We have vessels which are registered, and vessels which are licensed to fish and not registered. The licence carries a narrow and restricted authority; the registry carries the broadest and most unrestricted authority. The vessel with a licence can fish, but cannot trade; the registered vessels can lawfully both fish and trade. The distinction between the two classes in the action of the Newfoundland authorities would seem to have been implied in the despatch from Senator Lodge which I quoted in my letter of the 12th, and the imputation of the prohibition of the Minister of Marine and Fisheries may perhaps have come from the port officers, in conversation with the masters of American vessels, giving him as their authority for their prohibitions.

As the buying of herring and bait fish, which until recently has been permitted for a good many years in Newfoundland, is trading, the American fishing fleet have come very generally to take an American registry, instead of confining themselves to the narrower fishing licence, and far the greater part of the fleet now in northern waters consists of registered vessels. The prohibition against fishing under an American register substantially bars the fleet from fishing. American vessels have also apparently been in the habit of entering at the Newfoundland custom-houses and applying for a Newfoundland licence to buy or take bait, and I gather from all the information I have been able to get that both the American masters and the Customs officials have failed to clearly appreciate the different conditions created by the practical withdrawal of all privileges on the part of Newfoundland and the throwing of the American fishermen back upon the bare rights which belong to them under the Treaty of 1818.

I am confident that we can reach a clear understanding regarding those rights and the essential conditions of their exercise, and that
a statement of this understanding to the Newfoundland
492 Government, for the guidance of its officials on the one hand,
and to our American fishermen for their guidance on the other,
will prevent causeless injury and possible disturbances, such as have
been cause for regret in the past history of the north-eastern fisheries.

I will try to state our view upon the matters involved in the situation, which now appears to exist upon the Treaty Coast. We consider that—

1. Any American vessel is entitled to go into the waters of the Treaty Coast and take fish of any kind.

She derives this right from the Treaty (or from the conditions existing prior to the Treaty and recognized by it) and not from any permission or authority proceeding from the Government of Newfoundland.

2. An American vessel seeking to exercise the Treaty right is not bound to obtain a licence from the Government of Newfoundland, and, if she does not purpose to trade as well as fish, she is not bound to enter at any Newfoundland custom-house.

3. The only concern of the Government of Newfoundland with such a vessel is to call for proper evidence that she is an American vessel, and, therefore, entitled to exercise the Treaty right, and to have her refrain from violating any laws of Newfoundland not inconsistent with the Treaty.

4. The proper evidence that a vessel is an American vessel and entitled to exercise the Treaty right is the production of the ship's papers of the kind generally recognized in the maritime world as evidence of a vessel's national character.

5. When a vessel has produced papers showing that she is an American vessel, the officials of Newfoundland have no concern with the character or extent of the privileges accorded to such a vessel by the Government of the United States. No question as between a registry and licence is a proper subject for their consideration. They are not charged with enforcing any laws or regulations of the United States. As to them, if the vessel is American she has the Treaty right, and they are not at liberty to deny it.

6. If any such matter were a proper subject for the consideration of the officials of Newfoundland, the statement of this Department that vessels bearing an American Registry are entitled to exercise the Treaty right should be taken by such officials as conclusive.

If your Government sees no cause to dissent from these propositions, I am inclined to think a statement of them as agreed upon would resolve the immediate difficulty now existing on the Treaty Coast.

I have, however, to call your attention to a further subject, which I apprehend may lead to further misunderstanding in the near future if it is not dealt with now. That is, the purposes of the Government of Newfoundland in respect of the treatment of American fishing-vessels as exhibited in a Law enacted during the past summer by the Legislature of that Colony, under the title "An Act respecting Foreign Fishing Vessels."

This Act appears to be designed for the enforcement of laws previously enacted by Newfoundland, which prohibited the sale to foreign fishing-vessels of herring, caplin, squid, or other bait fishes, lines, seines, or other outfits or supplies for the fishery or the shipment by a foreign fishing-vessel of crews within the jurisdiction of Newfoundland.

The Act of last summer respecting foreign fishing-vessels provides:—

Section 1. Any Justice of the Peace, sub-collector, preventive officers, fishery warden, or constable, may go on board any foreign fishing-vessel being within

any port of the coasts of this island, or hovering within British waters within 3 marine miles of any of the coasts, bays, creeks, or harbours in this island, and may bring such foreign fishing-vessel into port, may search her cargo and may examine the master upon oath touching the cargo and voyage, and the master or person in command, shall answer truly such questions as shall be put to him under a penalty not exceeding 500 dollars. And if such foreign fishing-vessel has on board any herring, caplin, squid, or other bait fishes, ice, lines, seines, or other outfits or supplies for the fishery purchased within any port on the coast of this island, or within the distance of 3 marine miles from any coasts, bays, creeks, or harbours of this island, or if the master of the said vessel shall have engaged or attempted to engage any person to form part of the crew of the said vessel in any port or on any part of the coasts of this island, or has entered such waters for any purpose not permitted by Treaty or Convention for the time being in force such vessel and the tackle, rigging, apparel, furniture, stores, and cargo thereof shall be forfeited.

Section 3. In any prosecution under this Act the presence on board any foreign fishing-vessel in any port of this island, or within British waters aforesaid of any caplin, squid, or other bait fishes, of ice, lines, seines, or other outfits or supplies for the fishery shall be *primâ facie* evidence of the purchase of the said bait, fishes, and supplies and outfits within such port or waters.

It seems plain that the provisions above quoted constitute a warrant to the officers named to interfere with and violate the rights of American fishing-vessels under the Treaty of 1818.

The 1st section authorizes any of the officers named to stop an American vessel while fishing upon the Treaty Coast and compel it to leave the fishing grounds, to prevent it from going to the places where the fish may be, to prevent it departing with the fish which it may have taken, and to detain it for an indefinite period during a search of the cargo and an examination of the master under oath under a heavy penalty.

It is to be observed that this section does not require that the vessel shall have been charged with any violation of the laws of Newfoundland, or even that she shall have been suspected of having violated the laws of Newfoundland as a condition precedent to compelling it to desist from the exercise of its Treaty rights, and virtually seizing it and taking it into port. In the consideration of this provision, it

is unnecessary to discuss any question as to the extent to which
 493 American vessels may be interfered with in the exercise of their Treaty rights pursuant to judicial proceedings based upon a charge of violation of law, or even upon reasonable ground to believe that any law has been violated, for the authority of the Acts authorized, appears to be part of no such proceeding.

When we consider that the minor officials named in the Act, invested with this extraordinary and summary power, are presumptively members of the fishing communities, in competition with which the American fishermen are following their calling, it is plain that in denying the right of the Government of Newfoundland to do what this section provides for we are not merely dealing with a theoretical question, but with the probability of serious injustice.

The 3rd section of the Act, above quoted in full, makes the presence on board of an American vessel of the fish, gear—the implements necessary to the exercise of the Treaty right—*primâ facie* evidence of a criminal offence against the laws of Newfoundland, and it also makes the presence on board the vessel of the fish which the vessel has a right to take under Treaty *primâ facie* evidence of a criminal offence under the laws of Newfoundland. This certainly cannot be justified. It is, in effect, providing that the exercise of the Treaty right shall be *primâ facie* evidence of a crime.

I need not argue with the Government of Great Britain that the 1st section of this Act purports to authorize the very kind of official conduct which led to the establishment in England of the rule against unreasonable searches and seizures, now firmly embedded in the jurisprudence of both nations. Nor need I argue that American vessels are of right entitled to have on them in the waters of the Treaty Coast both fish of every kind, and the gear for the taking of fish, and that a law undertaking to make that possession *primâ facie* proof of crime deprives them of that presumption of innocence to which all citizens of Great Britain and America are entitled. When the Legislature of Newfoundland denies these rights to American fishing-vessels, it imposes upon them a heavy penalty for the exercise of their rights under the Treaty, and we may reasonably apprehend that this penalty will be so severe in its practical effect as to be an effectual bar to the exercise of the Treaty right.

I feel bound to urge that the Government of Great Britain shall advise the Newfoundland Government that the provisions of law which I have quoted are inconsistent with the rights of the United States under the Treaty of 1818, and ought to be repealed; and that, in the meantime, and without any avoidable delay, the Governor in Council shall be requested by a Proclamation which he is authorized to issue under the 8th section of the Act respecting Foreign Fishing-Vessels, to suspend the operation of the Act.

There is still another phase of this subject to which I must ask your attention. I am advised that there is a very strong feeling among the Newfoundland fishermen on the Treaty Coast against the enforcement of the Newfoundland Act prohibiting the sale of bait, and that at a recent mass meeting of fishermen at the Bay of Islands, Resolutions were adopted urging the repeal or suspension of that Act, and containing the following clauses:—

If our requests are not granted immediately we shall be compelled, in justice to ourselves and families, to seek other ways and means to engage with the Americans.

We would also direct the attention of his Excellency the Governor in Council to what took place in Fortune Bay a few years ago when Captain Solomon Jacobs seined herring against the wishes of the people, and the result. If a similar occurrence should take place here, who will be responsible?

This Resolution indicates the existence of still another source from which, if not controlled, may come most unfortunate results when the American fishermen proceed to the exercise of their Treaty rights, that is, the Newfoundland fishermen themselves acting independently of their Government.

You are aware that for a considerable period American fishing-vessels, instead of themselves taking herring, caplin, and squid upon the Treaty Coast, have been in the habit of buying those fish from the Newfoundland fishermen. For many of the Newfoundland fishermen this trade has been a principal means of support. That has been especially so in and about the Bay of Islands. It has been profitable to the local fishermen, and it has been for the Americans a satisfactory substitute for the exercise of their Treaty right to catch the fish themselves. It is, indeed, not unnatural that these fishermen should struggle in every way open to them to prevent the loss of their means of support, and that if they cannot control their own Government so as to secure permission to sell herring and bait, they should

seek to prevent the Americans from taking the bait, in the hope that as the result of that prevention, their profitable trade may be restored.

The Resolution which I have quoted referring to the Fortune Bay case is a clear threat of violence to prevent the exercise of the Treaty right. If the threat should be carried out it is too much to expect that some at least of the American fishermen will not refuse to yield to lawless force which seeks to deprive them of their rights and of their means of livelihood.

We shall do everything in our power to prevent such a collision, and we should indeed deeply deplore it, but the true and effective method of prevention plainly must be the exercise of proper control by the Government of Newfoundland over the fishermen of Newfoundland, and it seems to me that the danger is sufficiently real and imminent to justify me in asking that the Government of Great Britain shall take speedy steps to bring about the exercise of such control.

I have, &c.

(Signed)

ELIHU ROOT.

494 No. 246.—1906, February 2: Letter from Sir Edward Grey (British Foreign Secretary) to Mr. Whitelaw Reid (United States Minister at London) enclosing Memorandum dealing with Mr. Root's note to Sir M. Durand of 19th October 1905.

FOREIGN OFFICE, February 2, 1906.

YOUR EXCELLENCY, The views of the United States' Government with respect to the position of affairs on the coast of Newfoundland, and to the rights of American fishing-vessels in those waters under the Treaty of the 20th October, 1818, as set forth in Mr. Root's note to His Majesty's Ambassador at Washington of the 19th October, 1905, have received the serious attention of His Majesty's Government.

I have now the honour to inclose a Memorandum dealing *seriatim* with the six propositions formulated by Mr. Root, and with his observations with regard to some of the provisions of recent Newfoundland legislation for the regulation of the fisheries.

As, owing to the prompt measures adopted and to the conciliatory spirit displayed by both Governments, the fishing season has now closed without any collision between the British and American fishermen, or the development of any such friction as was at one time anticipated, it is unnecessary to deal more particularly with the latter portion of Mr. Root's note, which was devoted to that side of the question.

I have, &c.

(Signed)

EDWARD GREY.

[Memorandum enclosed in above.]

Mr. Root's note to Sir M. Durand of the 19th October, 1905, on the subject of the United States' fishery in the waters of Newfoundland under the Convention of the 20th October, 1818, may be divided into three parts.

The first deals with complaints which had reached the United States' Government to the effect that vessels of the United States' registry had been forbidden by the Colonial authorities to fish on the Treaty Coast, the second with the provisions of "The Newfoundland Foreign Fishing-Vessels Act, 1905," and the third with the possibility of a lawless and violent interruption of the United States' fishery by the inhabitants of the Bay of Islands.

The complaints referred to in the first part of Mr. Root's note were at once brought to the notice of the Government of Newfoundland, and they replied that there had been no attempt to prevent American fishermen from taking fish. The complaints in question appear to have been based on some misunderstanding, and the subsequent course of the fishery proved that the apprehensions on the part of the United States' Government to which they gave rise were, fortunately not well founded.

His Majesty's Government, however, agree with the United States' Government in thinking that inasmuch as the privileges which citizens of the United States have for many years enjoyed of purchasing bait and supplies and engaging men in Newfoundland waters have recently been withdrawn and American fishermen have consequently, in Mr. Root's words, been thrown back upon their rights under the Convention of 1818, it is desirable that a clear understanding should be reached regarding those rights and the essential conditions of their exercise, and they have accordingly given the most careful consideration to the six propositions advanced in Mr. Root's note as embodying the views of the United States' Government on the subject.

They regret, however, that they are unable to record their assent to these propositions without some important qualifications.

Proposition 1 states:—

Any American vessel is entitled to go into the waters of the Treaty Coast and take fish of any kind. She derives this right from the Treaty (or from the conditions existing prior to the Treaty and recognized by it) and not from any permission or authority proceeding from the Government of Newfoundland.

The privilege of fishing conceded by Article I of the Convention of 1818 is conceded, not to American vessels, but to inhabitants of the United States and to American fishermen.

His Majesty's Government are unable to agree to this or any of the subsequent propositions if they are meant to assert any right of American vessels to prosecute the fishery under the Convention of 1818 except when the fishery is carried on by inhabitants of the United States. The Convention confers no rights on American vessels as such. It enures for the benefit only of inhabitants of the United States.

Proposition 2 states:—

An American vessel seeking to exercise the Treaty right is not bound to obtain a license from the Government of Newfoundland, and, if she does not purpose to trade as well as fish, she is not bound to enter at any Newfoundland custom-house.

495 His Majesty's Government agree that the Government of Newfoundland could not require that American fishermen seeking to exercise the Treaty right should take out a licence from the Colonial Government. No licence is required for what is a matter of

right, and no such licence has, His Majesty's Government are informed, been, in fact, required.

With the last part of the proposition it will be more convenient to deal in conjunction with proposition 3.

Proposition 3 states:—

The only concern of the Government of Newfoundland with such a vessel is to call for proper evidence that she is an American vessel, and therefore entitled to exercise the Treaty right, and to have her refrain from violating any laws of Newfoundland not inconsistent with the Treaty.

It has already been pointed out that the Convention of 1818 confers no rights on American vessels as such, and that the exercise of the right of fishing under the Convention is subject to the condition that the fishing is carried on by inhabitants of the United States. His Majesty's Government, however, agree that no law of Newfoundland should be enforced on American fishermen which is inconsistent with their rights under the Convention.

Mr. Root's note does not give any indication of what laws of the Colony would be regarded by the United States' Government as inconsistent with the Convention if applied to American fishermen. The opinion of His Majesty's Government on this point is as follows:—

The American fishery, under Article I of the Convention of 1818, is one carried on within the British jurisdiction and "in common with" British subjects. The two Governments hold different views as to the nature of this Article. The British Government consider that the war of 1812 abrogated that part of Article III of the Treaty of Peace of 1783 which continued to inhabitants of the United States "the liberty" (in the words used by Mr. Adams to Earl Bathurst in his note of the 25th September, 1815, "of fishing and drying, and curing their fish within the exclusive jurisdiction on the North American coasts to which they had been accustomed while themselves forming a part of the British nation," and that consequently Article I of the Convention of 1818 was a new grant to inhabitants of the United States of fishing privileges within the British jurisdiction. The United States' Government, on the other hand, contend that the war of 1812 had not the effect attributed to it by the British Government, and that Article I of the Convention of 1818 was not a new grant, but merely a recognition (though limited in extent) of privileges enjoyed by inhabitants of the United States prior, not only to the war, but to the Treaty of 1783. Whichever of these views be adopted, it is certain that inhabitants of the United States would not now be entitled to fish in British North American waters but for the fact that they were entitled to do so when they were British subjects. American fishermen cannot therefore rightly claim to exercise their right of fishery under the Convention of 1818 on a footing of greater freedom than if they had never ceased to be British subjects. Nor consistently with the terms of the Convention can they claim to exercise it on a footing of greater freedom than the British subjects "in common with" whom they exercise it under the Convention. In other words, the American fishery under the Convention is not a free but a regulated fishery, and, in the opinion of His Majesty's Government, American fishermen are bound to comply with all Colonial Laws and Regulations, including any touching the conduct of the fishery, so long as these are not in their nature unreasonable,

and are applicable to all fishermen alike. One of these Regulations prohibits fishing on Sundays. His Majesty's Government have received information that several breaches of this Regulation were committed by American fishermen during the past fishing season. This Regulation has been in force for many years, and looking to the insignificant extent to which American fishermen have exercised their right of fishery on the Treaty Coast in the past, it cannot be regarded as having been made with the object of restricting the enjoyment of that right. Both its reasonableness and its *bona fides* appear to His Majesty's Government to be beyond question, and they trust that the United States' Government will take steps to secure its observance in the future.

As regards the treatment of American vessels from which American fishermen exercise the Treaty right of fishery, His Majesty's Government are prepared to admit that, although the Convention confers no rights on American vessels as such, yet since the American fishery is essentially a ship fishery, no law of Newfoundland should be enforced on American fishing-vessels which would unreasonably interfere with the exercise by the American fishermen on board of their rights under the Convention. The United States' Government, on their part, admit, in Mr. Root's note, that the Colonial Government are entitled to have an American vessel engaged in the fishery refrain from violating any laws of Newfoundland not inconsistent with the Convention, but maintain that if she does not purpose to trade, but only to fish, she is not bound to enter at any Newfoundland custom-house.

Mr. Root's note refers only to the question of entry inwards, but it is presumed that the United States' Government entertain the same views on the question of clearing outwards. At all events, American vessels have not only passed to the fishing grounds in the inner waters of the Bay of Islands without reporting at a Colonial custom-house, but have also omitted to clear on returning to the United States. In both respects they have committed breaches of the Colonial Customs Law, which, as regards the obligations to enter and to clear, makes no distinction between fishing- and trading-vessels.

His Majesty's Government regret not to be able to share the view of the United States' Government that the provisions of the Colonial Law which impose those obligations are inconsistent with the Convention of 1818, if applied to American vessels which do not purpose to trade, but only to fish. They hold that the only ground on
496 which the application of any provisions of the Colonial Law to American vessels engaged in the fishery can be objected to is that it unreasonably interferes with the exercise of the American right of fishery.

It is admitted that the majority of the American vessels lately engaged in the fishery on the western coast of the Colony were registered vessels, as opposed to licensed fishing-vessels, and as such were at liberty both to trade and to fish. The production of evidence of the United States' registration is therefore not sufficient to establish that a vessel, in Mr. Root's words, "does not purpose to trade as well as fish," and something more would seem clearly to be necessary. The United States' Government would undoubtedly be entitled to complain if the fishery of inhabitants of the United States were seriously interfered with by a vexatious and arbitrary enforcement

of the Colonial Customs laws, but it must be remembered that, in proceeding to the waters in which the winter fishery is conducted, American vessels must pass in close proximity to several custom-houses, and that in order to reach or leave the grounds in the arms of the Bay of Islands, on which the fishery has been principally carried on during the past season, they have sailed by no less than three custom-houses on the shores of the bay itself. So that the obligation to report and clear need not in any way have interfered with a vessel's operations. It must also be remembered that a fishery conducted in the midst of practically the only centres of population on the west coast of the Colony affords ample opportunities for illicit trade, and consequently calls for careful supervision in the interests of the Colonial revenue.

The provisions in question are clearly necessary for the prevention of smuggling, and His Majesty's Government are of opinion that exception cannot be taken to their application to American vessels as an unreasonable interference with the American fishery, and they entertain the strong hope that the United States' Government will, on reconsideration, perceive the correctness of this view, and issue instructions accordingly for the future guidance of those in charge of American vessels.

It is, moreover, to the advantage of the American vessels engaged in the winter fishery in the Bay of Islands that they should report at a Colonial custom-house. Owing to the extent and peculiar configuration of that bay, and owing to the prevalence of fogs, vessels that enter its inner waters may remain for days without the local officers becoming aware that they are on the coast unless they so report. In such circumstances it is difficult for the Colonial Government to insure to American fishermen that protection against lawless interference for which Mr. Root calls in the concluding part of his note.

His Majesty's Government desire further to invite the attention of the United States' Government to the fact that certain United States' vessels engaged in the fishery refused to pay light dues. This is the first time, His Majesty's Government are informed, that American vessels have refused to pay these dues, and it is presumed that the refusal is based on the denial by the Colonial Government of the trading privileges allowed in past years. His Majesty's Government, however, cannot admit that such denial entitles American vessels to exemption from light dues in the ports in which they fish. As already stated, American fishing-vessels engaged in the fishery under the Convention of 1818 have no Treaty status as such, and the only ground on which, in the opinion of His Majesty's Government, the application of any Colonial law to such vessels can be objected to is that such application involves an unreasonable interference with the exercise of the Treaty rights of the American fishermen on board. The payment of light dues by a vessel on entering a port of the Colony clearly involves no such interference. These dues are payable by all vessels of whatever description and nationality other than coasting- and fishing-vessels owned and registered in the Colony (which are, on certain conditions, exempt either wholly or in part). His Majesty's Government trust that in these circumstances such directions will be issued as will prevent further refusals in the future, and they would point out generally that it is the duty of all foreign-

ers sojourning in the limits of the British jurisdiction to obey that law, and that, if it is considered that the local jurisdiction is being exercised in a manner not consistent with the enjoyment of any Treaty rights, the proper course to pursue is not to ignore the law, but to obey it, and to refer the question of any alleged infringement of their Treaty rights to be settled diplomatically between their Government and that of His Majesty.

Propositions 4, 5, and 6 state:—

Proposition 4:

The proper evidence that a vessel is an American vessel, and entitled to exercise the Treaty right, is the production of the ship's papers of the kind generally recognized in the maritime world as evidence of a vessels' national character.

Proposition 5:

When a vessel has produced papers showing that she is an American vessel, the officials of Newfoundland have no concern with the character or extent of the privileges accorded to such a vessel by the Government of the United States. No question as between a registry and licence is a proper subject for their consideration. They are not charged with enforcing any Laws or Regulations of the United States. As to them, if the vessel is American she has the Treaty right, and they are not at liberty to deny it.

Proposition 6:

If any such matter were a proper subject for the consideration of the officials of Newfoundland, the statement of this Department that vessels bearing an American registry are entitled to exercise the Treaty right should be taken by such officials as conclusive.

His Majesty's Government are unable to agree to these propositions, except with the reservations as to the status of American vessels under the Convention already indicated, and with reference to proposition 6, they would submit that the assurance to be given by the Department of State of the United States should be that the persons by whom the fishery is to be exercised from the American vessels are inhabitants of the United States.

In point of fact the Colonial Government have informed His Majesty's Government that they do not require an American vessel to produce a United States' fishing licence. The distinction between

United States' registration and the possession of a United States' fishing licence is however, of some importance, inas-
 497 much as a vessel which, so far as the United States' Government are concerned, is at liberty both to trade and to fish naturally calls for a greater measure of supervision by the Colonial Government than a vessel fitted out only for fishing and debarred by the United States' Government from trading; and information has been furnished to His Majesty's Government by the Colonial Government which shows that the proceedings of American fishing-vessels in Newfoundland waters have in the past been of such a character as to make it impossible, from the point of view of the protection of the Colonial revenue, to exempt such vessels from the supervision authorized by the Colonial Customs Law.

His Majesty's Government now turn to that part of Mr. Root's note which deals with "The Foreign Fishing-Vessels Act, 1905."

His Majesty's Government would have viewed with the strongest disapproval any disposition on the part of the Colonial authorities to administer this Act in a manner not consistent with His Majesty's Treaty obligations, but they are confident that the United States'

Government will readily admit that the fears expressed on this head in Mr. Root's note have not been realized.

They desire, however, to point out that, though the Act in question was passed to give effect to the decision of the Colonial Government to withdraw from American fishing-vessels the privileges which they had been allowed to enjoy for many years previously of purchasing bait and supplies and of engaging crews in the ports of the Colony, the provisions objectionable to the United States' Government which it embodies are in no sense new. They will be found in "The Foreign Fishing-Vessels Act, 1893." The present Act differs from the earlier Act in that it takes away, by omission, from the Colonial Government the power conferred upon them by the earlier Act of authorizing the issue of licences to foreign fishing-vessels for the enjoyment of the privileges mentioned. Allowing for this change, the provisions of the two Acts are in all essential respects identical. The provisions as to boarding, bringing into port, and searching appear in both Acts, and also the provisions as to the possession of bait, outfits, and supplies being *primâ facie* evidence of the purchase of the same in the Colonial jurisdiction, except that in the earlier Act there was a further provision, consequential on the authority which it conferred on the Colonial Government to issue licences, directing that the failure or refusal to produce a licence should be *primâ facie* evidence of the purchase of such articles without a licence. The position of any American fishing-vessel choosing to fish for herself on the Treaty Coast has consequently been since 1893 the same as it is to-day. His Majesty's Government do not advance these considerations with the object of suggesting that the objections which the United States' Government have taken to sections 1 and 3 of the Foreign Fishing-Vessels Act are impaired by the fact that these provisions have been on the Statute Book of the Colony since 1893 without protest, and they are ready to assume that no such protest has been lodged merely because the privileges accorded to American vessels in the ports of the Colony up to the present have been such as to render it unnecessary for inhabitants of the United States to avail themselves of their right of fishing under the Convention of 1818. The object of His Majesty's Government is simply to remove any impression which may have formed itself in the mind of the United States' Government that the language of the Act of 1905 was selected with any special view of prejudicing the exercise of the American Treaty right of fishery, and to point out that, on the contrary, it dates back to 1893, that is, to a time when it was the policy of the Colonial Government to treat American vessels on a favoured footing.

A new Act was not necessary to give effect to the present policy of the Colonial Government. Effect to it could have been given under the Act of 1893 by the mere suspension of the issue of licences to American vessels, and the only object of the new Act, as His Majesty's Government understand the position, was to secure the express and formal approval of the Colonial Legislature for the carrying out of the policy of the Colonial Government.

Having offered these general remarks, His Majesty's Government desire to point out that, in discussing the general effects of "The Foreign Fishing-Vessels Act, 1905," on the American fishery under the Convention of 1818, the United States' Government confine them-

selves to sections 1 and 3 and make no reference to section 7, which preserves "the rights and privileges granted by Treaty to the subjects of any State in amity with His Majesty." In view of this provision, His Majesty's Government are unable to agree with the United States' Government in regarding the provisions of sections 1 and 3 as "constituting a warrant to the officers named to interfere with and violate" American rights under the Convention of 1818. On the contrary, they consider section 7 as, in effect, a prohibition of any vexatious interference with the exercise of the Treaty rights whether of American or of French fishermen. As regards section 3, they admit that the possession by inhabitants of the United States of any fish and gear which they may lawfully take or use in the exercise of their rights under the Convention of 1818 cannot properly be made *primâ facie* evidence of the commission of an offence, and, bearing in mind the provisions of section 7, they cannot believe that a Court of Law would take a different view.

They do not, however, contend that the Act is as clear and explicit as, in the circumstances, it is desirable that it should be, and they propose to confer with the Government of Newfoundland with the object of removing any doubts which the Act in its present form may suggest as to the power of His Majesty to fulfil his obligations under the Convention of 1818.

On the concluding part of Mr. Root's note it is happily not necessary for His Majesty's Government to offer any remarks, since the fishing season has come to an end without any attempt on the part of British fishermen to interfere with the peaceful exercise of the American Treaty right of fishery.

498 No. 247.—1906, *June 30: Letter from Mr. Root to Mr. White-law Reid.*

DEPARTMENT OF STATE,
Washington, June 30, 1906.

SIR, The Memorandum inclosed in the note from Sir Edward Grey to you of the 2nd February, 1906, and transmitted by you on the 6th February, has received careful consideration.

The letter which I had the honour to address to the British Ambassador in Washington on the 19th October last stated with greater detail the complaint in my letter to him of the 12th October, 1905, to the effect that the local officers of Newfoundland had attempted to treat American ships as such, without reference to the rights of their American owners and officers, refusing to allow such ships sailing under register to take part in the fishing on the Treaty coast, although owned and commanded by Americans, and limiting the exercise of the right to fish to ships having a fishing licence.

In my communications the Government of the United States objected to this treatment of ships as such—that is, as trading-vessels or fishing-vessels, and laid down a series of propositions regarding the treatment due to American vessels on the Treaty coast, based on the view that such treatment should depend, not upon the character of the ship as a registered or licensed vessel, but upon its being

American; that is, owned and officered by Americans, and, therefore, entitled to exercise the rights assured by the Treaty of 1818 to the inhabitants of the United States.

It is a cause of gratification to the Government of the United States that the prohibitions interposed by the local officials of Newfoundland were promptly withdrawn upon the communication of the facts to His Majesty's Government, and that the Memorandum now under consideration emphatically condemns the view upon which the action of the local officers was based, even to the extent of refusing assent to the ordinary forms of expressions which ascribe to ships the rights and liabilities of owners and masters in respect of them.

It is true that the Memorandum itself uses the same form of expression when asserting that American ships have committed breaches of the Colonial Customs Law, and ascribing to them duties, obligations, omissions, and purposes which the Memorandum describes.

Yet we may agree that ships, strictly speaking, can have no rights or duties, and that whenever the Memorandum, or the letter upon which it comments, speaks of a ship's rights and duties, it but uses a convenient and customary form of describing the owner's or master's right and duties in respect of the ship. As this is conceded to be essentially "a ship fishing," and as neither in 1818 nor since could there be an American ship not owned and officered by Americans, it is probably quite unimportant which form of expression is used.

I find in the Memorandum no substantial dissent from the first proposition of my note to Sir Mortimer Durand of the 19th October, 1905, that any American vessel is entitled to go into waters of the Treaty coast and take fish of any kind, and that she derives this right from the Treaty and not from any authority proceeding from the Government of Newfoundland.

Nor do I find any substantial dissent from the fourth, fifth, and sixth propositions, which relate to the method of establishing the nationality of the vessel entering the Treaty waters for the purpose of fishing, unless it be intended, by the comments on those propositions, to assert that the British Government is entitled to claim that, when an American goes with his vessel upon the Treaty coast for the purpose of fishing, or with his vessel enters the bays or harbours of the coast for the purpose of shelter and of repairing damages therein, or of purchasing wood, or of obtaining water, he is bound to furnish evidence that all the members of his crew are inhabitants of the United States. We cannot for a moment admit the existence of any such limitation upon our Treaty rights. The liberty assured to us by the Treaty plainly includes the right to use all the means customary or appropriate for fishing upon the sea, not only ships and nets and boats, but crews to handle the ships and the nets and the boats. No right to control or limit the means which Americans shall use in fishing can be admitted unless it is provided in the terms of the Treaty, and no right to question the nationality of the crews employed is contained in the terms of the Treaty. In 1818, and ever since, it has been customary for the owners and masters of fishing-vessels to employ crews of various nationalities. During all that period I am not able to discover that any suggestion has ever been made of a right to scrutinize the

nationality of the crews employed in the vessels through which the Treaty right has been exercised.

The language of the Treaty of 1818 was taken from the IIIrd Article of the Treaty of 1783. The Treaty made at the same time between Great Britain and France, the previous Treaty of the 10th February, 1763, between Great Britain and France, and the Treaty of Utrecht of the 11th April, 1713, in like manner contained a general grant to "the subjects of France" to take fish on the Treaty coast. During all that period no suggestion, so far as I can learn, was ever made that Great Britain had a right to inquire into the nationality of the members of the crew employed upon a French vessel.

Nearly two hundred years have passed during which the subjects of the French King and the inhabitants of the United States have exercised fishing rights under these grants made to them in these general terms, and during all that time there has been an almost continuous discussion in which Great Britain and her Colonies have endeavoured to restrict the right to the narrowest possible limits, without a suggestion that the crews of vessels enjoying the right, or whose owners were enjoying the right, might not be employed in the customary way without regard to nationality. I cannot suppose that it is now intended to raise such a question.

499 I observe with satisfaction that the Memorandum assents to that part of my second proposition to the effect that "an American vessel seeking to exercise the Treaty right is not bound to obtain a licence from the Government of Newfoundland," and that His Majesty's Government agree that "no law of Newfoundland should be enforced on American fishermen which is inconsistent with their rights under the Convention."

The views of His Majesty's Government, however, as to what laws of the Colony of Newfoundland would be inconsistent with the Convention if applied to American fishermen, differ radically from the view entertained by the Government of the United States. According to the Memorandum, the inhabitants of the United States going in their vessels upon the Treaty coast to exercise the Treaty right of fishing are bound to enter and clear in the Newfoundland custom-houses, to pay light dues, even the dues from which coasting and fishing-vessels owned and registered in the Colony are exempt, to refrain altogether from fishing except at the time and in the manner prescribed by the Regulations of Newfoundland. The Colonial prohibition of fishing on Sundays is mentioned by the Memorandum as one of the Regulations binding upon the American fishermen. We are told that His Majesty's Government "hold that the only ground on which the application of any provisions of Colonial law to American vessels engaged in the fishery can be objected to is that it unreasonably interferes with the American right of fishery."

The Government of the United States fails to find in the Treaty any grant of right to the makers of Colonial law to interfere at all, whether reasonably or unreasonably, with the exercise of the American rights of fishery, or any right to determine what would be a reasonable interference with the exercise of that American right if there could be any interference. The argument upon which the Memorandum claims that the Colonial Government is entitled to interfere with and limit the exercise of the American right of fishery,

in accordance with its own ideas of what is reasonable, is based first upon the fact that, under the terms of the Treaty the right of the inhabitants of the United States to fish upon the Treaty coast is possessed by them "in common with the subjects of His Britannic Majesty": and, second, upon the proposition that "the inhabitants of the United States would not now be entitled to fish in British North American waters but for the fact that they were entitled to do so when they were British subjects," and that "American fishermen cannot therefore rightfully claim any other right to exercise the right of fishery under the Treaty of 1818 than if they had never ceased to be British subjects."

Upon neither of these grounds can the inferences of the Memorandum be sustained. The qualification that the liberty assured to American fishermen by the Treaty of 1818 they were to have "in common with the subjects of Great Britain" merely negatives an exclusive right. Under the Treaties of Utrecht, of 1763 and 1783, between Great Britain and France, the French had constantly maintained that they enjoyed an exclusive right of fishery on that portion of the coast of Newfoundland between Cape St. John and Cape Raye, passing around by the north of the island. The British, on the other hand, had maintained that British subjects had a right to fish along with the French, so long as they did not interrupt them.

The dissension arising from these conflicting views had been serious and annoying, and the provision that the liberty of the inhabitants of the United States to take fish should be in common with the liberty of His Britannic Majesty to take fish was precisely appropriate to exclude the French construction and leave no doubt that the British construction of such a general grant should apply under the new Treaty. The words used have no greater or other effect. The provision is that the *liberty* to take fish shall be held in common, not that the *exercise* of that liberty by one people shall be the limit of the exercise of that liberty by the other. It is a matter of no concern to the American fishermen whether the people of Newfoundland choose to exercise their right or not, or to what extent they choose to exercise it. The statutes of Great Britain and its Colonies limiting the exercise of the British right are mere voluntary and temporary self-denying ordinances. They may be repealed to-morrow. Whether they are repealed, or whether they stand, the British right remains the same, and the American right remains the same. Neither right can be increased nor diminished by the determination of the other nation that it will or will not exercise its right, or that it will exercise its right under any particular limitations of time or manner.

The proposition that "the inhabitants of the United States would not now be entitled to fish in British North American waters but for the fact that they were entitled to do so when they were British subjects," may be accepted as a correct statement of one of the series of facts which led to the making of the Treaty of 1818. Were it not for that fact there would have been no fisheries Article in the Treaty of 1783, no controversy between Great Britain and the United States as to whether that Article was terminated by the war of 1812, and no settlement of that controversy by the Treaty of 1818. The Memorandum, however, expressly excludes the supposition that the British Government now intends to concede that the present rights of American fishermen upon the Treaty coast are a continuance of the right

possessed by the inhabitants of the American Colonies as British subjects, and declares that this present American right is a new grant by the Treaty of 1818. How then can it be maintained that the limitations upon the former right continued although the right did not, and are to be regarded as imposed upon the new grant, although not expressed in the instrument making the grant? On the contrary, the failure to express in the terms of the new Treaty the former limitations, if any there had been, must be deemed to evidence an intent not to attach them to the newly created right.

Nor would the acceptance by Great Britain of the American view that the Treaty of 1783 was in the nature of a partition of Empire, that the fishing rights formerly enjoyed by the people of the Colonies and described in the instrument of partition continued notwithstanding the war of 1812, and were in part declared and in part abandoned by the Treaty of 1818, lead to any different conclusion. It may be that under this view the rights thus allotted to the Colonies in 1783 were subject to such Regulations as Great Britain had already imposed upon their exercise before the partition, but the partition itself and the recognition of the independence of the Colonies in the
 500 Treaty of partition was a plain abandonment by Great Britain of the authority to further regulate the rights of the citizens of the new and independent nation.

The Memorandum says: "The American fishermen cannot rightly claim to exercise their right of fishery under the Convention of 1818 on a footing different than if they had never ceased to be British subjects." What then was the meaning of independence? What was it that continued the power of the British Crown over this particular right of Americans formerly exercised by them as British subjects, although the power of the British Crown over all other rights formerly exercised by them as British subjects was ended? No answer to this question is suggested by the Memorandum.

In previous correspondence regarding the construction of the Treaty of 1818, the Government of Great Britain has asserted, and the Memorandum under consideration perhaps implies, a claim of right to regulate the action of American fishermen in the Treaty waters, upon the ground that those waters are within the territorial jurisdiction of the Colony of Newfoundland. This Government is constrained to repeat emphatically its dissent from any such view. The Treaty of 1818 either declared or granted a perpetual right to the inhabitants of the United States which is beyond the sovereign power of England to destroy or change. It is conceded that this right is, and for ever must be, superior to any inconsistent exercise of sovereignty within that territory. The existence of this right is a qualification of British sovereignty within that territory. The limits of the right are not to be tested by referring to the general jurisdictional powers of Great Britain in that territory, but the limits of those powers are to be tested by reference to the right as defined in the instrument created [*sic*] or declaring it. The Earl of Derby in a letter to the Governor of Newfoundland, dated the 12th June, 1884, said: "The peculiar fisheries rights granted by Treaties to the French in Newfoundland invest those waters during the months of the year when fishing is carried on in them, both by English and French fishermen, with a character somewhat analogous to that of a common sea for the purpose of fishery." And the same

observation is applicable to the situation created by the existence of American fishing rights under the Treaty of 1818. An appeal to the general jurisdiction of Great Britain over the territory is, therefore, a complete begging of the question, which always must be, not whether the jurisdiction of the Colony authorizes a law limiting the exercise of the Treaty right, but whether the terms of the grant authorize it.

The distinguished writer just quoted observes in the same letter:—

The Government of France each year during the fishing season employs ships of war to superintend the fishery exercised by their countrymen, and, in consequence of the divergent views entertained by the two Governments respectively as to the interpretation to be placed upon the Treaties, questions of jurisdiction which might at any moment have become serious have repeatedly arisen.

The practice thus described, and which continued certainly until as late as the modification of the French fishing rights in the year 1904, might well have been followed by the United States, and probably would have been, were it not that the desire to avoid such questions of jurisdiction as were frequently arising between the French and the English has made this Government unwilling to have recourse to such a practice so long as the rights of its fishermen can be protected in any other way.

The Government of the United States regrets to find that His Majesty's Government has now taken a much more extreme position than that taken in the last active correspondence upon the same question arising under the provisions of the Treaty of Washington. In his letter of the 3rd April, 1880, to the American Minister in London, Lord Salisbury said:—

In my note to Mr. Welsh of the 7th November, 1878, I stated that "British sovereignty as regards these waters, is limited in scope by the engagements of the Treaty of Washington, which *cannot* be modified or affected by any municipal legislation," and Her Majesty's Government fully admit that United States' fishermen have the right of participation on the Newfoundland *inshore fisheries*, *in common* with British subjects, as specified in Article XVIII of that Treaty. But it cannot be claimed, consistently with this right of participation in common with the British fishermen, that the United States' fishermen have any *other*, and still less that they have any *greater*, rights than the British fishermen had at the date of the Treaty.

If, then, at the *date* of the signature of the Treaty of Washington certain restraints were, by the municipal law, imposed upon the *British fishermen*, the United States' fishermen were, by the *express terms* of the Treaty, equally subjected to those restraints and the obligation to observe *in common* with the British the then existing local laws and regulations, which is implied by the words "*in common*," attached to the United States' citizens *as soon as* they claimed the benefit of the Treaty.

Under the view thus forcibly expressed, the British Government would be consistent in claiming that all regulations and limitations upon the exercise of the right of fishing upon the Newfoundland coast, which were in existence at the time when the Treaty of 1818 was made, are now binding upon American fishermen.

Farther than this, His Majesty's Government cannot consistently go, and, farther than this, the Government of the United States cannot go.

For the claim now asserted that the Colony of Newfoundland is entitled at will to regulate the exercise of the American Treaty right is equivalent to a claim of power to completely destroy that right. This Government is far from desiring that the Newfoundland fisheries shall go unregulated. It is willing and ready now, as it has

always been, to join with the Government of Great Britain in agreeing upon all reasonable and suitable regulations for the due control of the fishermen of both countries in the exercise of their rights, but this Government cannot permit the exercise of
 501 these rights to be subject to the will of the Colony of Newfoundland. The Government of the United States cannot recognize the authority of Great Britain or of its Colony to determine whether American citizens shall fish on Sunday. The Government of Newfoundland cannot be permitted to make entry and clearance at a Newfoundland custom-house and the payment of a tax for the support of Newfoundland lighthouses conditions to the exercise of the American right of fishing. If it be shown that these things are reasonable the Government of the United States will agree to them, but it cannot submit to have them imposed upon it without its consent. This position is not a matter of theory. It is of vital and present importance, for the plain object of recent legislation of the Colony of Newfoundland has been practically to destroy the value of American rights under the Treaty of 1818. Those rights are exercised in competition with the fishermen and merchants of Newfoundland. The situation of the Newfoundland fishermen residing upon the shore and making the shore their base of operations, and of the American fishermen coming long distances with expensive outfits, devoting long periods to the voyage to the fishing grounds and back to the market, obliged to fish rapidly in order to make up for that loss of time, and making ships their base of operations, are so different that it is easy to frame regulations which will offer slight inconvenience to the dwellers on shore and be practically prohibitory to the fishermen from the coasts of Maine and Massachusetts; and, if the grant of this competitive right is to be subject to such laws as our competitors chose to make, it is a worthless right. The Premier of Newfoundland in his speech in the Newfoundland Parliament, delivered on the 12th April, 1905, in support of the Foreign Fishing Bill, made the following declaration:—

This bill is framed specially to prevent the American fishermen from coming into the bays, harbours, and creeks of the coast of Newfoundland for the purpose of obtaining herring, caplin, and squid for fishing purposes.

And this further declaration:—

This communication is important evidence as to the value of the position we occupy as mistress of the northern seas so far as the fisheries are concerned. Herein was evidence that it is within the power of the Legislature of this Colony to make or mar our competitors to the North Atlantic fisheries. Here was evidence that by refusing or restricting the necessary bait supply, we can bring our foreign competitors to realize their dependency upon us. One of the objects of this legislation is to bring the fishing interests of Gloucester and New England to a realization of their dependence upon the bait supplies of this Colony. No measure could have been devised having more clearly for its object the conserving, safeguarding, and protecting of the interests of those concerned in the fisheries of the Colony.

It will be observed that there is here the very frankest possible disavowal of any intention to so regulate the fisheries as to be fair to the American fishermen. The purpose is, under cover of the exercise of the power of regulation, to exclude the American fishermen. The Government of the United States surely cannot be expected to see with complacency the rights of its citizens subjected to this kind of regulation.

The Government of the United States finds assurance of the desire of His Majesty's Government to give reasonable and friendly treatment to American fishing rights on the Newfoundland coast in the statement of the Memorandum that the Newfoundland Foreign Fishing-Vessels Act is not as clear and explicit as, in the circumstances, it is desirable that it should be, and in the expressed purpose of His Majesty's Government to confer with the Government of Newfoundland with the object of removing any doubts which the Act, in its present form, may suggest as to the power of His Majesty to fulfil his obligation under the Convention of 1818. It is hoped that, upon this Conference, His Majesty's Government will have come to the conclusion, not merely that the seventh section of the Act, which seeks to preserve "the rights and privileges granted by Treaty to the subjects of any State in amity with His Majesty," amounts to a prohibition of any "vexatious interference" with the exercise of the Treaty rights of American fishermen, but that this clause ought to receive the effect of entirely excluding American vessels from the operation of the first and third clauses of the Act relating to searches and seizures and *primâ facie* evidence. Such a construction by His Majesty's Government would wholly meet the difficulty pointed out in my letter of the 19th October, as arising under the first and third sections of the Act. A mere limitation, however, to interference which is not "vexatious," leaving the question as to what is "vexatious interference" to be determined by the local officers of Newfoundland, would be very far from meeting the difficulty.

You will inform His Majesty's Government of these views, and ask for such action as shall prevent any interference upon any ground by the officers of the Newfoundland Government with American fishermen when they go to exercise their Treaty rights upon the Newfoundland coast during the approaching fishing season.

I am, &c.

(Signed)

ELIHU ROOT.

502 No. 248.—1906, July 18: Letter from Sir M. Durand to Sir Edward Grey, enclosing extract from "Boston Herald" of July 19, 1906.

LENOX, MASSACHUSETTS, July 18, 1906.

SIR, I have the honour to transmit to you herewith copies of cuttings from newspapers of Boston, Massachusetts, on the subject of the Newfoundland fisheries. According to a letter from Representative Gardner, of Massachusetts, to the Gloucester Board of Trade, the State Department holds that the local regulation prohibiting purse seining is unreasonable as against American fishermen. Mr. Gardner declares that if American fishermen undertake to fish in this manner the State Department will do all in its power to help them and to secure adequate compensation in case of interference.

I have, &c.

(Signed)

H. M. DURAND

[Extract from the "Boston Herald" of July 9, 1906, enclosed in above.]

[Special despatch to the "Boston Herald."]

GLOUCESTER, *July 10, 1906.*

The following self-explanatory letter bearing upon the Newfoundland herring fishery, and in line with what was published in the "Herald" this morning, has been received by the Board of Trade in this city from Congressman Gardner:—

To the Gloucester Board of Trade, Gloucester.

HAMILTON, *July 7, 1906.*

GENTLEMEN, I am receipt of a letter dated the 2nd July, 1906, from the Secretary of State just before his departure for South America, answering a large number of the questions raised in my Memorandum of Mr. Alexander of the United States' Fish Commission, dated the 30th June, relative to the fishery regulation of Newfoundland coast.

The State Department holds that the local regulation prohibiting purse seining is unreasonable as against American fishermen. If our fishermen undertake to exercise their rights in this way, the State Department will do everything in its power to help them, and, if vessels should be seized or their fishing interfered with, to secure adequate compensation. It is my view, therefore, that it would be wise for Gloucester vessels desirous of doing so to prepare to take herring by purse seines this autumn.

I am well aware that I am taking a great responsibility and risk in offering this advice, but the situation is such that I feel it would be unjustifiable for me to decline to give a definite opinion. It is, of course, within the bounds of possibility that American fishermen taking herring with purse seines may be subject to such annoyance as may cause serious financial losses. Nevertheless, it is necessary for our fishermen to receive some definite statement, and the advice that I give is the result of my most serious thought.

Many of the provisions of the new Act passed on the 10th May, 1906, are extremely unfriendly, but some of those which are unfriendly are probably not violations of our Treaty rights. The State Department believes that Newfoundland has the right to prohibit its own citizens from engaging in our crews unless they are inhabitants of the United States. If they are inhabitants of the United States we are entitled to have their fish from our vessels regardless of their citizenship. The views expressed above, if correct, would permit our vessels to go purse seining with crews shipped in American waters, but our right to secure such crews by advertisement in the Newfoundland papers would undoubtedly be contested by Great Britain. In order to avoid the raising of this question at the present time I suggest that no such advertisements shall be inserted.

With regard to the question of gill netting as carried on in the Bay of Islands and elsewhere, I do not think that we can contest the right of Newfoundland to forbid her citizens from shipping aboard our vessels; and this prohibition may perhaps apply to other British subjects. We contend, however, that Newfoundland is not entitled to inquire into the nationality of our crews; but the contrary view appears to be taken by the British Government. At the present time, therefore, it is undesirable to raise this question if a successful herring season can be obtained in some other way.

My advice as to the coming fishing season is to refrain from shipping British subjects in British waters or British ports. I am aware, of course, that this advice, if carried out practically precludes gill netting for the coming season, unless that operation is carried on by combining the crews of several vessels. The State Department is now contending with the Government of Great Britain that Newfoundland had no right to interfere with our fishermen by any regulation that did not exist when the Treaty of 1818 was made. At the same time we have offered to join with Great Britain in agreeing to reasonable regulations. The courses of diplomacy, however, are so slow that I do not believe it would be possible to arrive at any definite conclusion prior to 1907.

503 I feel the very grave responsibility which I take in giving any advice at all, and if it is followed I shall not cease to feel uneasy for fear that I

may have made a mistake. Nevertheless I feel it my duty to advise either to pursue the herring fisheries for the year 1906 with purse seines or to continue with the nets only with crews shipped in American ports or waters.

Very respectfully,

(Signed) A. P. GARDNER.

No. 249.—1906, September 3: Letter from Sir Edward Grey to Mr. Whitelaw Reid.

FOREIGN OFFICE, September 3, 1906.

YOUR EXCELLENCY, In my note of the 14th August I stated that His Majesty's Government hoped shortly to be able to submit to the Government of the United States proposals for a provisional Arrangement, which would secure the peaceable and orderly conduct of the forthcoming herring fishery on the coast of Newfoundland. I have now the honour, on the understanding mentioned in my note, viz., that the Arrangement would be in the nature of a *modus vivendi* to be applicable only to the ensuing season, and not in any way to affect the rights and claims of either party to the Convention of 1818, to submit the following proposals, viz.:—

(1.) His Majesty's Government will not bring into force "The Newfoundland Foreign Fishing Vessels Act, 1906," which imposes on United States' fishing-vessels certain restrictions in addition to those imposed by the Act of 1905.

(2.) The provisions of the first part of section 1 of the Act of 1905 as to boarding and bringing into port, and the whole of section 3 of the same Act will not be regarded as applying to the United States' fishing-vessels.

(3.) The United States' Government will in return direct their fishermen to comply with the Colonial Fishery Regulations, as was in fact done last year, with the exception of certain breaches of the prohibition of Sunday fishing.

(4.) The demand for payment of light dues will be waived by His Majesty's Government.

(5.) The United States' Government will direct the masters of United States' fishing-vessels to comply with the provisions of the Colonial Customs Law as to reporting at a customs-house, on arrival in and departure from colonial waters.

2. As regards head (3) of this Arrangement, I would point out that of the three restrictions which the Colonial Fishery Regulations impose on the herring fishery in the waters open to United States' fishermen, the first, viz., the prohibition of "purse" seines, is in force in all the waters of the Colony. It is also in force in all the waters of Canada. The second, the prohibition of herring traps, is also in force in Placentia, St. Mary's and Fortunes Bays, and in the district of Twillingate. The third, the prohibition of "herring" seines, is in force also subject to some reservations as to baiting purposes in the inner waters of Placentia Bay, and in certain waters on the north-east coast. The application of these three restrictions to the herring bays of the west coast is, of course, prior to and not in any way connected with the present policy of the Colonial Government, and His Majesty's Government have the testimony of the naval officers who have been employed on the Treaty Coast as to the destructive results

of the use of seines. His Majesty's Government therefore hope that the United States' Government will recognize that His Majesty's Government are, apart from any question of right, acting in the interests of the continuation of the common fishery in proposing as a part of the provisional Arrangement compliance with the three restrictions mentioned.

The fourth restriction, viz., the prohibition of Sunday fishing, is of general application throughout the Colony, and is also in force in Canada. Having regard to the duration of the fishing season and to other circumstances, His Majesty's Government do not feel that compliance with this prohibition involves any material inconvenience to United States' fishermen. On the other hand, in view of the strong feeling against Sunday fishing which prevails in the Colony, the disregard of it is fraught with possibilities of serious disorder. It is therefore hoped that the United States' Government will assist His Majesty's Government in the maintenance of peaceable relations between the two sets of fishermen by not countenancing any breach of the prohibition during the ensuing season.

3. As regards head (5), as explained in the Memorandum communicated to your Excellency on the 2nd February, a call at a customs-house, whether on entering or on leaving the waters of the Colony, need involve no interference with a vessel's fishing operations, and is in itself a requirement which may be reasonably made in the interests not only of the colonial revenue but of the United States' fishermen.

4. I trust that you will be able to inform me at an early date that the Arrangement outlined above is agreed to by your Government.

I have, &c.

(Signed)

EDWARD GREY.

504 No. 250.—1906, September 12: Memorandum communicated by Mr. Whitelaw Reid to His Majesty's Government.

My Government hears with the greatest concern and regret that in the opinion of His Majesty's Government there is so wide a divergence of views with regard to the Newfoundland Fisheries that an immediate settlement is hopeless.

But it is much gratified with His Majesty's Government's desire to reach a *modus vivendi* for this season, and appreciates the readiness to waive the Foreign Fishing Vessels Act of 1906. This and other restrictive legislation had compelled our fishermen to use purse seines or abandon their Treaty rights.

My Government sees in the offer not to apply Section 3, Act of 1905, and that part of Section 1 relating to boarding fishing-vessels and bring them into port fresh proof of a cordial disposition not to press unduly this kind of regulation.

Our fishermen will also gladly pay light dues, if not hindered in their right to fish. They are not unwilling either to comply with the regulation to report at Custom-houses when possible. It is sometimes physically impossible, however, to break through the ice for that purpose.

Most unfortunately the remaining proposals, those as to purse-seining and Sunday fishing, present very grave difficulties.

We appreciate perfectly the desire of His Majesty's Government to prevent Sunday fishing. But if both this and purse-seine fishing are taken away, as things stand there might be no opportunity for profitable fishing left under our Treaty rights. We are convinced that purse seines are no more injurious to the common fishery than the gill nets commonly used—are not, in fact, so destructive and do not tend to change the migratory course of the herring as gill nets do, through the death of a large percentage of the catch and consequent pollution of the water.

The small amount of purse-seining this season could not of course materially affect the common fishery anyway. Besides many of our fishermen have already sailed, with purse seines as usual, and the others are already provided with them. This use of the purse seine was not the free choice of our fishermen. They have been driven to it by local Regulations, and the continued use of it at this late date this year seems vital.

But we will renounce Sunday fishing for this season if His Majesty's Government will consent to the use of purse seines, and we cannot too strongly urge an acceptance of this solution.

No. 251.—1906, September 20: Letter from Sir. Edward Grey to Sir. M. Durand.

FOREIGN OFFICE, September 20, 1906.

Sir, The American Ambassador called at this Office to-day, and requested an early reply to the Memorandum communicated by his Excellency on the 12th instant respecting the proposed *modus vivendi* in regard to the Newfoundland Fishery question.

His Excellency was informed that His Majesty's Government were doing all that they could do to expedite an early and satisfactory reply, that they were pressing the Newfoundland Government to authorize temporarily the use of purse seines, on the understanding that care would be taken not to interfere with other modes of fishing, and that they hoped that, if this were agreed to, the United States' Government would do all in their power to discourage and prevent the engagement of Newfoundland fishermen just outside the 3-mile limit.

Mr. Whitelaw Reid said that he would telegraph in this sense to his Government.

I am, &c.

(Signed)

EDWARD GREY.

No. 252.—1906, September 25: Memorandum communicated by His Majesty's Government to Mr. Whitelaw Reid.

His Majesty's Government have considered, after consultation with the Government of New Foundland, the proposals put forward in the Memorandum communicated by the United States' Ambassador on the 12th instant respecting the suggested *modus vivendi* in regard to the Newfoundland fishery question.

They are glad to be able to state that they accept the arrangement set out in the above Memorandum, and consent accordingly to the use of purse-seines by United States' fishermen during the ensuing season, subject, of course, to due regard being paid, in the use of such implements, to other modes of fishery.

His Majesty's Government trust that the United States' Government will raise no objection to such a stipulation, which is only intended to secure that there shall be the same spirit of give and take and of respect for common rights between the users of purse-seines and the users of stationary nets, as would be expected to exist if both sets of fishermen employed the same gear.

They further hope that, in view of this temporary authorization of the purse-seine, the United States Government will see their way to arranging that the practice of engaging Newfoundland fishermen just outside the 3-mile limit, which to some extent prevailed last year, should not be resorted to this year.

An arrangement to this effect would save both His Majesty's Government and the Newfoundland Government from embarrassment, which it is conceived, having regard to the circumstances in which the *modus vivendi* is being settled, the United States' Government would not willingly impose upon them. Moreover, it is not in itself unreasonable, seeing that the unwillingness of the United States' Government to forego the use of purse-seines appears to be largely based upon the inability of their fishermen to engage local men to work the form of net recognized by the Colonial fishery regulations.

The United States' Government assured His Majesty's late Government in November last that they would not countenance a specified evasion of "The Newfoundland Foreign Fishing-vessels Act, 1905," and the proposed arrangement would appear to be in accordance with the spirit which prompted that assurance.

FOREIGN OFFICE, *September 25, 1906.*

No. 253.—1906, *September 26: Letter from Sir Edward Grey to Sir M. Durand.*

FOREIGN OFFICE, *September 26, 1906.*

SIR, Your Excellency is already aware that I had communicated to the American Ambassador a Memorandum containing the views of His Majesty's Government on the proposed *modus vivendi* on the subject of the Newfoundland fisheries.

On receipt of this communication, of which a copy was inclosed in my despatch of the 14th September, Mr. Whitelaw Reid called yesterday and said he had every reason to hope that the terms therein proposed would be accepted by his Government. He was not, however, quite sure as to what was meant by interference of purse-seines with other modes of fishing.

As to that part of the Memorandum dealing with the enlistment of Newfoundlanders outside the 3-mile limit, he expressed his personal conviction that his Government would do all that lay in their power to prevent the exasperation and irritation which is naturally caused by such proceedings just outside the limit; but he wished to throw out

a suggestion, that the best way to avoid such irritation would be to waive temporarily that clause in the Act of 1905 which makes it illegal to enlist men within the 3-mile limit.

He pointed out that nothing could prevent the American captains from enlisting men outside the territorial waters of Newfoundland, and that to waive the application of the latter part of the first section of the Act would prevent disputes cropping up, and would promote peace and harmony on the coast of Newfoundland.

I am, &c.

(Signed)

EDWARD GREY.

No. 254.—1906, October 1: *Letter from Sir Edward Grey to Sir M. Durand.*

FOREIGN OFFICE, October 1, 1906.

SIR, I told Mr. Carter to-day that the suggestion contained in Mr. Whitelaw Reid's private letter, to suspend the clause in Section 1 of the Act of 1905 which prevented American vessels from recruiting fishermen in Newfoundland waters, if the Americans in return would stop using purse-seines after the 1st November, had been telegraphed to the Colony by the Colonial Office. If the Colonial Government accepted the suggestion at once, there would be no difficulty about including it in the *modus vivendi*, but in view of the fact that the legislation of 1906 in the Colony had been suspended, and that this had been done with very great reluctance, I assumed that the point now raised would have to depend entirely on the opinion of the Colony with regard to it.

Mr. Carter asked me whether he was to understand that we wished the *modus vivendi* to be absolutely concluded and put in force at once, without waiting for the new point to be settled.

I said I should like not to answer this question until I had consulted the Colonial Office as to whether they desired to wait for the reply of the Colony on the new point now raised or not, but I would send a reply in a day or two.

I am, &c.

(Signed)

EDWARD GREY.

506 No. 255.—1906, October 4: *Memorandum communicated by His Majesty's Government to Mr. Carter.*

The proposals contained in Mr. Whitelaw Reid's private letter for the suspension of the recruiting clause in section 1 of the Act of 1905, if United States' fishermen would refrain from using purse seines after the 1st November, have been considered by the Newfoundland Government, but they find themselves quite unable to accept them.

In these circumstances His Majesty's Government would be glad to be favoured, at the earliest possible moment, with the views of the United States' Government on the *modus vivendi* proposals contained in Sir E. Grey's Memorandum of the 25th September in order that, if they are accepted, the Colonial Government and United States'

fishermen may both be made acquainted at once with the terms of the arrangement proposed, and the necessary instructions given for its observation.

FOREIGN OFFICE, *October 4, 1906.*

No. 256.—1906, *October 6: Letter from Mr. Whitelaw Reid to Sir Edward Grey.*

LONDON, *October 6, 1906.*

SIR, I am authorized by my Government to ratify a *modus vivendi* in regard to the Newfoundland fishery question on the basis of the Foreign Office Memorandum, dated the 25th ultimo, in which you accept the arrangement set out in my Memorandum of the 12th ultimo, and consent accordingly to the use of purse seines by American fishermen during the ensuing season, subject, of course, to due regard being paid in the use of such implements to other modes of fishery, which, as you state, is only intended to secure that there shall be the same spirit of give and take and of respect for common rights between the users of purse seines and the users of stationary nets as would be expected to exist if both sets of fishermen employed the same gear.

My Government understand by this that the use of purse seines by American fishermen is not to be interfered with, and the shipment of Newfoundlanders by American fishermen outside the 3-mile limit is not to be made the basis of interference or to be penalized; at the same time they are glad to assure His Majesty's Government, should such shipments be found necessary, that they will be made far enough from the exact 3-mile limit to avoid any reasonable doubt.

On the other hand, it is also understood that our fishermen are to be advised by my Government, and to agree, not to fish on Sunday.

It is further understood that His Majesty's Government will not bring into force the Newfoundland Foreign Fishing-vessels Act of 1906, which imposes on American fishing-vessels certain restrictions in addition to those imposed by the Act of 1905, and also that the provisions of the first part of section 1 of the Act of 1905, as to boarding and bringing into port, and also the whole of section 3 of the same Act, will not be regarded as applying to American fishing-vessels.

It also being understood that our fishermen will gladly pay light dues if they are not deprived of their rights to fish, and that our fishermen are not unwilling to comply with the provisions of the Colonial Customs Law as to reporting at a custom-house when physically possible to do so.

I need not add that my Government are most anxious that the provisions of the *modus vivendi* should be made effective at the earliest possible moment. I am glad to be assured by you that this note will be considered as sufficient ratification of the *modus vivendi* on the part of my Government

I have, &c.

(Signed)

WHITELAW REID.

No. 257.—1906, October 8: Letter from Sir Edward Grey to Mr. Whitelaw Reid.

FOREIGN OFFICE, October 8, 1906.

YOUR EXCELLENCY, I have received with satisfaction the note of the 6th instant, in which your Excellency states that you have been authorised by your Government to ratify a *modus vivendi* in regard to the Newfoundland fishery question, on the basis of the Memorandum which I had the honour to communicate to you on the 25th ultimo, and I am glad to assure your Excellency that the note in question will be considered by His Majesty's Government as a sufficient ratification of that arrangement on the part of the United States' Government.

His Majesty's Government fully share the desire of your Government that the provisions of the *modus vivendi* should be made effective at the earliest moment possible, and the necessary instructions for its observance were accordingly sent to the Government of Newfoundland immediately on receipt of your Excellency's communication.

I have, &c.

(Signed)

EDWARD GREY.

507 No. 258.—1907, June 20: Letter from Sir Edward Grey to Mr. Whitelaw Reid.

FOREIGN OFFICE, June 20, 1907.

SIR, On the 20th of July last, Your Excellency communicated to me a letter addressed to you by Mr. Root in which he gave reasons which prevented his agreement with the views of His Majesty's Government as to the rights of American fishing vessels in the waters of Newfoundland under the Convention of 1818.

No reply was returned at the time to the arguments contained in this letter, as the divergence of views between the two Governments made it hopeless to expect an immediate and definitive settlement of the various questions at issue and it was essential to arrive at some arrangement immediately which would secure the peaceable and orderly conduct of the impending fishery season.

Upon the conclusion of the *Modus Vivendi*, His Majesty's Government further deferred any additional observations on the questions at issue until the arrival in this country of the Premier of Newfoundland to attend the Imperial Conference.

They have now had the advantage of a full discussion with Sir R. Bond, and although His Majesty's Government are unable to modify the views to which they have on various occasions given expression, of the proper interpretation of the Convention of 1818 in its bearing on the rights of American fishermen, they are not without hope, having regard to the willingness of the United States Government from a practical point of view to discuss reasonable and suitable regulations for the due control of the fishermen of both countries, that an arrangement may be arrived at which will be satisfactory to both countries.

I desire at the outset to place on record my appreciation of the moderation and fairness with which Mr. Root has stated the American side of the question and I shall in my turn endeavour to avoid anything of a nature to embitter this long-standing controversy.

It will be convenient to recapitulate the main grounds of divergence between the two Governments on the question of principle.

His Majesty's Government, on the one hand, claim that the Treaty gave no fishing rights to American vessels as such, but only to inhabitants of the United States and that the latter are bound to conform to such Newfoundland laws and regulations as are reasonable and not inconsistent with the exercise of their Treaty rights. The United States Government, on the other hand, assert that American rights may be exercised irrespectively of any laws or regulations which the Newfoundland Government may impose, and agree that as ships strictly speaking can have no rights or duties, whenever the term is used, it is but a convenient or customary form of describing the owners' or masters' rights. As the Newfoundland fishery, however, is essentially a ship fishery, they consider that it is probably quite unimportant which form of expression is used.

By way of qualification Mr. Root goes on to say that if it is intended to assert that the British Government is entitled to claim that, when an American goes with his vessel upon the Treaty Coast for the purpose of fishing, or with his vessel enters the bays or harbours of the coast for the purpose of obtaining shelter, and of repairing damages therein, or of purchasing wood, or of obtaining water, he is bound to furnish evidence that all the members of the crew are inhabitants of the United States, he is obliged entirely to dissent from any such proposition.

The views of His Majesty's Government are quite clear upon this point. The Convention of 1818 laid down that the inhabitants of the United States should have for ever in common with the subjects of His Britannic Majesty the liberty to take fish of every kind on the coasts of Newfoundland within the limits which it proceeds to define.

This right is not given to American vessels, and the distinction is an important one from the point of view of His Majesty's Government, as it is upon the actual words of the Convention that they base their claim to deny any right under the Treaty to American masters to employ other than American fishermen for the taking of fish in Newfoundland Treaty waters.

Mr. Root's language, however, appears to imply that the condition which His Majesty's Government seek to impose on the right of fishing is a condition upon the entry of an American vessel into the Treaty waters for the purpose of fishing. This is not the case. His Majesty's Government do not contend that every person on board an American vessel fishing in the Treaty waters must be an inhabitant of the United States, but merely that no such person is entitled to take fish unless he is an inhabitant of the United States. This appears to meet Mr. Root's argument that the contention of His Majesty's Government involves as a corollary that no American vessel would be entitled to enter the water of British North America (in which inhabitants of the United States are debarred from fishing by the Convention of 1818) for any of the four specified purposes, unless all the members of the crew are inhabitants of the United States.

Whatever may be the correct interpretation of the Treaty as to the employment of foreigners generally on board American vessels, His Majesty's Government do not suppose that the United States Government lay claim to withdraw Newfoundlanders from the jurisdiction of their own Government so as to entitle them to fish in the employment of Americans in violation of New foundland laws. The United States Government do not, His Majesty's Government understand, put their claim higher than that of a "common" fishery, and such an arrangement cannot override the power of the Colonial Legislature to enact laws binding on the inhabitants of the Colony.

508 It can hardly be contended that His Majesty's Government have lost their jurisdiction not only over American fishermen fishing in territorial waters of Newfoundland, but also over the British subjects working with them.

It may be as well to mention incidentally in regard to Mr. Root's contention that no claim to place any such restriction on the French right of fishery was ever put forward by Great Britain; that there was never any occasion to advance it, for the reason that foreigners other than Frenchmen were never employed by French fishing vessels.

The main question at issue is, however, that of the application of the Newfoundland regulations to American fishermen. In this connection the United States Government admit the justice of the view that all regulations and limitations upon the exercise of the right of fishing upon the Newfoundland Coast, which were in existence at the time of the Convention of 1818, would now be binding upon American fishermen. Although Mr. Root considers that to be the extreme view which His Majesty's Government could logically assert, and states that it is the utmost to which the United States Government could agree, His Majesty's Government feel that they cannot admit any such contention, as it would involve a complete departure from the position which they have always been advised to adopt as to the real intention and scope of the treaties upon which the American fishing rights depend. On this vital point of principal there does not seem to be any immediate prospect of agreement with United States views, and it would, therefore, seem better to endeavour to find some temporary solution of the difficulty as to the regulations under which the Americans are to fish.

His Majesty's Government note with satisfaction Mr. Root's statement that the American Government are far from desiring that the fishery should go unregulated, and believing as they do that the Newfoundland regulations have been framed with the intention of preserving and maintaining the fishery in the most efficient and productive condition, and for the prevention of practices that must be detrimental to the common interests they propose to communicate a copy of all the regulations that are now in force, and if there is anything in these regulations which the United States Government feel to bear hardly upon the American fishermen, His Majesty's Government will gladly pay the utmost consideration to any American representations on the subject with a view to the amendment of the regulations in the sense desired, provided that such be consistent, with the due preservation of the fishery.

Pending this examination of the regulations, His Majesty's Government would propose the following arrangements as to the provisions in the Newfoundland enactments that have been most discussed.

These are the obligations to report at a Custom House and to pay light dues, and the prohibition to use purse seines, and to fish on Sundays. Other regulations, such as the prohibition to throw ballast or rubbish into the water frequented by herring, and to throw overboard on the fishing ground fish offal, heads and bones, have occasionally come in question, but are clearly reasonable, and are not, it is believed, objected to by the United States Government. Fishing at night is another question which has been discussed, although it is not forbidden by the regulations. His Majesty's Government understand that by tacit consent among the fishermen themselves fishing is not pursued at night, and with this arrangement there seems no reason to interfere.

With regard to the entry and clearance of American vessels at Newfoundland ports, I would remind your Excellency that the American vessels engaged in the winter fishery in the Bay of Islands must pass in close proximity to several Custom Houses, and that it cannot be said that the obligation to report and clear unduly interferes with the operations of the vessels. On this point, however, His Majesty's Government would, in order to secure an arrangement for the next fishing season, be prepared to defer discussion of the question of right; but they would urge, on the other hand, that it would be most advisable that American vessels should comply with the regulation on the ground that unless the vessels enter at the Custom Houses, the British authorities have no cognizance that they are in Newfoundland waters, and that, as His Majesty's Government are responsible for keeping the peace, it is important that they should know exactly what American vessels are on the fishing grounds. Moreover, the provision in question is clearly necessary for the prevention of smuggling, and unless American vessels have made proper entry at a Custom House, there is no means, short of searching the vessels, of ascertaining whether they are really fishing vessels, and not smugglers.

The next point in dispute is the prohibition of purse seines. His Majesty's Government have the independent testimony of British naval officers who have been employed on the Treaty Coast as to the distinctive results of their use; and they would, therefore, point out that there is complete justification for the Colonial regulation.

I would, moreover, remind Your Excellency that the regulation is in force in all the waters of the Colony of Newfoundland and of the Dominion of Canada, and applies equally to all fishermen whether they be Newfoundlanders or not. His Majesty's Government, therefore, feel that they cannot interfere with the enforcement of the regulation which prohibits purse seines in the waters of Newfoundland. They would also point out that fishing on Sundays is always liable to lead to regrettable breaches of the peace, and they would propose that the American fishermen should agree to abstain from this practice.

Finally, His Majesty's Government feel that the payment of light dues by an American vessel entering a port of the Colony clearly does not involve an unreasonable interference with the exercise of the treaty rights of the American fishermen on board. These dues are payable by all vessels of whatever description and nationality, other than coasting and fishing vessels owned and registered in the Colony. As, however, vessels of the latter class are under cer-

tain conditions exempt either wholly or in part from payment, His Majesty's Government consider that it would be unfair to introduce any discrimination against American vessels in this respect, and it is proposed that the demand for light dues should be waived under the same conditions as in the case of the Newfoundland vessels.

509 I venture to express the hope that the temporary arrangement outlined above will be agreed to by the United States Government.

I have, &c.,

E. GREY.

His Excellency the Honourable WHITELAW REID,

&c., &c., &c.

No. 259.—1907, July 12: *Letter from Mr. Whitelaw Reid to Sir Edward Grey.*

AMERICAN EMBASSY,

London, July 12, 1907.

SIR, Referring to your letter of June 20th, in relation to the Newfoundland Fisheries, I beg to say that while its propositions seemed so much in conflict with our views on the subject that my previous instructions would have enabled me to make an immediate reply, I hastened to lay them before my Government.

Before communicating the result I desire to acknowledge and reciprocate to the full the kindly expressions you have been good enough to use as to the moderation and fairness with which Mr. Root has stated the American side of the case. We have had the same appreciation of your conduct of the discussion, and we share your wish to bring the long-standing controversy on the subject to a satisfactory conclusion without having added anything tending in the slightest degree to embitter it.

But with the utmost desire to find in your last letter some practical basis for an agreement, we are unable to perceive it. Acquiescence in your present proposals would seem to us equivalent to yielding all the vital questions in dispute, and abandoning our fishing rights on the coast of Newfoundland under the Treaty of 1818.

Without dwelling on minor points, on which we would certainly make every effort to meet your views, I may briefly say that in our opinion, sustained by the observations of those best qualified to judge, the surrender of the right to hire local fishermen, who eagerly seek to have us employ them, and the surrender at the same time of the use of purse seines and of fishing on Sunday would, under existing circumstances, render the Treaty stipulation worthless to us.

My Government holds this opinion so strongly that the task of reconciling it with the positions maintained in your letter of June 20th seems hopeless.

In this conviction my Government authorizes me, and I now have the honour, to propose a reference of the pending questions under the Treaty of 1818 to arbitration before the Hague Tribunal.

We have the greater reason to hope that this solution may be agreeable to you since your Ambassador to the United States recently suggested some form of arbitration, with a temporary *modus vivendi*

pending the decision, as the best way of reaching a settlement. We hope also that the reference of such a long-standing question between two such nations at such a time to the Hague Tribunal might prove an important step in promoting the spread of this peaceful and friendly method of adjusting differences among all civilized countries of the world.

If this proposition should be agreeable to you we should trust that the conclusion might be reached in so short a period that the continuation in force meantime of the *modus vivendi* I had the honour of arranging with you last year could work no real hardship to any British or Colonial interests. In its practical operation last year it resulted in voluntary arrangements by which our fishermen gave up purse seines. They did, however, employ Newfoundland fishermen. We do not think the continued employment of men so eager for the work, and the consequent influx of their wages into the Colony could, for the short time involved, work the Colony any harm. But if for any reason you should find it unsuitable or inconvenient to renew for so short a time this feature of the *modus vivendi*, we should be compelled to insist on the use of purse seines for the reason already stated. To give that up too we should consider under existing circumstances as giving up altogether our Treaty rights of fishing on that coast.

Hoping that in these proposals we have made an offer not only indicating our earnest desire to reach a mutually satisfactory arrangement, but an honourable and agreeable means of doing so,

I have, &c.,

WHITELAW REID.

Sir EDWARD GREY, Bart.,
&c., &c., &c.

510 No. 260.—1907, September 7: Telegram from Lord Elgin
(British Colonial Secretary) to the Governor of Newfoundland.

(Sent 3.20 p. m., September 7, 1907.)

[Telegram.]

Referring to my telegram of yesterday's date, following *modus vivendi* as embodied in note from United States Ambassador has been concluded:—

1. It is understood that His Majesty's Government will not bring into force the Newfoundland Foreign Fishing Vessels Act of 1906, which imposes on American fishing vessels certain restrictions in addition to those imposed by the Act of 1905, and also that the provisions of the first part of Section 1 of the Act of 1905, as to boarding and bringing into port, and also the whole of Section 3 of the same Act, will not be regarded as applying to American fishing vessels.

2. In consideration of the fact that the shipment of Newfoundlanders by American fishermen outside the three mile limit is not to be made the basis of interference nor to be penalised, my Government waives the use of purse seines by American fishermen during the term

governed by this agreement, and also waives the right to fish on Sundays.

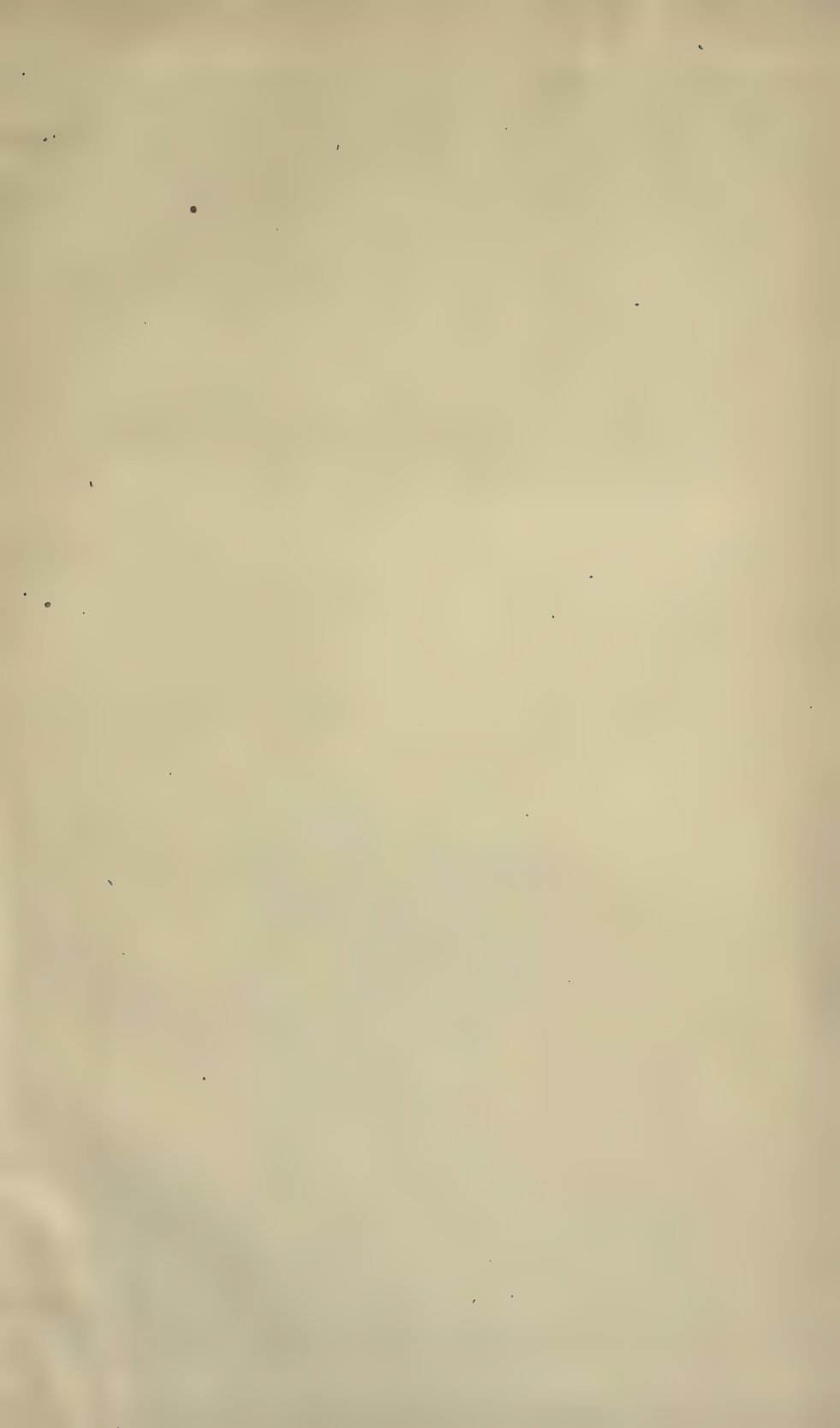
3. It is understood that American fishing vessels will make their shipments of Newfoundlanders as fishermen sufficiently far from the exact three mile limit to avoid reasonable doubt.

4. It is further understood that American fishermen will pay light dues when not deprived of their rights to fish, and will comply with the provisions of the Colonial Customs Law as to reporting at a Custom House when physically possible to do so.

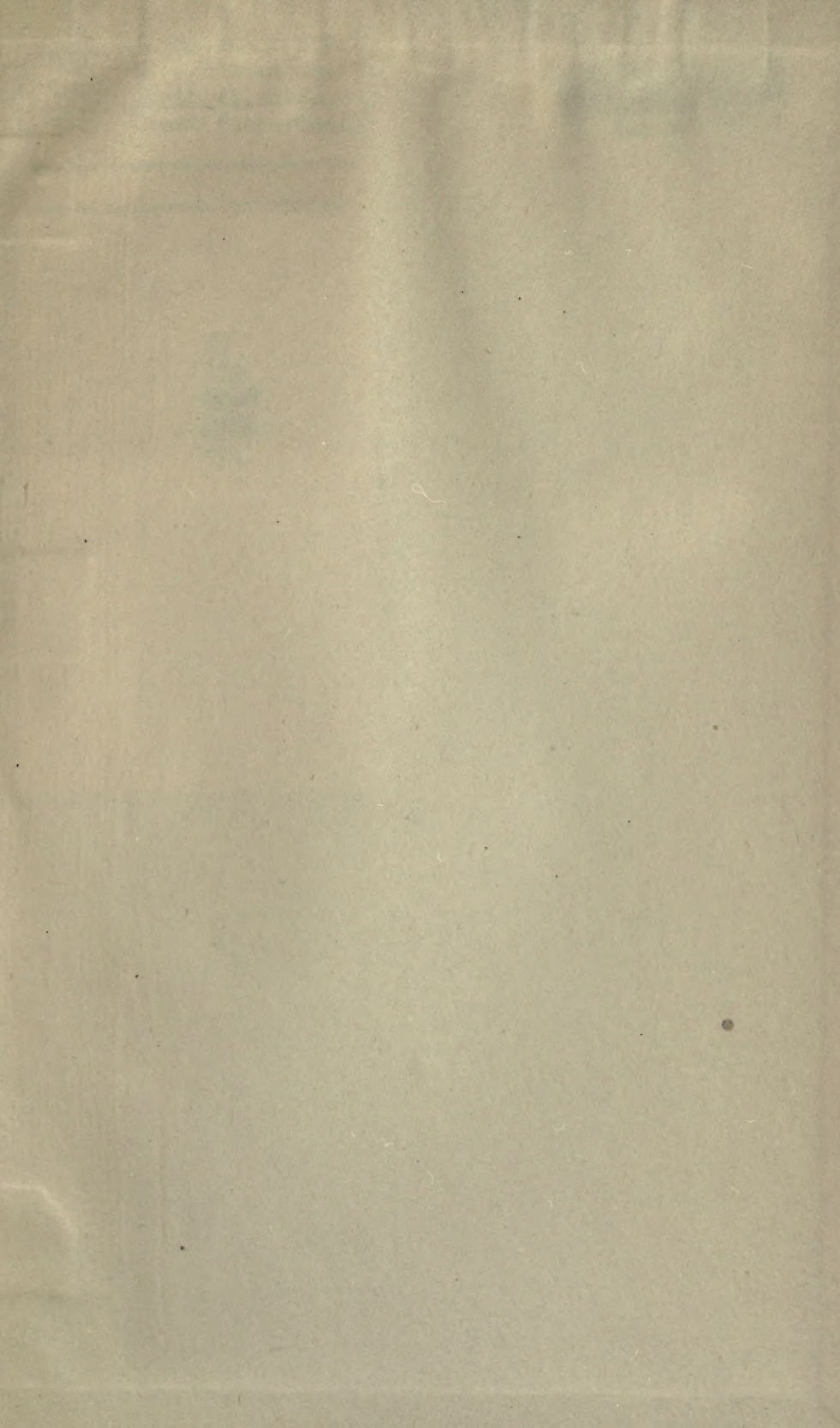
But my Government has every desire to make the arrangement, pending arbitration, as agreeable as possible to the Newfoundland authorities, consistent with the due safeguarding of Treaty Rights which we have enjoyed for nearly a century. If, therefore, the proposals you have recently shown me from the Premier of Newfoundland, or any other changes in the above *modus vivendi* should be proposed by mutual agreement between the Newfoundland authorities and our fishermen, having due regard to the losses that might be incurred by a change of plans so long after preparations for the season's fishing had been made, and the voyage begun, my Government will be ready to consider such changes with you in the most friendly spirit, and if found not to compromise our rights, to unite with you in ratifying them at once.

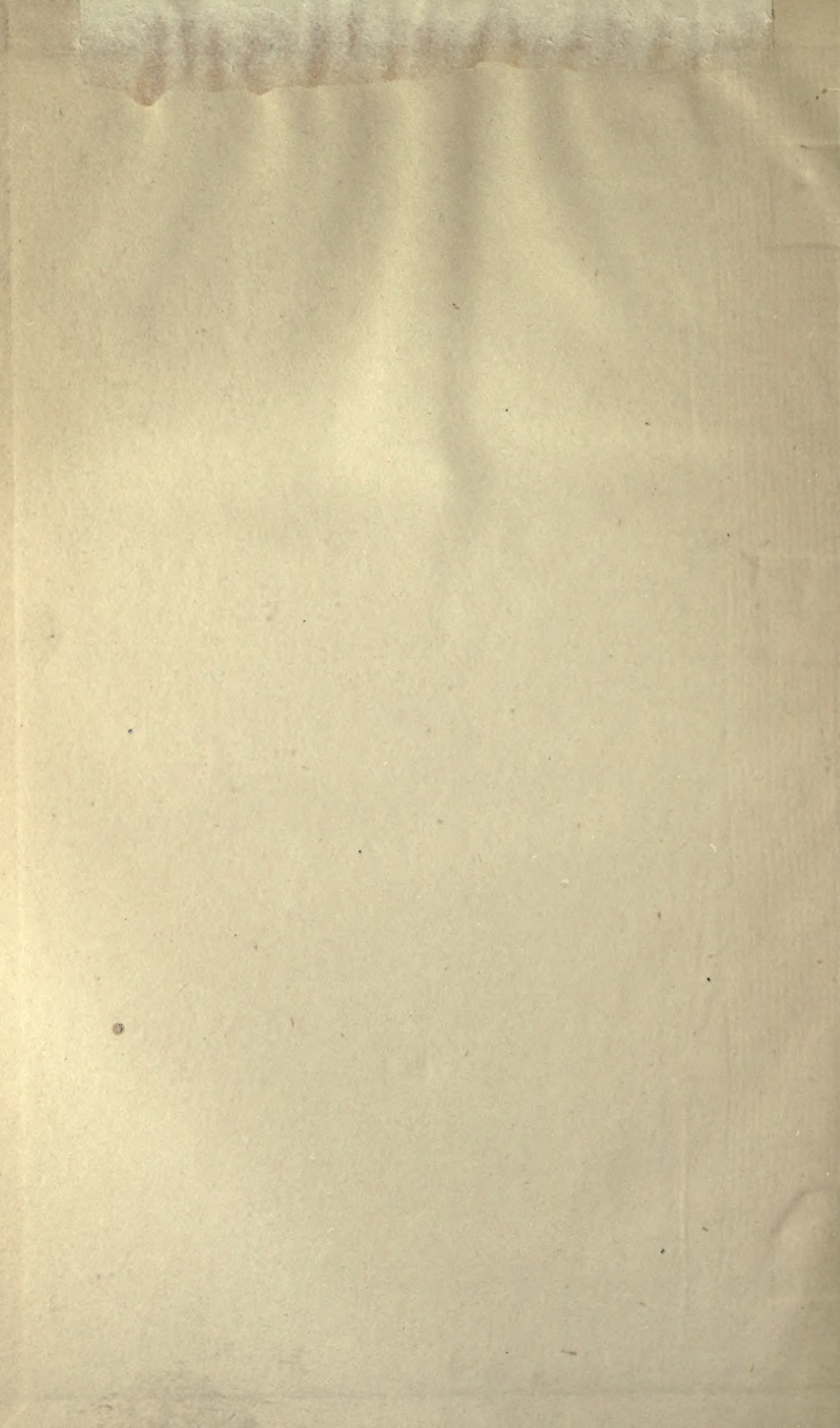
Please communicate at once to your Ministers, but do not publish till Monday. United States Ambassador has promised to delay publication till then.—ELGIN.











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